1-17

AGENCY DKT NO. 288-11/16

IN THE MATTER OF THE TENURE	:	
HEARING OF CHRISTIAN MOGHALU,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF	:	DECISION
THE CITY OF NEWARK, ESSEX COUNTY.	:	

The record of this matter and the proposed settlement agreement and general release have been reviewed. Upon such review, the Commissioner finds that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley S. Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/06/17

Date of Mailing: 1/06/17

2-17

H.D., on behalf of minor child, E.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY AND MS. EVERETT, TEACHER,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner filed a *pro se* appeal alleging that personnel employed by the respondent Board improperly notified the Division of Child Protection and Permanency (Division) that E.B. had been physically abused by his father. Petitioner asserted that E.B.'s black eye was caused by a fight at school, which Ms. Everett – E.B.'s classroom teacher – communicated to petitioner via a telephone call on Friday, along with the message that she did not want to report the fight because the children would be suspended and might miss scheduled PARCC testing. On the following Monday, however, petitioner alleged that Ms. Everett called her claiming that E.B.'s injury – a noticeable black eye – had occurred over the weekend and not at school; the reporting of this information to the Division led to E.B.'s removal from petitioner's care and placement in a foster home. Petitioner contended that the teacher changed her story to protect her teaching position, as she was required to report classroom fighting and had not done so. Petitioner requested that the school be investigated and that the teacher be reprimanded for her behavior. The respondents contended that the Commissioner lacks jurisdiction in this case, and filed a motion to dismiss pursuant to *N.J.A.C.* 6A:3-1.5(g).

The ALJ found, *inter alia*, that: respondent's motion to dismiss in lieu of an answer was filed in accordance with *N.J.A.C.* 6A:3-1.5(g); for the purposes of the motion, all facts alleged by the petition were deemed admitted; *N.J.S.A.* 18A:11-1(c) vests the power to control and regulate the conduct of public school employees exclusively in the local board of education; pursuant to *N.J.S.A.* 18A:6-9, the Commissioner's jurisdiction extends only to "controversies and disputes arising under the school laws"; and the relief sought by the petitioner herein is not available under the Commissioner's authority to resolve controversies and disputes. The ALJ concluded that the petition must be dismissed for lack of jurisdiction.

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

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

January 6, 2017

OAL DKT. NO. EDU 10655-16
AGENCY DKT. NO. 156-5/16

H.D., on behalf of minor child, E.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY AND MS. EVERETT, TEACHER,	:	DECISION
RESPONDENTS.	:	

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

Upon a comprehensive review of this matter, the Commissioner concurs with the Administrative Law Judge – for the reasons stated in the Initial Decision – that the Commissioner does not have jurisdiction to grant the relief sought by the petitioner in this matter. Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/06/17
Date of Mailing: 1/06/17

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION TO DISMISS
OAL DKT. NO. EDU 10655-16
AGENCY DKT. NO. 156-5/16

H.D. ON BEHALF OF E.B.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, AND MS. EVERETT, TEACHER,
Respondents.

H.D., pro se

Cherie Adams, for respondents (Adams, Gutierrez and Lattiboudere, attorneys)

Record Closed: October 17, 2016 Decided: November 29, 2016

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, H.D., a former resident of Jersey City and the mother of E.B., alleges school personnel improperly notified the Division of Child Protection and Permanency (the Division) that E.B. had been physically abused by his father. She requests that the

Martin School for the Arts "be investigated." She also demands that the classroom teacher, Ms. Everett, be "reprimanded." The respondents, Jersey City Board of Education (the Board) and Ms. Everett, ask that the petition be dismissed for lack of jurisdiction.

PROCEDURAL HISTORY

The petition of appeal was filed on April 26, 2016. Upon being advised by the Department of Education that her appeal was procedurally flawed, H.D. refiled her petition on May 31, 2016. Via letter dated June 22, 2016, counsel for the Board asked that the petition be dismissed for lack of jurisdiction. She was advised by letter dated June 23, 2016, that it was necessary that respondents file a responsive pleading. Via letter dated July 15, 2016, respondents filed a motion to dismiss the petition in lieu of an answer.

The case was transmitted to the Office of Administrative Law on July 18, 2016, and was originally assigned to Judge Karaszegi. H.D. filed opposition to the pending motion on September 30, 2016, and via letter dated October 11, 2016, respondents renewed their request that the petition be dismissed. The case was reassigned to me on October 14, 2016, after Judge Karaszegi's appointment to the New Jersey Superior Court. Via letter dated October 17, 2016, I advised the parties of the change in judge and indicated that I would be ruling on the pending motion to dismiss. I adjourned a pending March 2017 hearing date, and closed the record as of the date of my letter.

FINDINGS OF FACT

Respondent's motion is filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a motion to dismiss in lieu of an answer. In ruling on a motion to dismiss

> The judge considers whether all the evidence together with all legitimate inferences therefrom could sustain a judgment in favor of the party opposing the motion. The judge is not concerned with weight, worth, nature or extent of the

> evidence. The judge must accept all the evidence supporting the party defending against the motion and accord that party the benefit of all inferences that can reasonably and legitimately be deduced therefrom. If reasonable minds could differ, the motion must be denied.
>
> [37 New Jersey Practice, Administrative Law and Practice § 5.19, at 259-60 (Steven Lefelt, Anthony Miragliotta & Patricia Prunty) (2d ed. 2000).]

All evidence supporting the party defending the motion must be accepted, and that party must be "accorded the benefit of all inferences which can be reasonably and legitimately deduced therefrom." Syvertsen v. Scotch Plains-Fanwood Bd. of Educ., 92 N.J.A.R.2d (EDU) 251 (citing Dolson v. Anastasia, 55 N.J. 2 (1969)). Accordingly, for purposes of the motion, all facts alleged by the petition will be deemed admitted, and I **FIND** as follows:

On Friday, April 8, 2016, H.D. received a call from Ms. Everett, the classroom teacher, advising that her son, E.B., had been involved in an altercation with W., a classmate, and that W. had punched her son in the face. Everett advised H.D. that E.B.'s eye was bruised, and that she had applied ice to help reduce swelling. Everett told H.D. she did not want to report the fight because the children were friends and would get suspended; and as a result might miss important PARCC testing. H.D. sent her husband, D.D., to pick up E.B. after school. D.D. arrived to find E.B. crying and upset, and he spoke with Ms. Everett who shared the same story with him about the fight with W. When H.D. returned home that evening, E.B. reported that W. was teasing him and calling him names, so E.B. hit W. with his hat. W. then punched him in the face.

E.B. returned to school on Monday, April 11, 2016. That morning, Ms. Everett called H.D. and advised that she believed E.B.'s black eye was the result of an injury at home. They talked about having H.D. come to school to discuss the situation, and while they never finalized their plans to do so, H.D. left work at 12:30 that day and went to the school at 2:00 p.m. She met with the building principal, Ms. Jennings, who inquired about how the bruise occurred. Ms. Everett was called to join the conversation. Everett denied calling H.D. the prior Friday and advising that W. had struck E.B.; she now

stated that school personnel believed that E.B.'s father had struck him. Everett advised that she was obliged to report her concerns to the Division and had done so. The petition avers that

> On Monday about 9:00 p.m. DYFS took my son and placed him into a foster home. The worker offered for a homecare worker to live in the home but I refused. Till this time I do not know what my son said and I also don't know what they told him to say to hide the fact there was a fight in the classroom.

CONCLUSIONS OF LAW

The Commissioner of Education is without the authority to grant petitioner the relief she seeks. I **CONCLUDE** that the petition of appeal must be dismissed. N.J.S.A. 18A:11-1(c) vests the power to control and regulate the conduct of public school employees exclusively in local boards of education. See: F.R. on behalf of M.R. v. Montville Tp. Bd. of Educ., Dkt. No. 47-2/05, Comm'r (July 21, 2005). http://njlaw.rutgers.edu/collections/oal/>. In F.R., a parent asked that a building principal be directed to apologize to his elementary age son for falsely accusing him of improperly selling merchandise in school. The petition was dismissed, as there was "no statutory authority for the Commissioner to order an employee of a public school district to tender an apology to students, parents or anyone else, and no statutory authority for the Commissioner to impose discipline on employees of a local board of education" except as prescribed by N.J.S.A. 18A: 6-10, et. seq. Ibid.

Moreover, to the extent that H.D. alleges that Ms. Everett improperly brought her concerns about abuse to the Division's attention, respondents correctly assert that Everett's obligation to do so was governed by N.J.S.A. 9:6-8.10, and any review of the propriety of her actions is not justiciable here. Pursuant to N.J.S.A. 18A:6-9, the Commissioner's jurisdiction extends only to "controversies and disputes arising under the school laws."

The demand that the Martin Center for the Arts "be investigated" flows from the actions of Ms. Everett, and accordingly, for the reasons expressed above, is likewise

not a claim that is within the Commissioner of Education's jurisdiction. Nor is a request that school personnel be "investigated" properly the subject of a petition of appeal before the Commissioner. For a matter to be justiciable a party must have suffered a distinct injury or harm that was caused by the adverse party and that can be remedied by a court, or here, by the Commissioner. New Jersey Turnpike Auth. v Parsons, 3 N.J. 235, 240 (1949); In re Ass'n of Trial Lawyers of Am., 228 N.J. Super. 180 (App. Div. 1988). A request for an "investigation" is not relief available under the Commissioner's authority to resolve controversies and disputes. See e.g.: Ciambrone v. Witty and Bloomingdale Bd. of Educ., EDU 9202-00, Initial Decision (March 21, 2001), modified, Comm'r (May 7, 2001), <http://njlaw.rutgers.edu/collections/oal/>.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the petition of appeal be **DISMISSED**.

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

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

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

November 29, 2016

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: November 29, 2016

Date Mailed to Parties: NOV 30 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

4-17LM

4-17

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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

KIMBERLEY HARRINGTON
Acting Commissioner

January 9, 2017

Susanne Lavelle, Esq.
1814 Kennedy Blvd.
Union City, New Jersey 07087

Sabino Valdes
[redacted]
Paramus, New Jersey 07652

Re: *In the Matter of the Tenure Hearing of Sabino Valdes, Board of Education of the City of Union, Hudson County, Agency Dkt. No. 328-9/00*

Dear Parties:

I have reviewed the materials filed in connection with Sabino Valdes' Motion for Reconsideration of the Acting Commissioner's November 3, 2016 decision, denying Mr. Valdes' motion to reopen the tenure charges filed against him by the Union City Board of Education. The Commissioner notes that on or about December 19, 2016, Mr. Valdes also filed a Notice of Appeal of the November 3, 2016 decision with the Appellate Division.

Pursuant to New Jersey Court Rule 2:9-1(a), "the supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of petition for certification is filed." The Appellate Division has indicated that the trial court does not have jurisdiction pending appeal to entertain a motion for reconsideration. *Kiernan v. Kiernan*, 355 *N.J. Super.* 89, 92 (App. Div. 2002). As Mr. Valdes has filed a Notice of Appeal with the Appellate Division, the Commissioner no longer has jurisdiction to entertain Mr. Valdes' Motion for Reconsideration.

Accordingly, the Motion for Reconsideration is hereby DISMISSED for lack of jurisdiction.

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library
Clerk, Appellate Division

KH/MKD/BON

VIA REGULAR MAIL

5-17

OAL DKT. NO. EDU 06447-15
(EDU 14815-13 ON REMAND)
AGENCY DKT. NO. 252-10/13

JANINE WALKER CAFFREY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, proposed settlement agreement, and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's May 6, 2015 determination that the prior Agreement submitted did not comply with *N.J.A.C.* 6A:3-1.13, as it was neither signed by the Board's attorney, nor did it contain a copy of the Board's resolution approving the settlement. Since there is now a Board resolution approving the settlement on the matter, the Commissioner can approve the within Agreement in its present form.

Under the terms of the Agreement, petitioner and her attorney were to be paid certain sums of money through the Board's Insurance Carrier within ten days of the approval of the settlement by the Board. The Agreement was approved on June 19, 2014, according to the resolution submitted by the Board attorney; therefore, it follows that payment was to be made to petitioner and her attorney by June 29, 2014. These dates have preceded the consideration of the Agreement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or

have agreed upon mutually satisfactory alternate dates for the effectuation of the settlement payments. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/09/17

Date of Mailing: 1/09/17

AG&L Adams Gutierrez & Lattiboudere, LLC

The Legal Center
1037 Raymond Blvd., Suite 900
Newark, NJ 07102
Phone: 973-735-2742 - Fax: 973-735-2743
www.asgllaw.com

November 17, 2016

VIA ELECTRONIC MAIL sharon.jeffers@oal.nj.gov
Honorable Jeffrey A. Gerson, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Janine Walker Caffery v. Perth Amboy Board of Education
Agency Ref. No. 252-10/13; OAL Docket No. EDU 14815-13

Dear Judge Gerson:

Further to your request, on June 19, 2014 the Perth Amboy Board of Education approved the settlement agreement between Janine Walker Caffery and the Perth Amboy Board of Education involving the following Docket Numbers:

EDU 14815-2013N
SEC 30-12
SEC 02-13
SEC 35-13
EEC 117-9-2013N

I trust the enclosed satisfies your request. Should Your Honor have any further questions, please do not hesitate to contact me.

Respectfully submitted,

DERLYS MARIA GUTIERREZ

DMG
Encl.
Cc: Derek J. Jess, School Business Administrator – via email only
Rita Barone, Esq. – via email only
Andrew Babiak, Esq. – via email only

Perth Amboy Public Schools
Administrative Headquarters Building
178 Barracks Street
Perth Amboy, New Jersey 08861
Tel: (732) 376-6202 – Fax: (732) 826-2644

Derek J. Jess
School Business Administrator
Board Secretary

Resolution

The Perth Amboy Board of Education hereby resolves to approve the settlement of litigation under, OAL Docket No. EDU 14815-2013N, Docket Nos. SEC 30-12, SEC 02-13, SEC 35-13 and OAL Docket No. EEC – 11709 – 2013N in accordance with the terms and condition set forth in the settlement agreement. The Board also authorizes the Board Attorney and the Administration to take all steps necessary to effectuate the purposes of this resolution.

I HEREBY certify that the foregoing is true and exact as adopted by the Perth Amboy Board of Education, County of Middlesex, at its meeting held on JUN 1 3 2014

Derek J. Jess
Secretary/School Business Admin.

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

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

DAVID C. HESPE
Commissioner

May 6, 2015

RECEIVED
MAY 08 2015
By

Andrew Babiak, Esq.
920 West State Street
Trenton, New Jersey 08618-5328

Deryls Gutierrez, Esq.
Adams, Stern, Gutierrez & Lattiboudere, LLC
1037 Raymond Blvd., Suite 900
Newark, New Jersey 07102

Dear Parties:

JANINE WALKER CAFFREY V. BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY, AGENCY DKT NO. 252-10/13, OAL DKT NO. EDU 14815-13, ASSISTANT COMMISSIONER DECISION NO. 140-15

We are enclosing a copy of the decision of the Assistant Commissioner of Education dated May 6, 2015 in the above-captioned matter. Appeals of Commissioner decisions may be filed with the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36.*

Additionally, please note that, pursuant to *N.J.A.C. 6A:3-1.14(c)*, the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

Jennifer Killough-Herrera, Acting Director
Bureau of Controversies and Disputes

MKD/DCS/pp:o:/dec ltr/jwalker-140-15
Enclosure
c: State Law Library

PURCELL, MULCAHY, HAWKINS, FLANAGAN & LAWLESS, LLC
COUNSELORS AT LAW

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DAVID M. HAWKINS
ELIZABETH C. FLANAGAN
SUSAN A. LAWLESS♦◂
MICHAEL J. MCCAFFREY*♦
RITA F. BARONE

GRAHAM T. ROSS, COUNSEL
JOHN J. COYLE, JR., COUNSEL*
HOLLY C. BAKKE, COUNSEL

* CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS A CIVIL TRIAL ATTORNEY
** CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS A CRIMINAL TRIAL ATTORNEY
◂ ALSO MEMBER OF PA BAR
♦ ALSO MEMBER OF NY BAR

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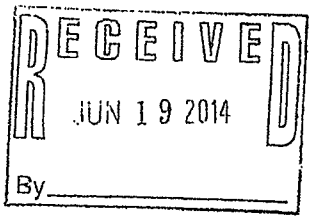
ROBERT I. AUFSEESER, LL.M♦
DANIELLE H. BOHLEN
ROBERT B. HAINES, OF COUNSEL
KELLEY W. LAVERY♦**
JERALD S. LEIBOWITZ, OF COUNSEL
MARK MATTIA, OF COUNSEL♦
KERRI A. MCDOWELL♦
VIRGINIA B. MORAN, OF COUNSEL♦
ELIZABETH A. O'BRIEN, OF COUNSEL
JOSEPH R. PURCELL, OF COUNSEL
DEBRA H. ROTHENBERG
ALYSSA K. WEINSTEIN, OF COUNSEL

PLEASE REPLY TO BEDMINSTER OFFICE

June 18, 2014



VIA FEDERAL EXPRESS
Derlys Maria Gutierrez, Esq.
Adams Gutierrez & Lattiboudere, LLC
The Legal Center
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102

Janine Walker Caffrey v. Samuel Lebreault, Obdulia Gonzalez, Israel Varela, Milady Tejeda
OAL Docket No.: EEC-11709-2013N
Docket No. C02-13
Our File No. (303) 21837 -H/RFB

Dear Ms. Gutierrez:

Enclosed please find the signed and witnessed Settlement Agreement and General Release from Ms. Caffrey, which we received from Alan Schorr.

Please confirm Mr. Schorr's inquiry regarding the June 19 date. Thank you.

Very truly yours,

RITA F. BARONE

RFB/mms
Enclosure

000 . 21424
RFB

ALAN H. SCHORR & ASSOCIATES, P.C.

Attorneys At Law

Alan H. Schorr*°
Zachary R. Wall°
Arykah A. Trabosh°
Rachel S. London°†

Certified Civil Trial Attorney*
Licensed to practice in NJ and PA°
Licensed to practice in DE†

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Phone: 856.874.9090
Fax: 856.874.9080

www.schorrlaw.com
schorrlawnj@aol.com

June 13, 2014

Via First Class Mail
Rita F. Barone, Esquire
1 Pluckemin Way
PO Box
Bedminster, NJ 07921

RE: Walker Caffrey, Janine v. Lebreault, Samuel; Gonzalez, Obduia; Varela, Israel and Tejeda, Milady/Perth Amboy BOE, Middlesex County
Agency Docket No.: C02-13
OAL Docket No.: EEC 11709-2013 N

Dear Ms. Barone:

Enclosed please find the signed and witnessed Settlement Agreement and General Release from Ms. Caffrey. I understand that there will be a meeting on June 19 to authorize this payment, and then we will expect payment 10 days thereafter. Please advise promptly if anything changes.

Very truly yours,

Alan H. Schorr

AHS:je
enclosure
cc: Janine Caffrey

RECEIVED
JUN 18 2014

OAL DKT. NO. EDU 14815-13
AGENCY DKT. NO. 252-10/13

JANINE WALKER CAFFREY	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the agreement attached to the Initial Decision contains only petitioner's signature; the agreement is not signed by the Board attorney – who is the Board's duly authorized representative in litigation. Furthermore, neither the file nor the agreement contain a copy of the Board's resolution approving the settlement and designating someone other than the Board attorney to sign the agreement on its behalf that is required by *N.J.A.C.* 6A:3-1.13. Without either the Board attorney's signature evidencing respondent's assent to the terms of the settlement, or the appropriate Board resolution and signature of its designee, the Commissioner cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement and General Release consistent with the concerns set forth

above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION*
EVO POPOFF

Date of Decision: 5/06/15

Date of Mailing: 5/06/15

* This matter has been delegated to an Assistant Commissioner pursuant to *N.J.S.A.* 18A:4-34.

Perth Amboy Public Schools

Administrative Headquarters Building
178 Barracks Street
Perth Amboy, New Jersey 08861
Tel: (732) 376-6202 – Fax: (732) 826-2644

Derek J. Jess
School Business Administrator
Board Secretary

Resolution

The Perth Amboy Board of Education hereby resolves to approve the settlement of litigation under, OAL Docket No. EDU 14815-2013N, Docket Nos. SEC 30-12, SEC 02-13, SEC 35-13 and OAL Docket No. EEC – 11709 – 2013N in accordance with the terms and condition set forth in the settlement agreement. The Board also authorizes the Board Attorney and the Administration to take all steps necessary to effectuate the purposes of this resolution.

I HEREBY certify that the foregoing is true and exact as adopted by the Perth Amboy Board of Education, County of Middlesex, at its meeting held on JUN 19 2014

Derek J. Jess
Secretary/School Business Admin.

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

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

DAVID C. HESPE
Commissioner

May 6, 2015

RECEIVED
MAY 08 2015
By_____

Andrew Babiak, Esq.
920 West State Street
Trenton, New Jersey 08618-5328

Deryls Gutierrez, Esq.
Adams, Stern, Gutierrez & Lattiboudere, LLC
1037 Raymond Blvd., Suite 900
Newark, New Jersey 07102

Dear Parties:

JANINE WALKER CAFFREY V. BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY, AGENCY DKT NO. 252-10/13, OAL DKT NO. EDU 14815-13, ASSISTANT COMMISSIONER DECISION NO. 140-15

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Very truly yours,

Jennifer Killough-Herrera, Acting Director
Bureau of Controversies and Disputes

MKD/DCS/pp:o/dec ltr/jwalker-140-15
Enclosure
c: State Law Library

PURCELL, MULCAHY, HAWKINS, FLANAGAN & LAWLESS, LLC
COUNSELORS AT LAW

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THOMAS M. MULCAHY
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SUSAN A. LAWLESS ♦ ◂
MICHAEL J. MCCAFFREY* ♦
RITA F. BARONE

GRAHAM T. ROSS, COUNSEL
JOHN J. COYLE, JR., COUNSEL*
HOLLY C. BAKKE, COUNSEL

* CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS A CIVIL TRIAL ATTORNEY
** CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS A CRIMINAL TRIAL ATTORNEY
◂ ALSO MEMBER OF PA BAR
♦ ALSO MEMBER OF NY BAR

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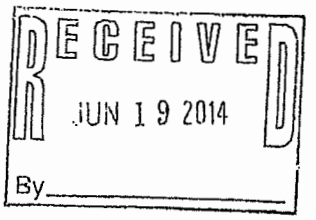
ROBERT I. AUFSEESER, LL.M ♦
DANIELLE H. BOHLEN
ROBERT B. HAINES, OF COUNSEL
KELLEY W. LAVERY ♦ **
JERALD S. LEIBOWITZ, OF COUNSEL
MARK MATTIA, OF COUNSEL ♦
KERRI A. MCDOWELL ♦
VIRGINIA B. MORAN, OF COUNSEL ♦
ELIZABETH A. O'BRIEN, OF COUNSEL
JOSEPH R. PURCELL, OF COUNSEL
DEBRA H. ROTHENBERG
ALYSSA K. WEINSTEIN, OF COUNSEL

PLEASE REPLY TO BEDMINSTER OFFICE

June 18, 2014



VIA FEDERAL EXPRESS
Derlys Maria Gutierrez, Esq.
Adams Gutierrez & Lattiboudere, LLC
The Legal Center
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102

Janine Walker Caffrey v. Samuel Lebreault, Obdulia Gonzalez, Israel Varela, Milady Tejeda
OAL Docket No.: EEC-11709-2013N
Docket No. C02-13
Our File No. (303) 21837 -H/RFB

Dear Ms. Gutierrez:

Enclosed please find the signed and witnessed Settlement Agreement and General Release from Ms. Caffrey, which we received from Alan Schorr.

Please confirm Mr. Schorr's inquiry regarding the June 19 date. Thank you.

Very truly yours,

Rita Barone

RITA F. BARONE

RFB/mms
Enclosure

005 . 21424
RFB

ALAN H. SCHORR & ASSOCIATES, P.C.

Attorneys At Law

Alan H. Schorr*°
Zachary R. Wall°
Arykah A. Trabosh°
Rachel S. London°†

Certified Civil Trial Attorney*
Licensed to practice in NJ and PA°
Licensed to practice in DE†

5 Split Rock Drive
Cherry Hill, NJ 08003
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www.schorrlaw.com
schorrlawnj@aol.com

June 13, 2014

Via First Class Mail
Rita F. Barone, Esquire
1 Pluckemin Way
PO Box
Bedminster, NJ 07921

RE: Walker Caffrey, Janine v. Lebreault, Samuel; Gonzalez, Obduia; Varela, Israel and Tejeda, Milady/Perth Amboy BOE, Middlesex County
Agency Docket No.: C02-13
OAL Docket No.: EEC 11709-2013 N

Dear Ms. Barone:

Enclosed please find the signed and witnessed Settlement Agreement and General Release from Ms. Caffrey. I understand that there will be a meeting on June 19 to authorize this payment, and then we will expect payment 10 days thereafter. Please advise promptly if anything changes.

Very truly yours,

Alan H. Schorr

AHS:je
enclosure
cc: Janine Caffrey

RECEIVED
JUN 18 2014
Parker McCay P.A.
Flanigan & Lacombe LLC

OAL DKT. NO. EDU 14815-13
AGENCY DKT. NO. 252-10/13

JANINE WALKER CAFFREY	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the agreement attached to the Initial Decision contains only petitioner's signature; the agreement is not signed by the Board attorney – who is the Board's duly authorized representative in litigation. Furthermore, neither the file nor the agreement contain a copy of the Board's resolution approving the settlement and designating someone other than the Board attorney to sign the agreement on its behalf that is required by *N.J.A.C.* 6A:3-1.13. Without either the Board attorney's signature evidencing respondent's assent to the terms of the settlement, or the appropriate Board resolution and signature of its designee, the Commissioner cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement and General Release consistent with the concerns set forth

above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION*
EVO POPOFF

Date of Decision: 5/06/15
Date of Mailing: 5/06/15

* This matter has been delegated to an Assistant Commissioner pursuant to *N.J.S.A.* 18A:4-34.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06447-15
AGENCY DKT. NO. 252-10/13
ON REMAND
OAL DKT. NO. EDU 14815-13

JANINE WALKER CAFFERY,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,

Respondent.

Alan Shore, Esq., for petitioner

Derlys Gutierrez, Esq., for respondent (Adams, Stern, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: November 17, 2016 Decided: November 22, 2016

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

On October 17, 2013, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for settlement conferences on January 23, 2014, February 13, 2014 and March 31, 2014 but all dates were adjourned because the parties agreed to settle the matter. A signed copy of the Settlement Agreement and General Release indicating the terms of settlement was forwarded to

the undersigned on August 5, 2014. The matter was remanded to the Office of Administrative Law on May 6, 2015 because the settlement agreement did not contain the signature from the Board's attorney. The revised settlement agreement is now signed by the Board attorney and is attached here.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

11/22/16
DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: November 25, 2016

Date Mailed to Parties: November 28, 2016
sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into this 13th day of June, 2014, by and between Janine Walker Caffrey and The Board of Education of the City of Perth Amboy, Obdulia Gonzalez, Israel Varela, Kenneth Puccio, Dianne Roman, Samuel Lebreault, Milady Tejeda, Anthony Bermudez, William Ortiz, Mark Carvajal and any and all past or present board members of the Perth Amboy Board of Education.

WHEREAS, Janine Walker Caffrey was employed by the Perth Amboy Board of Education from July 1, 2011 to June 30, 2014; and

WHEREAS, Janine Walker Caffrey initiated a claim seeking equitable and legal relief based on allegations of wrongful discharge and non-renewal of contract including but not limited to claims under: (1) the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.*; (2) Conscientious Employee Protection Act, N.J.S.A. 34:19-1, *et seq* ; (3) breach of express and implied contract; and (4) breach of the implied covenant of good faith and fair dealing.

WHEREAS, the parties desire to settle fully, permanently and finally all differences between them for any event related to, arising out of, or in connection with Janine Walker Caffrey's employment by the Perth Amboy Board of Education and to terminate any and all claims made or that could have been made against the Perth Amboy Board of Education and the individual past and present board members along with all officers, trustees, employees, agents, directors, representatives, successor or assigns, which settlement shall constitute the good faith settlement of the aforementioned claims;

NOW, THEREFORE, the parties, intending to be bound hereby, covenant and agree as follows:

1. The Perth Amboy Board of Education through its insurance carrier agrees to pay Janine Walker Caffrey a total amount of $184,000.00. The payment of this sum is in full and complete satisfaction of all of claims against the Perth Amboy Board of Education and all past and present individual board members including claims for attorneys' fees, expenses, back wages, front wages, liquidated damages, punitive damages, emotional distress damages, and any other claim that could be made by Janine Walker Caffrey against the Perth Amboy Board of Education and the past and present individual board members. Said payment is to made payable to Janine Walker Caffrey and Alan Schorr, Esq.

2. The Insurance Carrier for the Perth Amboy Board of Education shall issue a Form 1099 to Alan Schorr, Esq. in the amount of $62,966.67 which shall be reflected as payment of attorneys' fees and costs, and the remainder in the amount of $121,033.33 shall be paid to Janine Walker Caffrey, and the Insurance Carrier will issue a 1099 to Janine Walker Caffrey in that amount. No other Form 1099 and no W-2 shall issue.

3. Payment shall be made within 10 days of approval of this agreement by the Perth Amboy Board of Education as this agreement is subject to Board approval.

4. Release. For good and valuable consideration, including without limitation the payments described in this Agreement, Janine Walker Caffrey hereby releases, discharges, and covenants not to sue the Perth Amboy Board of Education, Obdulia Gonzalez, Israel Varela, Kenneth Puccio, Dianne Roman, Samuel Lebreault, Milady Tejeda, Anthony Bermudez, William Ortiz, Mark Carvajal and any and all past or present board members of the Perth Amboy Board of Education and the Perth Amboy Board of Education's direct and indirect parents, subsidiaries, and predecessors, and all of its and their respective past and present employees, directors, officers, attorneys, successors, and

assigns (individually and collectively the "Releasees"), from and/or upon with respect to any and all actions, suits, liabilities, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, torts, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, whether known or unknown, suspected or unsuspected, in law or equity, which could be or have been asserted against the Releasees, parties to this Agreement, heirs, executors, administrators, successors, assigns, and attorneys and for any and all claims which have, ever had, now have, or hereafter can, shall, or may have been asserted by reason of any matter, cause, or thing whatsoever from the beginning of the world to the date of this Agreement, including specifically by way of description, but not by way of limitation, any and all claims:

a. alleged or related to the employment of Janine Walker Caffrey by the Perth Amboy Board of Education;

b. arising out of or related to any claims Janine Walker Caffrey may have against the Perth Amboy Board of Education, Obdulia Gonzalez, Israel Varela, Kenneth Puccio, Dianne Roman, Samuel Lebreault, Milady Tejeda, Anthony Bermudez, William Ortiz, Mark Caravjal and any and all past or present board members of the Perth Amboy Board of Education from the beginning of time to a time to the date of this Agreement;

c. arising out of or in any way related to claims pertaining to New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000(e) *et*

seq. , the Civil Rights Act of 1991 as amended 42 U.S.C. Section1981 *et seq.* , the Family Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Conscientious Employee Protection Act, the Wage and Hour Act, the Employee Retirement Income Security Act, breach of express or implied contract, tortious interference with prospective business relations, breach of the implied covenant of good faith and fair dealing, breach of any employment handbook or contract, and the Administrative Code and charters of the various cities and State of New Jersey;

d. any and all claims for violation of the federal or any state constitution;

e. any and all claims arising out of any other laws and regulations relating to employment discrimination and wrongful discharge; and

f. any and all ethics claims instituted against any past or present individual board member of the Perth Amboy Board of education including but not limited to the following: Caffrey v. Varela, SEC 30-12; Caffrey v. Lebreault, Gonzalez, Varela, & Tejeda, SEC 02-13; and Caffrey v. Varela, SEC 35-13;

g. any and all claims instituted under the school laws of the State of New Jersey including but not limited to the action entitled Caffrey v. Perth Amboy Board of Education, Agency Ref. No. 252-10/13, OAL Docket No. EDU 14815-2013N brought before the New Jersey Commissioner of

Education;

h. any and all claims for attorneys' fees and costs.

5. Waiver of Right to Consider and to Revise Agreement. Janine Walker Caffrey waives any right she may possess under any federal or state statute: (a) to a waiting period to consider this Settlement Agreement and Mutual Release further before signing same; and (b) to revoke her signature after having signed this Settlement Agreement and Mutual Release.

6. Confidentiality and Non-Disparagement Clause. In consideration of the payment made in this Agreement. Janine Walker Caffrey hereby agrees and promises that she will not make, publish or cause to be made or published, any statements or comments, true, false or otherwise, whether they be oral or written, which in any way relate to, refer to, or otherwise concern her employment with the Perth Amboy Board of Education, this Agreement, any and all ethics claims or complaints against any past or present Perth Amboy Board of Education board member or any interaction with any past or present individual board members including Obdulia Gonzalez, Israel Varela, Kenneth Puccio, Dianne Roman, Samuel Lebreault, Milady Tejeda, Anthony Bermudez, William Ortiz, and Mark Carvajal, or which in any way relate to her opinions, thoughts or comments concerning the Perth Amboy Board of Education, the Perth Amboy Public Schools, **any past, present or future board members and shall refrain from engaging in any blogging, tweeting, posting, writing an article or a book,**

commenting in any form of social media, posting on any internet website whatsoever, and/or granting an interview or making a statement or comment to a journalist, blogger, editor, etc...regarding same including but not limited to attending any board meetings of the Perth Amboy Board of Education. Janine Walker Caffrey hereby agrees should she breach this paragraph, the Perth Amboy Board of Education shall be entitled to a payment of $10,000 for each discrete breach of this paragraph. Any dispute over this paragraph shall be submitted to the jurisdiction of the State of New Jersey, Superior Court. Notwithstanding the forgoing, in the event that any board member shall make a public statement about Janine Walker Caffrey she shall be permitted to respond publicly to that comment only. If served with a lawful subpoena, Janine Walker Caffrey shall be permitted to respond to the subpoena to the extent it requires information related to her employment with the Perth Amboy Board of Education. Nothing set forth in this agreement shall prevent Janine Walker Caffrey to list her employment with Perth Amboy on her resume and discuss her employment with prospective employers privately.

7. No Admission of Liability. The Parties understand and acknowledge that this Agreement constitutes a compromise and settlement of disputed claims. No action taken by the Parties hereto, or either of them, either previously or in connection with this Agreement shall be deemed or construed to be (a) an admission of the truth or falsity of any claims heretofore made or (b) an acknowledgment or admission by either party of any fault or liability whatsoever

to the other party or to any third party.

8. Agreement not to Voluntarily Testify – In consideration of the payment made in this Agreement, Janine Walker Caffrey agrees to not voluntarily testify in any and all ethics claims against any past or present board member of the Perth Amboy Board of Education including but not limited to Obdulia Gonzalez, Israel Varela, Kenneth Puccio, Dianne Roman, Samuel Lebreault, Milady Tejeda, Anthony Bermudez, William Ortiz, and Mark Carvajal which claim or claims are presently pending before or may be instituted before the Office of Administrative Law and/or the School Ethics Commission whether being prosecuted by the School Ethics Commission through the New Jersey State Deputy Attorney General's Office or any individual. These actions include but are not limited to: Caffrey v. Lebreault, SEC 16-12; Caffrey v. Varela, SEC 17-12; Cores v. Varela, SEC 18-12; Caffrey v. Puccio, SEC 21-12; Cores v. Puccio, SEC 25-12; and Cores v. Puccio, SEC 31-12. Janine Walker Caffrey further agrees to advise the School Ethics Commission in writing that she believes that this Agreement is sufficient to resolve all the ethics claims she had originally instituted including those now prosecuted by the School Ethics Commission. If served with a lawful subpoena, Janine Walker Caffrey shall be permitted to respond to the subpoena.

9. Withdrawal of pending claims In consideration of the payment made in this Agreement, Janine Walker Caffrey agrees to withdraw the following pending claims she has instituted against the Perth Amboy Board of Education and/or individual board members Obdulia Gonzalez, Israel Varela, Kenneth Puccio,

Samuel Lebreault, and Milady Tejeda: Caffrey v. Perth Amboy Board of Education, Agency Ref. No. 252-10/13, OAL Docket No. EDU 14815-2013N, Caffrey v. Varela, SEC 30-12; Caffrey v. Lebrealt, Gonzalez, Varela, & Tejeda, SEC 02-13; and Caffrey v. Varela, SEC 35-13;

10. Move out of City of Perth Amboy In consideration of the payment made in this Agreement, Janine Walker Caffrey represents that she has already moved out of the City of Perth Amboy and does not intend on returning.

11. Costs. The Parties shall each bear their own costs, expert fees, attorneys' fees and other fees incurred in connection with this Agreement subject to what is reflected in this Agreement.

12. Authority. The Parties each represent that they have the authority to act on their own behalf and all who may claim through them to the terms and conditions of this Agreement. Each Party warrants and represents that there are no liens or claims of lien or assignments in law or equity or otherwise of or against any of the claims or causes of action released herein.

13. No Representations. Each Party and its duly authorized agents represent that they have had the opportunity to consult with an attorney, and have carefully read and understand the scope and effect of the provisions of this Agreement. Neither Party has relied upon any representations or statements made by the other Party hereto which are not specifically set forth in this Agreement.

14. Severability. In the event that any provision hereof becomes or is declared by a court of competent jurisdiction to be illegal, unenforceable or void, this Agreement shall continue in full force and effect without said provision.

15. Entire Agreement. This Agreement represents the entire agreement and understanding between the Parties and supersedes and replaces any and all prior agreements and understandings between the Parties.

16. No Oral Modification. This Agreement may only be amended in writing signed by all of the Parties to this Agreement.

17. Governing Law. This Agreement is made and entered into in the State of New Jersey, and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey.

18. Effective Date. This Agreement is effective after it has been signed by all parties.

19. Interpretation. The parties agree and represent that both parties have drafted this Agreement and both parties are to be considered equal drafters of this document for the purpose of interpretation of the meaning of this Agreement. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties.

20. Counterparts. This Agreement may be executed in counterparts, and each counterpart shall have the same force and effect as an original and shall constitute an effective, binding agreement on the part of each of the undersigned.

21. Approval. This agreement is subject to approval by the Perth Amboy Board of Education.

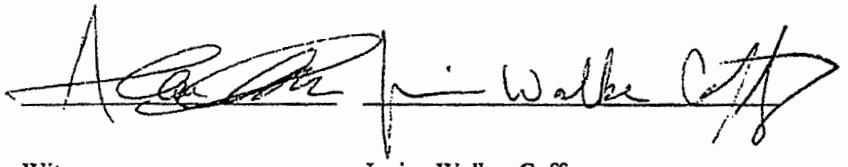
22. This Agreement is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, personal or legal representatives, predecessors, successors, and/or assigns.

23. Nothing in this agreement shall affect, Janine Walker Caffrey's right to be indemnified under statutory law for claims arising out of her employment with the Perth Amboy Board of Education.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the parties have executed this Agreement as of the date first above written.

PLEASE READ CAREFULLY. THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE IS NINE (9) PAGES IN LENGTH (INCLUSIVE OF SIGNATURE PAGE) AND INCLUDES A RELEASE OF KNOWN AND UNKNOWN CLAIMS.

THE UNDERSIGNED HAVE READ THE FOREGOING SETTLEMENT AGREEMENT AND GENERAL RELEASE, FULLY UNDERSTAND IT AND VOLUNTARILY AGREE TO IT.



Witness

Janine Walker Caffrey

Date: 6/13/14

Date: June 13, 2014

6-17

OAL DKT. NO. EDU 18048-16
AGENCY DKT. NO. 301-11/16

CLAUDINE HAYES,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

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

Accordingly, the recommended Order of the OAL – denying petitioner's application for emergent relief – is adopted for the reasons expressed therein. This case shall proceed at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/10/17

Date of Mailing: 1/10/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENT RELIEF
OAL DKT. NO. EDU 18048-16
AGENCY DKT. NO. 301-11/16

CLAUDINE HAYES,
Petitioner,
v.
CITY OF CAMDEN
STATE-OPERATED SCHOOL
DISTRICT, CAMDEN COUNTY,
Respondent.

Morrison Kent Fairbairn, Esq., for petitioner (Michael A. Armstrong and Associates, LLC, attorneys)

Louis R. Lessig, Esq., for respondent (Brown & Connery, LLP, attorneys)

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

Petitioner Claudine D. Hayes (Hayes), a tenured special education teacher who was employed by respondent State-Operated School District of the City of Camden (District) for approximately twelve years, but was deemed mentally unfit for service in 2014, seeks an order finding that the District violated N.J.S.A. 18A:16-4 by failing to

reemploy her upon receiving proof of her recovery, and further compelling the District to reemploy her or to allow her to provide the District with additional proof of her recovery.

PROCEDURAL HISTORY

On November 21, 2016, Hayes filed with the Commissioner of Education, New Jersey State Department of Education, Bureau of Controversies and Disputes, a petition of appeal and motion for emergent relief, alleging that the District violated N.J.S.A. 18A:16-4 by failing to reemploy her upon receiving proof of her recovery, and seeking an order compelling the District to reemploy her or allow her to provide the District with additional proof of her recovery.

On November 29, 2016, the Commissioner transmitted the motion for emergent relief to the Office of Administrative Law. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13; N.J.A.C. 1:1-8.2. Argument on the matter was held on December 6, 2016.

FACTUAL DISCUSSION

During the 2013–2014 school year, Hayes taught an elementary school class for behaviorally-challenged students. (Petition of Appeal, ¶ 4.) On December 11, 2013, Hayes suffered a panic attack on school grounds and was taken to the hospital by paramedics. (Id. at 7.) On December 13, 2013, the District notified Hayes that, due to her "alleged concerning pattern of behavior this year," she would be placed on paid administrative leave effective December 16, 2013, and be required to undergo a psychological examination to determine her fitness to teach. (Id. at Ex. A.) Hayes has not worked for the District since December 13, 2013.

On May 28 and May 29, 2014, Hayes was evaluated by a psychologist, Jonathan Mack, Psy.D.[1] (Id. at Ex. G.) During the evaluation, Dr. Mack "conducted a battery of psychological tests" and interviewed Hayes. In an August 11, 2014, report, Dr. Mack concluded that Hayes suffered from a personality disorder and a panic disorder and that,

[1] The selection of Dr. Mack as the expert was the subject of an Emergent Petition filed under docket number EDU 01761-14, and decided by the Hon. Elia Pelios, ALJ, on February 21, 2014.

in his opinion, "Ms. Hayes is at an unacceptable risk for future problems with the elementary school behaviorally disordered population throughout the [District] at this time." (Ibid.) He also opined that "she should be mandated to have weekly psychological counseling with a licensed psychologist and to be evaluated for mood stabilizing medications." (Ibid.)

On March 3, 2015, the District notified Hayes that, based on Dr. Mack's report and "pursuant to N.J.S.A. 18A:16-4, the State District Superintendent has determined that you are ineligible for further services with the District and shall be terminated from payroll effective sixty (60) days from receipt of this correspondence." (Id. at Ex. I.) The District further informed Hayes, "[y]ou will remain ineligible for service absent the submission of proof of recovery, satisfactory to the District," and, "[i]f you fail to submit such proof within (2) years from the beginning of your leave of absence, you will be permanently ineligible for service with the District."[2] (Ibid.)

On July 26 and July 27, 2016, Hayes visited another psychologist, Michael Ferenschak, Psy.D., for a fitness-for-duty evaluation. (Id. at Ex. L.) Dr. Ferenschak administered a number of psychological tests, conducted a clinical interview and, in an August 4, 2016, report, concluded that Hayes was fit to teach. (Ibid.) However, Dr. Ferenschak diagnosed her with a depressive disorder and anxiety disorder and noted that Hayes "appears to be susceptible to flare-ups of her mental health issues when in highly stressful situations." (Ibid.) As such, Dr. Ferenschak "recommended that she work in a non-high stress environment" and that, upon her return to work, "she seek psychotherapy to help her manage her work-related stress and guard against extreme emotional response." (Ibid.)

On August 12, 2016, after having received Dr. Ferenschak's report of August 4, 2016, the District's attorney informed Hayes' attorney that the report was "*not* satisfactory proof of recovery." (Id. at Ex. M.) The District found the report unsatisfactory because

[2] The petitioner challenged the District's decision to terminate her services and place her on unpaid leave in a matter filed under docket number EDU 09343-15 which was decided by the Hon. Joseph Ascione, ALJ, on January 4, 2016, and affirmed by the Commissioner on February 19, 2016. This decision is presently pending in the Superior Court, Appellate Division.

Hayes failed to provide the District with Dr. Ferenschak's qualifications and because the report did not indicate that Dr. Ferenschak was provided with or that he had considered certain information, including Hayes's job description and Dr. Mack's report. The District also found that "the contents of Dr. Ferenschak's report are inconsistent with its conclusions." (Ibid.) According to the District, "[Dr. Ferenschak's] report indicates that Ms. Hayes stopped attending counseling sessions—which Dr. Mack [had] indicated Ms. Hayes would need to attend—over one year ago, but still concludes she is able to work." The District further noted that Dr. Ferenschak's statement that "Ms. Hayes cannot work in a highly stressful environment" would show that "she is unable to work as a teacher of the handicapped in the District." (Ibid.) The District's attorney concluded the letter by stating that "[t]he District takes the safety of its students and staff seriously and is willing to act reasonably concerning this difficult situation," and, "[i]f you would like to discuss, I am available to speak at your convenience." (Ibid.)

The same day, Hayes' attorney emailed the District to express his disagreement with the District's opinion of the inadequacy of Dr. Ferenschak's report and asked the District to provide "a detailed written statement of what the District requires for satisfactory proof of recovery and how soon you need it." (Id. at Ex. N.)

Then, in an August 22, 2016, letter to Hayes' attorney, the District's attorney denied that the District had indicated in its previous correspondence that it "would be willing to accept future proof of recovery submissions pursuant to N.J.S.A. 18A:16-4." The letter also stated, "please let this letter confirm the District's position that the time has now expired for Ms. Hayes to apply for reinstatement pursuant to N.J.S.A. 18A:16-4, as her absence from the District has exceeded a period of two years." (Id. at Ex. O.)

LEGAL ANALYSIS AND CONCLUSION

90 Day Rule

Before reaching the merits of Hayes' motion for emergent relief, a threshold issue raised by the District concerning the timeliness of Hayes' petition and motion for emergent relief must be addressed. The District argues that Hayes violated N.J.A.C. 6A:3-1.3(i),

which requires that "[t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." Hayes filed her petition and motion for emergent relief on November 21, 2016, or 101 days after the District rejected her proof of recovery on August 12, 2016, and, as a result, her petition and motion should be dismissed as untimely.

However, in light of the District's statements in the August 12, 2016, letter that the District "is willing to act reasonably concerning this difficult situation" and, "[i]f you would like to discuss, I am available to speak at your convenience," and because the District stated in its August 22, 2016, letter, "please let this letter confirm the District's position that the time has now expired for Ms. Hayes to apply for reinstatement pursuant to N.J.S.A. 18A:16-4," it is reasonable to conclude that the August 22, 2016, letter served as notice of the District's final decision regarding proof of recovery and that Hayes had ninety days from the date of her receipt of that letter to file her petition and motion for emergent relief with respect to proof of recovery. As such, by appealing to the Commissioner on November 21, 2016, Hayes did not violate the ninety-day limitations period under N.J.A.C. 6A:3-1.3(i).

Emergent Relief

Turning to the merits of Hayes' motion for emergent relief, the regulations governing controversies and disputes before the Commissioner of Education provide that "[w]here the subject matter of the controversy is a particular course of action by a district board of education . . . the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case." N.J.A.C. 6A:3-1.6(a). The regulations further provide that the Commissioner may "[t]ransmit the motion to the OAL for immediate hearing on the motion." N.J.A.C. 6A:3-1.6(c)(3).

At such a hearing, a petitioner must show that he satisfies each of the following four standards:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b) (citing Crowe v. DeGioia, 90 N.J. 126 (1982)).]

Thus, the purpose of emergent relief is "to 'prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.'" Crowe, supra, 90 N.J. at 132 (citing Thompson ex rel. Bd. of Chosen Freeholders v. Paterson, 9 N.J. Eq. 624, 625 (Sup. Ct. 1854)).

Irreparable Harm

Hayes has failed to show that she will suffer irreparable harm if the requested relief is not granted, because "harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages," Crowe, supra, 90 N.J. at 132–33. Here, as the District persuasively argues, Hayes "can be reinstated to her position with back pay" and "the Commissioner could also order the District to accept future proof of recovery submission if she ultimately prevails." (District's Brief in Opposition to Motion for Emergent Relief, at 12–13.)

Right to Claim is Settled

Next, emergent relief "should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe, supra, 90 N.J. at 133 (citing Citizens Coach Co. v. Camden H. R. Co., 29 N.J. Eq. 299, 304–05 (E & A 1878)). Here, however, the legal right to reemployment upon proof of recovery from a mental disorder is settled by N.J.S.A. 18A:16-4, which provides that

> [i]f the result of any such examination indicates mental abnormality or communicable disease, the employee shall be ineligible for further service until proof of recovery, satisfactory to the board, is furnished, but if the employee is under contract or has tenure, he may be granted sick leave with compensation as provided by law and shall, upon satisfactory recovery, be permitted to complete the term of his contract, if he is under contract, or be reemployed with the same tenure as he possessed at the time his services were discontinued, if he has tenure, unless his absence shall exceed a period of two years.
>
> [Ibid.]

As the Commissioner has stressed, however, the right to reemployment under N.J.S.A. 18A:16-4 is conditioned upon a school board's satisfaction with the proof of recovery offered by the employee, such that "N.J.S.A. 18A:16-4 instructs that if it has been determined that an employee manifests a mental abnormality, he or she 'shall be ineligible for further service until proof of recovery, satisfactory to the board is furnished.'" Diaz v. Bd. of Educ. of Mahwah, EDU 1751-09, Final Decision (August 27, 2010), <http://njlaw.rutgers.edu/collections/oal/>. Importantly, an "action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. Bd. of Educ. of W. Orange, 60 N.J. Super. 288, 294 (App. Div. 1960) (citations omitted).

Likelihood of Success on the Merits

Under the third emergent relief standard, "a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits." Crowe, supra, 90 N.J. at 133 (citing Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115–16 (E. & A. 1930)). This typically "'involves a prediction of the probable outcome of the case' based on each party's initial proofs, usually limited to documents." Brown v. City of Paterson, 424 N.J. Super. 176, 182–83 (App. Div. 2012) (quoting Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 397 (App. Div. 2006)). However, emergent relief "should not issue where all material facts are controverted." Crowe, supra, 90 N.J. at 133 (citing Citizens Coach, supra, 29 N.J. Eq. at 305–06). Here, Hayes has failed to show a likelihood of success on

the merits because N.J.S.A. 18A:16-4 provides the District with the discretion to accept or reject proof of recovery, and it is clear from the papers that there are controverted material facts with respect to Hayes' proof of recovery.

Moreover, with respect to Hayes' requested relief of more time to submit proof of recovery, it appears from the language of N.J.S.A. 18A:16-4 that Hayes had two years to provide satisfactory proof of recovery either from the date she was placed on paid leave by the District (December 16, 2013), or from the date of Dr. Mack's fitness-for-duty determination (August 11, 2014), and that, at the latest, the time for proof of recovery expired on August 11, 2016. While it appears that Hayes timely submitted proof of recovery on August 9, 2016, she has failed to show that she is likely entitled to submit further proof of recovery beyond Dr. Ferenschak's initial report.

Balancing of the Equities

The fourth and final emergent relief standard involves "the relative hardship to the parties in granting or denying relief." Crowe, supra, 90 N.J. at 134 (citing Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J. Eq. 506, 515 (Ch. 1941), mod. on other grounds, 132 N.J. Eq. 613 (E. & A. 1942)). Here, Hayes has failed to show that she will suffer greater harm if the requested relief is denied than the District will suffer if the requested relief is granted. The District has an obligation to protect its students and staff from harm; further, the District disputes the sufficiency of Hayes' proof of recovery after being declared unfit to teach. If Hayes' motion for emergent relief is granted and the District is ordered to reemploy her prior to a plenary hearing on the adequacy of her proof of recovery, the District would run an unacceptable risk of harm to its students or staff, which is its uppermost concern.

Conclusion

Based on the foregoing, the motion for emergent relief must be denied.

ORDER

I **ORDER** that the motion for emergent relief is **DENIED**.

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

December 7, 2016
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/cb

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

Brief

For respondent:

Brief

7-17

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing of Michele Schwab:

WOODBRIDGE TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY, NEW JERSEY

"Petitioner,"

- and -

MICHELE SCHWAB

"Respondent."

OPINION AND AWARD

Agency Docket No. 125-5/16

Before
James W. Mastriani
Arbitrator

Appearances:

For the Petitioner:
Ari D. Schneider, Esq.
Busch Law Group, LLC

For the Respondent:
Edward A. Cridge, Esq.
Mellk O'Neill

This arbitration proceeding arises under the terms of N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1. It concerns tenure charges filed by the Woodbridge Township Board of Education [the "Petitioner" or "Board"] with the Commissioner of Education on April 29, 2016 seeking the removal of Michele Schwab [the "Respondent" or "Schwab"] from her tenured position as an elementary school teacher. The Petitioner alleges that the Respondent engaged in Unbecoming Conduct and/or Other Just Cause through (1) Theft/Shoplifting (two counts); (2) Failure to Report Arrest; (3) Violations of District Policies; and (4) Pattern of Unbecoming Conduct, Insubordination and/or Other Just Cause over Protracted Period of Time. On May 13, 2016, Respondent filed an Answer seeking dismissal of the tenure charges and her reinstatement with all lawful back pay. The relevant statutory reference for review of tenure dismissal charges is set forth in N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10 et seq. Petitioner has the burden to prove, by a preponderance of the evidence, that the tenure charges, including the disciplinary penalty of removal sought, should be sustained. Pursuant to N.J.S.A. 18A:6-16, as amended by PL 2012, Chapter 26, and P.L. 2015, Chapter 109, this controversy and dispute is subject to arbitration and was assigned to this arbitrator on May 26, 2016.

Informal pre-hearing conference calls to discuss hearing procedures including the offering of expert witnesses were held on May 24 and July 25, 2016. Arbitration hearings were conducted on August 20, September 7 and

October 4, 2016. During the course of the arbitration hearings, the parties argued orally, examined and cross-examined witnesses and submitted documentary evidence into the record. Testimony, in order received, was offered by six witnesses: Glen Geraghty, Asset Protection Manager at Sears, Judith Martino, Principal at Robert Mascenik Elementary School 26, Robert Zega, Ed.D., Superintendent of Schools, Respondent Michele Schwab, Avram Mack, MD and Eric Goldsmith, MD, each an expert witness in psychiatry. Post-hearing briefs were filed by the Petitioner and the Respondent on November 20, 2016. An extension of time to issue an award until January 5, 2017 was granted by the Director of Controversies and Disputes, Department of Education.

BACKGROUND

Michele Schwab was hired by the Woodbridge Township Board of Education in September 2001. She worked as a fourth grade teacher throughout her employment. She was last employed at the Robert Mascenik Elementary School 26. Her Principal was Judith Martino. While employed, her teaching performance was highly satisfactory. Many of her evaluations were submitted into the record and support this conclusion. Petitioner does not contend otherwise. Her more recent evaluations under the TEACHNJ Act scored her as a "Highly Effective Teacher." In addition to her evaluations, she received several commendations, including serving as a recipient of the Governor's Educator of the Year Program.

The events that the Petitioner states gave rise to the filing of tenure charges seeking her removal began on February 7, 2015. On this day, Respondent went to the Woodbridge Center Mall. While there, she entered Sears. Loss Prevention Agents observed Respondent placing a New York Jets hat and hooded sweatshirt from the sales floor into her purse. She was seen entering a fitting room and then exiting the store without paying for the merchandise. After exiting the store, a Loss Prevention Agent stopped her and requested that she return to the store to discuss her possession of merchandise that the store believed she had taken and concealed without making payment. Respondent voluntarily cooperated with this process which included a meeting with store security representatives immediately after the incident to discuss her actions. Glen Geraghty, Asset Protection Manager, detailed the events that occurred during the meeting. When confronted with what had been observed on video at the meeting, Respondent admitted in writing to having engaged in the removal of store merchandise without payment. She acknowledged at this arbitration hearing that she took the items without paying for them. The items taken included pliers that were later used to clip sensors off the items, a New York Jets hat and two New York Jets sweatshirts. One of the sweatshirts remained on the floor and was damaged by the pliers. Sears Asset Protection Manager Glen Geraghty testified that the value of the property was $229.98 and that the store never received payment from Respondent. During the meeting, the store referred the matter to the Woodbridge Township Police Department. An Incident Report was prepared, the Respondent was arrested and a Complaint

was filed in the Woodbridge Township Municipal Court. The Complaint was eventually dismissed in May when the Sears apprehending agent, no longer employed by Sears, did not appear in court to testify against the Respondent.

The Board became aware of Respondent's arrest on March 3, 2015 when Superintendent of Schools Dr. Robert Zega received a letter from Respondent's counsel at that time. Dr. Zega was unaware of Respondent's arrest until he received this letter.[1] The letter stated [P. Ex. C]:

> I represent Michele Schwab in the above captioned matter. She asked me to contact you regarding her inadvertence in not notifying you of this matter. Because of her obvious lack of familiarity with this type of matter, she assumed that as a matter of course I would contact your office regarding her alleged involvement. Having not done so, I ask that you overlook this omission as I should have fully explained the process to her. Please note that we are confident that this matter will be resolved in manner which will be satisfactory to all parties.

Following Dr. Zega's receipt of the letter, he arranged a meeting with the District's Director of Personnel, Joanne Shafer, Ms. Schwab and Union Representative Brian Geoffrey on March 4, 2015. Respondent testified that she was called out of the classroom to attend the meeting. Principal Martino was asked to have Respondent's class covered. According to Dr. Zega, at the

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[1] Judith L. Martino, Respondent's Principal at Robert Mascenik School #26, testified to receiving a phone call or a text message from a colleague indicating that Respondent forwarded a text message to the colleague indicating that she wished to harm herself at some point after the arrest. Principal Martino informed the District's Director of Security out of her concern for her welfare. The record does not show the precise date that this occurred, nor is there any evidence that Principal Martino notified Dr. Zega of this prior to his receipt of the March 3, 2015 letter from Respondent's attorney. Respondent testified that she told the colleague that "I wished I was dead" after the meeting with Dr. Zega, Director Shafer and Mr. Geoffrey at which time she was suspended. This testimony establishes that Dr. Zega could not have learned of the arrest prior to

meeting Ms. Schwab admitted that she was arrested for shoplifting, acknowledged that she had done so. According to Dr. Zega, she did not make any mention of any medications she was taking or mental health treatments she had been undergoing. Dr. Zega then suspended Ms. Schwab pending investigation of the shoplifting incident and for not reporting the incident within fourteen (14) days as required by District policy and law. He sent Respondent a letter after the meeting. It stated:

> As I discussed with you and your Association representative, Brian Geoffroy, today, certain allegations have been made against you regarding a serious matter. As a result and as I explained to you, you are hereby suspended with pay from your position as a teacher for the Woodbridge Township School District.
>
> I will recommend to the Woodbridge Township Board of Education at its next public meeting, scheduled for Thursday, March 19, 2015, that your suspension with pay be approved retroactively, effective today, March 4, 2015, and continue pending further action of the Board.

Respondent testified that she returned to her classroom after the meeting, picked up her belongings and went home. She testified that she was distraught and informed a colleague that she "wished I was dead." A substitute was assigned to cover Respondent's class during the period of her suspension. Dr. Zega's investigation confirmed the incident with Sears' Director of Security and he obtained a copy of the police incident report.

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the March 3, 2015 letter due to the fact that Principal Martino's knowledge of the colleague's statement to her occurred after the meeting at which Respondent was suspended.

Dr. Zega decided to lift the suspension and return Ms. Schwab to school in May of 2015 after he learned that the criminal charges against Respondent were dismissed due to the failure of the Sears' apprehending agent to appear in court to testify. He testified that he returned her to class because:

> We were hoping that this was a one-time incident, and we wanted to be compassionate to Ms. Schwab and return her to the classroom.

A similar type of incident to the February 7, 2015 event at Sears occurred on March 5, 2016. While Respondent was visiting a friend on Long Beach Island, she entered Song of the Sea, a store in Beach Haven, New Jersey. While in the store, she picked up a Shell Picture Frame off of a shelf valued at $60, placed it in her purse and left the store without paying for the item. The store owner was unaware of this act at the time. After later discovering that the item was missing, the owner viewed surveillance footage of the store that revealed the item's removal. The video was submitted into evidence. It showed Respondent removing the item from the shelf, concealing it and proceeding down an aisle. In an effort to identify the individual responsible, the owner first posted a picture of Respondent on Facebook. Shortly after, he posted the video footage of the incident on the public pages of Facebook. The post was viewed and reflected 47,000 "hits" including at least one of Respondent's fourth grade students. Principal Martino was informed by a teacher of the post and personally viewed it. Respondent was identified from the pictures and video and was arrested by the Beach Haven Police Department. She was served with a

summons for shoplifting. During the court proceeding on May 2, 2016 and after having discussion with the prosecutor, Respondent made application to enter into the Conditional Dismissal Program pursuant to N.J.S.A. 2C:43-13.1 et. seq. The entry into the program required entering a guilty plea to the charges. Respondent's guilty plea is reflected in a transcript of the court proceeding. She was admitted into the program. The prosecutor requested, and Respondent did not object, to the inclusion of a No Trespass Order as part of the plea wherein she agreed to stay out of the store. The conditional dismissal included that Respondent be on probation for a one year period.

Principal Judy Martino testified that because of the public nature of the Song of the Sea incident, students at the Robert Mascenik Elementary School were upset. She testified to receiving eight calls from parents expressing concern over the incident. She also noted that many teachers have students who attended school in the District. She testified that the entire two fourth grade classes became aware of the video. She assigned the school's guidance counselor to provide lessons to each fourth grade class regarding positive behavior to assist them in distinguishing between rumor and fact.

During the course of the arbitration hearings, a substantial volume of testimony and documentary evidence was received reflecting Respondent's mental health history dating back to the 1990s. There is no evidence that the District was aware of this history. During this time, she received counseling that

resulted in the prescription of several medications. As is evident, Respondent's mental health treatment began well prior to the February 7, 2015 and March 5, 2016 incidents described above and have continued up to the present. There is no suggestion that her mental health history affected her teaching performance in any way. Prescriptions of the medications and changes in those medications are reflected in the exhibits and in the testimony of the two psychiatrists who offered expert testimony. Respondent asserts that the mental health issues and the effects of changing medications were contributing and influencing factors in her conduct at Sears and Song of the Sea. According to Respondent's psychiatric expert, Dr. Avram Mack, the prescription changes were part of the factors that led to her "acting out" when faced with high stress. Dr. Mack opined that she could "do very well provided that she remains in some form of psychiatric treatment that combines medications and psychotherapy." Respondent testified that "I'm doing very well" and "I finally have a doctor who has me on the right medication regimen." These conclusions followed extensive testimony reflecting that Respondent underwent changes in her psychiatrists and medications over the prior years.

Petitioner does not dispute that the Respondent has suffered from mental health conditions, nor the documentary evidence reflecting her history of treatments. However, it contends that these conditions do not serve as a basis for mitigation of penalty. It cites the testimony of its psychiatric expert, Dr. Eric Goldsmith, who concluded that "it's my opinion to a reasonable degree of

psychiatric certainty there is no evidence of a psychiatric condition or psychological problem that would explain the theft incidents." Petitioner contends that relevant case law supports its position that a psychiatric condition does not warrant mitigation of the penalty of removal based upon the Respondent's conduct.

The positions of the parties are extensive and well articulated. Their main arguments will be summarized, including reference to the evidence concerning Respondent's psychiatric diagnosis, treatments and medications.

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Petitioner contends that it has proven that Respondent engaged in unbecoming conduct by committing two separate acts of theft and/or shoplifting, both of which involve conduct that is criminal in nature. While the incidents occurred outside of her normal duties as a teacher, nonetheless, Petitioner contends that Respondent created conditions under which the proper operations of the school were affected. In addition, Petitioner submits that Respondent violated Board Policy and law by failing to report her first arrest on February 7, 2015 to the Superintendent of Schools in timely fashion.

Petitioner submits that it has proven that Respondent committed conduct unbecoming as alleged in Charges I and III based upon Respondent's admissions that she engaged in conduct reflected in the two arrests for her actions on February 7, 2015 at the Woodbridge Mall and on March 5, 2016 at

Song of the Sea in Long Beach Island. Petitioner contends that Respondent's conduct was illegal, inappropriate and had harmful impacts on the school district and a breach of her trust as a teacher. The conduct was publicized on social media and became common knowledge to the students and parents of the District who became aware of the incident and by many who visually observed her theft on video on March 5, 2016. Her conduct, while off duty, is said to undermine Respondent's contention that she remains fit to be retained as an employee despite obvious concerns by the District, the public and parents over her continued presence in the school, her interaction with elementary school students and potential for future inappropriate or illegal conduct. Petitioner submits that Respondent engaged in conduct with disregard for New Jersey law and Board policy and that due to her unbecoming conduct she no longer can serve as a role model to guide the educational and social growth of students in the District.

In respect to Charge II, Petitioner contends that it has proven that the Respondent violated Board Policy 4219.2 and N.J.A.C. 6A:9B-4.1(c) by not reporting her February 7, 2015 arrest to the Superintendent of Schools until March 3, 2015. The Policy states:

> DUTY TO REPORT ARREST
>
> Any non-certificated employee who has been arrested and charged with an offense or crime in this State or any other State which would disqualify the employee from public school employment in accordance with N.J.S.A. 18A:6-7.1 et seq. or N.J.S.A. 18A:39-19.1 et seq. (as may be amended) must report his or her arrest and the

> nature of the charges to the superintendent as soon as possible. If the employee is absent from work and unable to report his or her arrest due to circumstances beyond the employee's control, then the employee shall report the arrest as soon as he or she returns to work. Thereafter, the employee may be suspended with or without pay in accordance with the law. Each such employee shall keep the Superintendent apprised of the status of the charges against him or her. Failure to report an arrest and charge in a timely manner and failure to keep the Superintendent apprised of the status of the charges may be the basis for disciplinary action.

Respondent's failure to report the arrest within fourteen (14) days is said to have deprived the Board of an opportunity to review her conduct in a timely manner and determine whether it should have suspended Respondent earlier pending further investigation. Moreover, the Board cites the testimony of Respondent's Principal Judith Martino that she provides Board Policy to all teachers at each annual opening day faculty meeting that includes the obligation of teachers to report arrests within fourteen (14) days. Thus, Petitioner submits that any attempt by the Respondent to defend her failure to provide notice to the Superintendent of Schools because of lack of knowledge to do so is without merit. Petitioner further notes that when Dr. Zega received the letter on March 3, the contents of the letter did not reveal, as required, that Respondent had been arrested, the date of the arrest and the charges that had been brought against her.

The Petitioner asserts, as alleged in Charge IV, that it has proven that Respondent violated Board Policy 4119.22/4219.22, Conduct and Dress by establishing that Respondent's conduct outside of school constituted

unbecoming conduct and affected the proper operation of the school. Petitioner cites relevant portions of this policy:

> UNBECOMING CONDUCT
>
> When an employee, either within the schools or outside normal duties, creates conditions under which the proper operation of the schools is affected, the board upon recommendation of the superintendent and in accordance with statute shall determine whether such acts or lack of actions constitute conduct unbecoming a school employee, and if so, will proceed against the employee in accordance with law.
>
> Unbecoming conduct sufficient to warrant board review may result from a single flagrant incident or from a series of incidents.

Petitioner points to the Song of the Sea Facebook post that clearly depicted Respondent engaging in illegal conduct and was widely viewed. Petitioner cites Principal Martino's testimony that she was aware that at least one of Respondent's fourth grade students viewed the surveillance footage and that the entire fourth grade had become aware of it. Principal Martino further testified that she received at least eight (8) phone calls from parents who had either heard about the arrest or heard about the Facebook video. According to Principal Martino, some parents expressed concern with how their children would cope in their classroom environment. The Board further contends, as set forth in Charge V, that when each individual act of unbecoming conduct is considered, the totality of Respondent's conduct is sufficient to require dismissal, even if any individual act of unbecoming conduct is not deemed to be egregious enough to require termination. It points out that each individual act was independent of one another

over the course of two school years thus reflecting a pattern of poor judgment and unlawful behavior.

Respondent seeks the dismissal of the tenure charges and her reinstatement to her classroom. Among Respondent's defenses to her conduct is that although she has suffered from serious, chronic mental health issues, her condition did not affect the quality of her job performance and that when she is returned to the classroom she would continue to perform in a highly effective manner. Her mental health issues, in conjunction with changes in her medications, are said to have been contributing factors to her conduct in the two instances that gave rise to the Petitioner's complaints underpinning the tenure charges. The testimony of Respondent, documentary medical evidence and the report and testimony of its psychiatric expert Dr. Avram Mack are asserted by Respondent to find that the penalty of removal in her instance is draconian and must be set aside in favor of her return to the classroom, especially in light of evidence that her current health status has stabilized.

Despite the burden placed on the Petitioner to establish just cause to support the tenure charges it filed against the Respondent, a review of the medical evidence and arguments presented by the Respondent as a defense to her conduct will first be undertaken before reviewing the response of the Petitioner who disputes that the Respondent's medical defenses can properly serve as mitigation to her conduct.

Respondent described her history of mental health treatment. She testified that her OB/GYN initially prescribed Zoloft sometime in the early 1990s. She then engaged a counselor who she saw between 1995 through the 2014-2015 school year. In documents, the counselor described that Respondent was having mood swings and was suffering from depression. Respondent had been taking 75 mg of Zoloft on a daily basis. However, towards the end of 2014, Respondent testified that she felt this medication was no longer working for her. She also testified that she was upset and stressed with her finances. Because of this, she began to reduce her intake of Zoloft towards the end of 2014 for the purpose of "weaning" off the medication.[2] She sought the help of her counselor to make an appointment with a psychiatrist. She testified that she had difficulty finding a psychiatrist who would treat her in timely fashion. Because of this, her counselor suggested that Respondent see her personal physician. She then made an appointment with her personal physician who prescribed Lorazepam and Paxil medications.

According to Respondent, her mental health issues described above in conjunction with the changing medications contributed to the events that occurred on February 7, 2015 and March 5, 2016. She based her testimony on the opinion of psychiatric expert Avram Mack, who evaluated her mental health

[2] It is not clear whether this effort was her own or with the aid of her counselor or a physician.

status and her prior medical history for the purpose of his presentation at this hearing. Respondent does not deny the events that occurred at Sears on February 7, 2015 that led to her arrest for shoplifting. She described that she was "in a fog that day" and believes that having come off the prescription medication Lorazepam and being placed on Paxil contributed to her lack of clear thinking. Once arrested, she described herself as being distraught. She was taken to Raritan Bay Crisis Center where she underwent an evaluation. She then began to be treated by a new psychiatrist who she continued to see along with her long-term counselor. She later stopped seeing the counselor toward the end of July 2015. Her psychiatrist had prescribed new medications: Effexor, Remeron and Abilify. The dosage for Effexor at this time was 225 mgs. Respondent testified that she was not pleased with the treatment she was receiving from this psychiatrist. In February 2016, the psychiatrist reduced the Effexor dosage to 150 mgs. During this approximate time period, Respondent testified that she underwent additional stress when her son failed to pass a psychological examination to become a probation officer.

Respondent offered additional testimony concerning her mental condition at the time that the March 5, 2016 incident occurred in Beach Haven, New Jersey. Respondent removed a picture frame from a store, concealed the item and left the store without paying for the item. Video tape footage confirmed her actions, she was identified and, after being arrested, she admitted to her conduct and plead guilty as required by her entry into the conditional dismissal program.

In her testimony, Respondent indicated that she was undergoing increasing stress at the time because of her son's inability to secure the probation officer position. She also believed that the changes to the Effexor medication contributed to her conduct. She entered a treatment facility at Summit Oaks after her arrest. After completion of the treatment, Respondent received outpatient treatment at the High Focus Center in Cranford, New Jersey. The outpatient treatment consisted of five hours per day, five days a week. After completion of treatment she secured a new treating psychiatrist. Respondent testified that she is happy with her treatment, that she has been given a proper medication regimen and is doing very well.

Respondent offers expert the testimony of psychiatric expert Avram Mack, M.D. who described her condition as having been stabilized. He offered the opinion that Respondent's actions were influenced by her mental health conditions and the effects of changing medications. Dr. Mack identified Respondent as having "a depressive disorder not otherwise specified." He expressed the opinion that her conduct during the two events:

> "represented her 'acting out' in the context of the combination of mood problems, recent stressors, insufficient medication therapy, and possibly the agitating effects of psychiatric medications. It is my opinion that Ms. Schwab's prohibited acting out behavior was influenced by many vulnerabilities is not the same as asserting that she was "insane" or "not criminally responsible." It is to say, rather, that among the factors affecting her, the behaviors occurred in a manner that is a recognized health phenomenon. It is important to note that this state of mind has been recognized by her current psychotherapist and by the patient and remains an area that she recognizes needs to be prevented in the future."

Dr. Mack also opined that Respondent's exposure to various medications, changes in those medications as well as changes in dosages, influenced her behavior. He believed that she suffered from "discontinuation syndrome." That is, the likelihood that a reduction or termination of medications that can lead to a variety of symptoms. His observations on this point included Respondent's cessation of sertraline (Zoloft) in December 2014 as a contributing factor in the February 7, 2015 incident because she no longer had exposure to this medication that had previously provided her with stability.

Dr. Mack identified Respondent as being caught in a "constellation" that influenced her actions such as having a disordered mood, as suffering from real time stressors, as having poor coping skills and being affected by a fluctuation in medications. He described her actions as a form of maladaptive coping as influenced by her psychiatric issues. He explained that the effects of maladaptive coping on her behavior did not require Respondent to be in the throes of a major depressive episode or to be disabled during the time of her actions. Dr. Mack offered his opinion on Respondent's prognosis:

> I think that Ms. Schwab can do very well provided that she remains in some form of psychiatric treatment that combines medications and psychotherapy.

Respondent also urges that her psychiatric expert's opinions were more credible than Petitioner's psychiatric expert, Eric Goldsmith, M.D. Respondent, citing to record testimony, explains the basis for this conclusion:

> Dr. Goldsmith diagnosed Ms. Schwab with a major depressive disorder, and concluded that: "[Ms. Schwab's] state of mind during the shoplifting episodes appears most consistent with her usual and typical inter-episode depression and not an outcome from an acute major depressive episode" **(P-X, p.16).** Dr. Goldsmith found that Ms. Schwab has long-standing difficulties in coping with stress, and that is irrespective of whether or not she was in the middle of a major depressive disorder. **Goldsmith:T:43:7-11.** Despite this diagnosis, Dr. Goldsmith concluded that there was no connection between Ms. Schwab's mental health conditions and her behavior. **Goldsmith:T:22:14-17**.
>
> Dr. Goldsmith's determination in this regard is unsound, for several reasons. First, Dr. Goldstein acknowledged that the psychological issues experienced by Ms. Schwab could have an affect on a person's behavior. Specifically, he acknowledged that depressed mood, anger, loneliness and feelings of inadequacy—symptoms he attributed to Ms. Schwab—can all affect behavior. **Goldsmith:T:54:20-56:3**.
>
> Second, Dr. Goldstein acknowledged that a person might suffer, discontinuation symptoms as the result of a reduction in a Zoloft or Effexor prescription. **Goldsmith:T:33:2-16**. As the result of discontinuation syndrome, a person may experience a change in mood. A person who suffers from depression can experience an increase in depression. A person who suffers from anxiety can suffer an increased in anxiety during a discontinuation syndrome. He also testified that Effexor is a short acting medication, and that was one of the reasons that it is associated with discontinuation symptoms. **Goldsmith:T:53:20-24**. Despite all of these factors, Dr. Goldsmith believed that it was just a "coincidence" that Ms. Schwab, an otherwise upstanding person and superlative teacher, had engaged in her 2 instances of aberrant behavior both shortly after discontinuing those medications. **Goldsmith:T:54:1-13**.
>
> Third, Dr. Goldsmith's conclusions were based on a number of incorrect assumptions. Dr. Goldsmith opined that:

> There is no evidence documented in the medical records of Christine Milne or Carmencita Lanez, M.D. of discontinuation symptoms or adverse side effects from the prescribed psychotropic medications that could account for a change in the mental status proximal to the two incidents of shoplifting. There is no documentation in the medical records of severe anxiety, mood changes, psychotic symptoms or dissociation related to the prescribed medications.

Exhibit P-X, p. 15. He also opined that "[in the months leading up to the second shoplifting event, Ms. Schwab was in good spirits." **Exhibit P-X, p.16.** Dr. Goldsmith's opinion that Ms. Schwab did not suffer from a discontinuation syndrome in connection with the reduction of her Zoloft and Effexor prescriptions was based upon the records of Ms. Milne and Dr. Lanez. **Goldsmith:T:44:25-48:2**. Since Ms. Schwab stopped seeing Ms. Milne in July 2015, however, Ms. Mime's records obviously would not document Ms. Schwab's mood at that time. Dr. Goldsmith overlooked the fact that Ms. Milne did, in fact, document mood swings during the time that Ms. Schwab was weaning off of Zoloft. **Goldsmith:T:44:25-48:2.** Likewise, Ms. Schwab did not see Dr. Lanez between the date in February 2016 when her Effexor was reduced, and March 5, 2016, when she took the picture frame in Beach Haven. This explains why her records did not document Ms. Schwab's mood changes during that crucial time period. Under cross examination, Dr. Goldsmith also admitted that Ms. Schwab did not tell him that she was in good spirits during February 2016, despite the fact that he relied on this assumption, in reaching the conclusions set forth in his report. **Goldsmith:T:59:11-60:8**. For all these reasons, Dr. Goldsmith's critical conclusions about Ms. Schwab's mindset during the relevant time periods are unsound.

Finally, though Dr. Goldsmith also opined that there was "no evidence" that Ms. Schwab needed a "more aggressive psychopharmacologic intervention" before her arrest in Beach Haven, he acknowledged that when she was admitted to Summit Oaks, her Effexor level was restored to the 225mg level that it had been at before it was reduced by Dr. Lanez. **Goldsmith:T:60:9-61:5.**

Petitioner disagrees with Respondent's psychiatric expert. It urges that the findings and opinions of Respondent's expert witness of Avram Mack, M.D.

be dismissed in favor of its own expert witness, Eric Goldsmith, M.D. Petitioner contends that Dr. Mack was unable to make an individual diagnosis of the Respondent, did not perform a clinical inventory of the Respondent, had never performed as a qualified expert in the past to opine whether illegal conduct was the result of a reduction in medication or a psychiatric condition, that he erred in concluding that Respondent had a "history" of acting out when faced with high stress based on his acknowledgement that the history he referred to was limited to a single reference to suicidal thoughts Respondent had in 2008, that his attempt to link Respondent's behavior to Respondent's medications was speculative without a reasonable degree of medical certainty, that Respondent continues to have the same stressors in her life that existed at the time she committed the two acts of shoplifting, and that Dr. Mack acknowledged that future "acting out" could reoccur and potentially result in conduct more severe than shoplifting including potentially violent behavior.

DISCUSSION

Pursuant to N.J.S.A. 18A:6-10, "[n]o person shall be dismissed or reduced in compensation ... if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state ... except for inefficiency, incapacity, unbecoming conduct, or other just cause." The burden is on the District to establish that it met this standard. My review of the evidence requires a finding as to whether Respondent engaged in the conduct she is charged with; if so, whether disciplinary action was warranted;

if so, whether the penalty of removal was consistent with the nature of the conduct; and, if so, whether there were mitigating circumstances requiring a lesser penalty than removal.

Respondent does not dispute that she engaged in inappropriate conduct on two occasions, one on February 7, 2015 and the other on March 5, 2016. On both occasions, she was arrested for shoplifting. In both instances, Respondent admitted to the conduct that gave rise to both arrests. The first charge was dismissed when the Sears apprehending agent did not appear in court as a prosecution witness. The second charge was resolved by way of the conditional dismissal program. N.J.S.A. 2C:43-13.1 et. seq. The Respondent entered a guilty plea as a prerequisite to enter the program and remains on probation. Based upon the testimony, the exhibits and Respondent's admissions during this arbitration hearing in these two cases, Petitioner has established that the Respondent engaged in the conduct it has alleged. Petitioner has also established that the conduct of Respondent rose to the level of conduct unbecoming a teacher and conduct that authorized discipline under its disciplinary policy. The conduct was outside of normal duties but had adverse impact on students and affected the proper operation of the schools. Upon learning of her arrest on March 3, 2015, Dr. Zega met with Respondent, confirmed her arrest, received her acknowledgement of her conduct and suspended her pending further investigation. This required the use of a substitute teacher in the fourth grade classroom until Dr. Zega reinstated her to

her class sometime in May. Respondent's arrest and acknowledgment of her conduct, even without a criminal conviction, is sufficient basis to find a violation of her job description that requires a teacher to "behave in accordance with the law and exhibit high standards of professional ethical behavior." Any doubt as to this conclusion is resolved by Respondent's second act of removing a store's item by concealment and without payment only one year later. At that time, she was arrested, entered into a guilty plea of the charges against her, is barred from entering the store and remains on a one year probation. Her arrest prompted events that caused the District to cover her class for the remainder of the semester and to counsel all of the fourth grade students who became aware of Respondent's arrest due mainly to the publicity surrounding the store's posting of the surveillance tape. The extent to which the video was observed cannot be determined, but the record clearly supports the conclusion that it was either seen or its contents described by faculty, parents and students who became aware that a District teacher had committed an unlawful act of dishonesty.

Respondent also failed to inform the Superintendent of Schools of her February 7, 2015 arrest until March 3, 2015. This arrest violated District policy and N.J.A.C. 6A:9B-4.1(c) when she, through counsel, did not report her arrest in a timely fashion. Moreover, the letter of notice sent by prior counsel, did not, as required by law, that there had been an arrest or the charges that had been lodged against Respondent. While an argument could be made that the inclusion of this violation in the tenure charges was not timely given the lapse of

one year, I do not find Petitioner to have waived its ability to file this charge given Respondent's repetition of conduct that led to her second arrest.

Based upon the above, Petitioner has met its burden to establish that the Respondent engaged in the conduct alleged and that it had just cause to discipline Respondent. The next issue to be decided is whether Petitioner has established that Respondent's conduct warranted dismissal from her tenured position. Respondent urges that even if it is found that Petitioner has established a basis for disciplinary action, the penalty of removal is not warranted in this instance for many reasons. They include 1) the District's failure to impose progressive discipline; 2) the Respondent was subject to double jeopardy; 3) that other removal cases in the State of New Jersey in the past have not been sustained even where significant misconduct has been proven; 4) that removal from tenure has not been sustained in certain cases even where a teacher has engaged in conduct unrelated to employment; 5) that the opinion of Respondent's psychiatric expert has established that her behavior was influenced by her exposure to changing medications and stressors leading to her "acting out" in the two instances, that Respondent "can do very well provided that she remains in some form of psychiatric treatment that combines medication and therapy"; and 6) that her past performance and recognition as a highly effective teacher remains unaltered despite her mental health conditions and that she will continue to be a highly effective teacher if given the opportunity to return to her class.

Notwithstanding the forceful presentations by Respondent, I conclude that Petitioner has met its burden to establish just cause for the penalty of removal. The proven conduct of Respondent was serious. It led to her arrest and criminal charges in two instances. The conduct is not in dispute. It reflected two instances of dishonesty by a fourth grade public teacher. The public visual evidence of her second act committed on March 5, 2016 depicted a clear image of her breach of trust as a public school elementary teacher. This repeated act of dishonesty within a thirteen (13) month period allowed the District to exercise its discretion to remove Respondent from her tenured position. District policy provides for the penalty of dismissal "when appropriate." This requires the District to exercise its judgment in accordance with just cause principles. A penalty short of removal was within the discretion of the District but I cannot find that it abused its discretion by not doing so.

The proven repetitive conduct did not require a penalty short of removal. Although the District did not impose discipline after her arrest at Sears, its failure to do so did not waive its ability to consider her admitted conduct in that instance after a repetition of conduct that she acknowledged to be unlawful. To the extent that it is suggested that the District's reinstatement of Respondent for the first offense created a condition for Respondent to assume that a second similar offense would not be considered egregious, such inference is without merit given the unlawful nature of her conduct. Both parties have submitted a volume of

arbitration cases in support of their respective positions. Prior decisions on either side of the proposition must give way to the facts of the case at hand. None reflect repetitive acts of dishonesty within a thirteen month period. I also conclude that the evidence concerning Respondent's mental health history cannot serve to mitigate against the District's decision to impose the penalty of removal. Respondent's expert, despite acknowledging Respondent's progress in her medical condition, acknowledged that his judgment did not reflect that Respondent's conduct was not unintentional nor that the stressors in her life that gave rise to her "acting out" were no longer present.

Based upon all of the above, I enter the following Award.

AWARD

The Woodbridge Township Board of Education had just cause to dismiss Michele Schwab from employment.

Dated: January 5, 2017
Sea Girt, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth } ss:

On this 5th day of January, 2017, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

John J. Blanchard
Attorney At Law
of New Jersey

8-17

AGENCY DKT. NO. 326-11/16

IN THE MATTER OF KIRK HARRIS, WOODLAND TOWNSHIP BOARD OF EDUCATION, BURLINGTON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the decision of the School Ethics Commission (Commission), forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. The Commission found that respondent violated the School Ethics Act for failure to complete training in accordance with *N.J.S.A.* 18A:12-33. Due to respondent's failure to satisfy the long-standing requirement – despite repeated notifications and ample opportunity to complete the training, either in-person or online – the Commission recommends a sanction of suspension for 30 days. If the respondent fails to complete the training by the end of the 30 day period, the Commission recommends that the respondent be removed from his position. Respondent did not file exceptions, nor has he submitted proof that he completed the required training. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon school officials by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. Accordingly, the respondent is suspended from his position as a school official and is hereby ordered to complete the required training within 30 days from the date of this decision. If the respondent does not complete the training within 30 days from the date of this decision, the respondent shall be removed from his position as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/09/17
Date of Mailing: 1/11/17

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

IN THE MATTER OF	:	**BEFORE THE**
KIRK HARRIS	:	**SCHOOL ETHICS COMMISSION**
WOODLAND TOWNSHIP BOARD OF	:	**DECISION FOR FAILURE**
EDUCATION,	:	**TO COMPLETE TRAINING**
BURLINGTON COUNTY	:	**IN A TIMELY MANNER**
	:	**DOCKET NO. T01-16**
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on September 27, 2016, and mailed on September 28, 2016 via regular and certified mail, return receipt requested, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), to show cause as to why the Commission should not find Respondent in violation of the Act, N.J.S.A. 18A:12-2i et seq., for failure to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on September 28, 2016, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute. Respondent did not submit a response to the OTSC, or otherwise complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and charter school trustees. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require each board member and charter school trustee to complete training on an annual basis.

Respondent is a member of the Woodland Township Board of Education located in the City of Chatsworth, County of Burlington. As a result of his position as a board of education member, and in accordance with the statute and regulations cited above, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online and, in this way, a board member or charter school trustee may complete it at any time, from anywhere. For the 2015 training cycle, Respondent was required to complete the Governance 1 training program.

On January 19, 2016, NJSBA provided the Commission with the names of those school board members who failed to complete mandated training in 2015 – the list provided by NJSBA included Respondent. Prior to this time, communications about mandated training were sent to Respondent on November 18, 2015, December 14, 2015, and January 8, 2016. After January 19, 2016, NJSBA sent reminder communications to Respondent on June 30, 2016 and July 5, 2016.

NJSBA also sent reminder communications to Respondent's Business Administrator on April 1, 2016, April 15, 2016, June 14, 2016 and July 12, 2016. Notwithstanding these communications, Respondent did not complete the training.

In addition to the communication efforts undertaken by the NJSBA, the Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in August, 2016, the Commission notified the County that the NJSBA identified Respondent as a school official who failed to complete training in 2015. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator and the Solicitor, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated September 13, 2016, via regular and certified mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on September 28, 2016.

To date, there is no dispute that Respondent did not complete his required training within the 2015 training cycle, and did not complete the training prior to the issuance of the Commission's OTSC. Further, there is no dispute that Respondent failed to respond to the Commission's OTSC as to why he did not complete the training in 2015.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees who fail to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on October 24, 2016, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of the long-standing training requirement, and has had ample opportunity to complete the mandated training.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. The Commission recommends that the Commissioner of Education impose a sanction of **suspension for thirty (30) days** for failure to complete the mandatory training, with such suspension to become effective immediately upon adoption by the Commissioner of Education. Further, if Respondent fails to submit written documentation to the Commission confirming that he completed training within the period of his suspension, the Respondent shall be **removed from office on the thirty-first (31st) day**.

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

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

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

Robert W. Bender
Chairperson

Mailing Date: November 23, 2016

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 22, 2016.

Kathryn A. Whalen, Acting Executive Director

IN THE MATTER OF KIRK HARRIS *WOODLAND TOWNSHIP BOARD OF EDUCATION, BURLINGTON COUNTY*	: : : : : : :	**BEFORE THE SCHOOL ETHICS COMMISSION DECISION FOR FAILURE TO COMPLETE TRAINING IN A TIMELY MANNER DOCKET NO. T01-16**

WHEREAS, Kirk Harris is a Board member of the Woodland Township Board of Education; and

WHEREAS, at its meeting on September 27, 2016, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Mr. Harris to show cause why he failed to complete his 2015 mandatory training as identified by the New Jersey School Boards Association (NJSBA) and as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, Mr. Harris failed to file a response to the OTSC; and

WHEREAS, at its meeting on October 24, 2016, the Commission found that Mr. Harris violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the 2015 training requirement he was obligated to complete; and

WHEREAS, at its meeting on October 24, 2016, the Commission recommended that the Commissioner of Education impose a sanction of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

WHEREAS, if at the conclusion of thirty (30) days, Respondent fails to submit written documentation to the Commission confirming that he completed training within the period of his suspension, the Respondent shall be removed from the Woodland Township District Board of Education on the thirty-first (31st) day; and

WHEREAS, at its meeting on November 22, 2016, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairman
School Ethics Commission

I certify that the within Resolution was duly adopted
by the School Ethics Commission at its public meeting
on November 22, 2016.

Kathryn A. Whalen

Kathryn A. Whalen, Acting Executive Director

9-17

AGENCY DKT. NO. 327-11/16

IN THE MATTER OF RICHARD LAMAZARES,	:	
CHESILHURST BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission (Commission), forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. The Commission found that respondent violated the School Ethics Act for failure to complete training in accordance with *N.J.S.A.* 18A:12-33. Due to respondent's failure to satisfy the long-standing requirement – despite repeated notifications and ample opportunity to complete the training, either in-person or online – the Commission recommends a sanction of suspension for 30 days. If the respondent fails to complete the training by the end of the 30 day period, the Commission recommends that the respondent be removed from his position. Respondent did not file exceptions, nor has he submitted proof that he completed the required training. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon school officials by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. Accordingly, the respondent is suspended from his position as a school official and is hereby ordered to complete the required training within 30 days from the date of this decision. If the respondent does not complete the training within 30 days from the date of this decision, the respondent shall be removed from his position as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/11/17
Date of Mailing: 1/11/17

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

IN THE MATTER OF	:	**BEFORE THE**
RICHARD LAMAZARES	:	**SCHOOL ETHICS COMMISSION**
CHESILHURT BOARD OF EDUCATION,	:	**DECISION FOR FAILURE**
CAMDEN COUNTY	:	**TO COMPLETE TRAINING**
	:	**IN A TIMELY MANNER**
	:	**DOCKET NO. T02-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on September 27, 2016, and mailed on September 28, 2016 via regular and certified mail, return receipt requested, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), to show cause as to why the Commission should not find Respondent in violation of the Act, N.J.S.A. 18A:12-21 et seq., for failure to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on September 28, 2016, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute. Respondent did not submit a response to the OTSC, or otherwise complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and charter school trustees. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require each board member and charter school trustee to complete training on an annual basis.

Respondent is a member of the Chesilhurst Board of Education located in the City of Chesilhurst, County of Camden. As a result of his position as a board of education member, and in accordance with the statute and regulations cited above, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online and, in this way, a board member or charter school trustee may complete it at any time, from anywhere. For the 2015 training cycle, Respondent was required to complete the Governance 1 training program.

On January 19, 2016, NJSBA provided the Commission with the names of those school board members who failed to complete mandated training in 2015 – the list provided by NJSBA included Respondent. Prior to this time, communications about mandated training were sent to Respondent on November 18, 2015, December 14, 2015, and January 8, 2016. After January 19, 2016, NJSBA sent reminder communications to Respondent on June 30, 2016 and July 5, 2016. NJSBA also sent reminder communications to Respondent's Business Administrator on April 1,

2016, April 15, 2016, June 14, 2016 and July 12, 2016. Notwithstanding these communications, Respondent did not complete the training.

In addition to the communication efforts undertaken by the NJSBA, the Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in August, 2016, the Commission notified the County that the NJSBA identified Respondent as a school official who failed to complete training in 2015. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator and the Solicitor, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated September 13, 2016, via regular and certified mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on September 28, 2016.

To date, there is no dispute that Respondent did not complete his required training within the 2015 training cycle, and did not complete the training prior to the issuance of the Commission's OTSC. Further, there is no dispute that Respondent failed to respond to the Commission's OTSC as to why he did not complete the training in 2015.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees who fail to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on October 24, 2016, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of the long-standing training requirement, and has had ample opportunity to complete the mandated training.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. The Commission recommends that the Commissioner of Education impose a sanction of **suspension for thirty (30) days** for failure to complete the mandatory training, with such suspension to become effective immediately upon adoption by the Commissioner of Education. Further, if Respondent fails to submit written documentation to the Commission confirming that he completed training within the period of his suspension, the Respondent shall be **removed from office on the thirty-first (31st) day**.

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

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

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

Robert W. Bender
Chairperson

Mailing Date: November 23, 2016

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 22, 2016.

Kathryn A. Whalen, Acting Executive Director

IN THE MATTER OF	:	**BEFORE THE**
RICHARD LAMAZARES	:	**SCHOOL ETHICS COMMISSION**
CHESILHURT BOARD OF EDUCATION,	:	**DECISION FOR FAILURE**
CAMDEN COUNTY	:	**TO COMPLETE TRAINING**
	:	**IN A TIMELY MANNER**
	:	**DOCKET NO. T02-16**

WHEREAS, Richard Lamazares is a Board member of the Chesilhurst Board of Education; and

WHEREAS, at its meeting on September 27, 2016, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Mr. Lamazares to show cause why he failed to complete his 2015 mandatory training as identified by the New Jersey School Boards Association (NJSBA) and as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, Mr. Lamazares failed to file a response to the OTSC; and

WHEREAS, at its meeting on October 24, 2016, the Commission found that Mr. Lamazares violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the 2015 training requirement he was obligated to complete; and

WHEREAS, at its meeting on October 24, 2016, the Commission recommended that the Commissioner of Education impose a sanction of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

WHEREAS, if at the conclusion of thirty (30) days, Respondent fails to submit written documentation to the Commission confirming that he completed training within the period of his suspension, the Respondent shall be removed from the Chesilhurst Board of Education on the thirty-first (31st) day; and

WHEREAS, at its meeting on November 22, 2016, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairman
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on November 22, 2016.

Kathryn A. Whalen

Kathryn A. Whalen, Acting Executive Director

10-17SEC

AGENCY DKT. NO. 328-11/16

IN THE MATTER OF RONALD MURPHY,	:	
BEVERLY BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
BURLINGTON COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission (Commission), forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. The Commission found that respondent violated the School Ethics Act for failure to complete training in accordance with *N.J.S.A.* 18A:12-33. Due to respondent's failure to satisfy the long-standing requirement – despite repeated notifications and ample opportunity to complete the training, either in-person or online – the Commission recommends a sanction of suspension for 30 days. If the respondent fails to complete the training by the end of the 30 day period, the Commission recommends that the respondent be removed from his position. Respondent did not file exceptions, nor has he submitted proof that he completed the required training. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon school officials by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. Accordingly, the respondent is suspended from his position as a school official and is hereby ordered to complete the required training within 30 days from the date of this decision. If the respondent does not complete the training within 30 days from the date of this decision, the respondent shall be removed from his position as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/11/17
Date of Mailing: 1/11/17

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

IN THE MATTER OF	:	**BEFORE THE**
RONALD MURPHY	:	**SCHOOL ETHICS COMMISSION**
BEVERLY BOARD OF EDUCATION,	:	**DECISION FOR FAILURE**
BURLINGTON COUNTY	:	**TO COMPLETE TRAINING**
	:	**IN A TIMELY MANNER**
	:	**DOCKET NO. T03-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on September 27, 2016, and mailed on September 28, 2016 via regular and certified mail, return receipt requested, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), to show cause as to why the Commission should not find Respondent in violation of the Act, N.J.S.A. 18A:12-21 et seq., for failure to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on September 28, 2016, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute. Respondent did not submit a response to the OTSC, or otherwise complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and charter school trustees. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require each board member and charter school trustee to complete training on an annual basis.

Respondent is a member of the Beverly Board of Education located in the City of Beverly, County of Burlington. As a result of his position as a board of education member, and in accordance with the statute and regulations cited above, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online and, in this way, a board member or charter school trustee may complete it at any time, from anywhere. For the 2015 training cycle, Respondent was required to complete the Governance 3 training program.

On January 19, 2016, NJSBA provided the Commission with the names of those school board members who failed to complete mandated training in 2015 – the list provided by NJSBA included Respondent. Prior to this time, communications about mandated training were sent to Respondent on November 18, 2015, December 14, 2015, and January 8, 2016. After January 19, 2016, NJSBA sent reminder communications to Respondent on June 30, 2016 and July 5, 2016. NJSBA also sent reminder communications to Respondent's Business Administrator on April 1,

2016, April 15, 2016, June 14, 2016 and July 12, 2016. Notwithstanding these communications, Respondent did not complete the training.

In addition to the communication efforts undertaken by the NJSBA, the Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in August, 2016, the Commission notified the County that the NJSBA identified Respondent as a school official who failed to complete training in 2015. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator and the Solicitor, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated September 13, 2016, via regular and certified mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on September 28, 2016.

To date, there is no dispute that Respondent did not complete his required training within the 2015 training cycle, and did not complete the training prior to the issuance of the Commission's OTSC. Further, there is no dispute that Respondent failed to respond to the Commission's OTSC as to why he did not complete the training in 2015.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees who fail to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on October 24, 2016, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of the long-standing training requirement, and has had ample opportunity to complete the mandated training.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. The Commission recommends that the Commissioner of Education impose a sanction of **suspension for thirty (30) days** for failure to complete the mandatory training, with such suspension to become effective immediately upon adoption by the Commissioner of Education. Further, if Respondent fails to submit written documentation to the Commission confirming that he completed training within the period of his suspension, the Respondent shall be **removed from office on the thirty-first (31st) day**.

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

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

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

Robert W. Bender
Chairperson

Mailing Date: November 23, 2016

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 22, 2016.

Kathryn A. Whalen, Acting Executive Director

IN THE MATTER OF	:	**BEFORE THE**
RONALD MURPHY	:	**SCHOOL ETHICS COMMISSION**
BEVERLY BOARD OF EDUCATION,	:	**DECISION FOR FAILURE**
BURLINGTON COUNTY	:	**TO COMPLETE TRAINING**
	:	**IN A TIMELY MANNER**
	:	**DOCKET NO. T03-16**

WHEREAS, Ronald Murphy is a Board member of the Beverly Board of Education; and

WHEREAS, at its meeting on September 27, 2016, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Mr. Murphy to show cause why he failed to complete his 2015 mandatory training as identified by the New Jersey School Boards Association (NJSBA) and as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, Mr. Murphy failed to file a response to the OTSC; and

WHEREAS, at its meeting on October 24, 2016, the Commission found that Mr. Murphy violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the 2015 training requirement he was obligated to complete; and

WHEREAS, at its meeting on October 24, 2016, the Commission recommended that the Commissioner of Education impose a sanction of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

WHEREAS, if at the conclusion of thirty (30) days, Respondent fails to submit written documentation to the Commission confirming that he completed training within the period of his suspension, the Respondent shall be removed from the Beverly Board of Education on the thirty-first (31st) day; and

WHEREAS, at its meeting on November 22, 2016, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairman
School Ethics Commission

I certify that the within Resolution was duly adopted
by the School Ethics Commission at its public meeting
on November 22, 2016.

Kathryn A. Whalen

Kathryn A. Whalen, Acting Executive Director

11-17

AGENCY DKT. NO. 329-11/16

IN THE MATTER OF KEVIN COLL,	:	
STOW CREEK BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CUMBERLAND COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission (Commission), forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. The Commission found that respondent violated the School Ethics Act for failure to complete training in accordance with *N.J.S.A.* 18A:12-33. Due to respondent's failure to satisfy the long-standing requirement – despite repeated notifications and ample opportunity to complete the training, either in-person or online – the Commission recommends a sanction of suspension for 30 days. If the respondent fails to complete the training by the end of the 30 day period, the Commission recommends that the respondent be removed from his position. Respondent did not file exceptions, nor has he submitted proof that he completed the required training. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon school officials by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. Accordingly, the respondent is suspended from his position as a school official and is hereby ordered to complete the required training within 30 days from the date of this decision. If the respondent does not complete the training within 30 days from the date of this decision, the respondent shall be removed from his position as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/11/17
Date of Mailing: 1/11/17

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

IN THE MATTER OF	:	**BEFORE THE**
KEVIN COLL	:	**SCHOOL ETHICS COMMISSION**
STOW CREEK BOARD OF EDUCATION,	:	**DECISION FOR FAILURE**
CUMBERLAND COUNTY	:	**TO COMPLETE TRAINING**
	:	**IN A TIMELY MANNER**
	:	**DOCKET NO. T04-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on September 27, 2016, and mailed on September 28, 2016 via regular and certified mail, return receipt requested, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), to show cause as to why the Commission should not find Respondent in violation of the Act, N.J.S.A. 18A:12-21 et seq., for failure to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on September 28, 2016, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute. Respondent did not submit a response to the OTSC, or otherwise complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and charter school trustees. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require each board member and charter school trustee to complete training on an annual basis.

Respondent is a member of the Stow Creek Board of Education located in the County of Cumberland. As a result of his position as a board of education member, and in accordance with the statute and regulations cited above, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online and, in this way, a board member or charter school trustee may complete it at any time, from anywhere. For the 2015 training cycle, Respondent was required to complete the Governance 1 training program.

On January 19, 2016, NJSBA provided the Commission with the names of those school board members who failed to complete mandated training in 2015 – the list provided by NJSBA included Respondent. Prior to this time, communications about mandated training were sent to Respondent on November 18, 2015, December 14, 2015, and January 8, 2016. After January 19, 2016, NJSBA sent reminder communications to Respondent on June 30, 2016 and July 5, 2016. NJSBA also sent reminder communications to Respondent's Business Administrator on April 1,

2016, April 15, 2016, June 14, 2016 and July 12, 2016. Notwithstanding these communications, Respondent did not complete the training.

In addition to the communication efforts undertaken by the NJSBA, the Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in August, 2016, the Commission notified the County that the NJSBA identified Respondent as a school official who failed to complete training in 2015. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator and the Solicitor, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated September 13, 2016, via regular and certified mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on September 28, 2016.

To date, there is no dispute that Respondent did not complete his required training within the 2015 training cycle, and did not complete the training prior to the issuance of the Commission's OTSC. Further, there is no dispute that Respondent failed to respond to the Commission's OTSC as to why he did not complete the training in 2015.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that board members and trustees who fail to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on October 24, 2016, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of the long-standing training requirement, and has had ample opportunity to complete the mandated training.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. The Commission recommends that the Commissioner of Education impose a sanction of **suspension for thirty (30) days** for failure to complete the mandatory training, with such suspension to become effective immediately upon adoption by the Commissioner of Education. Further, if Respondent fails to submit written documentation to the Commission confirming that he completed training within the period of his suspension, the Respondent shall be **removed from office on the thirty-first (31st) day**.

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

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

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

Robert W. Bender
Chairperson

Mailing Date: November 23, 2016

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 22, 2016.

Kathryn A. Whalen, Acting Executive Director

IN THE MATTER OF	:	**BEFORE THE**
KEVIN COLL	:	**SCHOOL ETHICS COMMISSION**
STOW CREEK BOARD OF EDUCATION,	:	**DECISION FOR FAILURE**
CUMBERLAND COUNTY	:	**TO COMPLETE TRAINING**
	:	**IN A TIMELY MANNER**
	:	**DOCKET NO. T04-16**

WHEREAS, Kevin Coll is a Board member of Stow Creek Board of Education; and

WHEREAS, at its meeting on September 27, 2016, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Mr. Coll to show cause why he failed to complete his 2015 mandatory training as identified by the New Jersey School Boards Association (NJSBA) and as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, Mr. Coll failed to file a response to the OTSC; and

WHEREAS, at its meeting on October 24, 2016, the Commission found that Mr. Coll violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the 2015 training requirement he was obligated to complete; and

WHEREAS, at its meeting on October 24, 2016, the Commission recommended that the Commissioner of Education impose a sanction of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

WHEREAS, if at the conclusion of thirty (30) days, Respondent fails to submit written documentation to the Commission confirming that he completed training within the period of his suspension, the Respondent shall be removed from the Stow Creek Board of Education on the thirty-first (31st) day; and

WHEREAS, at its meeting on November 22, 2016, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairman
School Ethics Commission

I certify that the within Resolution was duly adopted
by the School Ethics Commission at its public meeting
on November 22, 2016.

Kathryn A. Whalen

Kathryn A. Whalen, Acting Executive Director

1-3-17

S.M., on behalf of minor children, A.T.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Pro se petitioner filed an appeal of the determination of the respondent Board that her child, A.T., was not entitled to a free public education in Union Township schools between September 6, 2016 and November 16, 2016. The Board contended that a residency investigation showed that petitioner was not a domiciliary of Union Township during this time, and sought reimbursement of tuition for A.T.'s period of ineligible attendance.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a), public schools are required to provide a free education to individuals aged 5 to 20 years who are domiciled within the school district; the domicile of unemancipated children is the domicile of their parent or guardian; where a local board determines that a child is not properly domiciled in its district, *N.J.S.A.* 18A:38-1(b)(2) provides that the parent or guardian may contest the Board's residency decision, and bears the burden of proof by a preponderance of the evidence that the child is eligible for a free education; here, the petitioner was unable to produce compelling evidence that she was a domiciliary of Union during the time period in question. The ALJ concluded that petitioner was not domiciled in the Union School District for the forty-five day period between September 6, 2016 and November 16, 2015; accordingly, the Board is entitled to reimbursement for forty-five days of tuition at $78.28 per day, or a total of $3,522.60.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. Petitioner was directed to reimburse the Board in the amount of $3,522.60 for the period of A.T.'s ineligible attendance. The petition was dismissed.

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

Issued 1/12/17

OAL DKT. NO. EDU 13914-16
AGENCY DKT. NO. 207-7/16

S.M., on behalf of minor children, A.T.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain her burden of establishing that she was a domiciliary of Union between September 6, 2016 and November 16, 2016. The Commissioner further concurs with the ALJ's conclusion that A.T. was, therefore, not entitled to a free public education in the District's schools during this time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Board is entitled to tuition reimbursement in the amount of $3,522.60 ($78.28 per day for forty-five days) for the time period between September 6, 2016 and November 16, 2016, during which time A.T. was ineligible to attend, as detailed in the ALJ's Initial Decision.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $3,522.60 for tuition costs incurred during the time period that A.T. was ineligible to attend school in Union. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Kimberly Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/12/17
Date of Mailing: 1/12/17

[1] The Commissioner was not provided with a transcript of the November 15, 2016 hearing at the OAL.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 13914-16
AGENCY DKT. NO. 207-7/16

S.M.,

Petitioner,

v.

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

Respondent.

S.M., petitioner appearing pro se,

Stephen J. Christiano, Esq. for respondent (Cleary, Giacobbe, Alfieri & Jacobs, LLC)

Record Closed: November 15, 2016 Decided: November 29, 2016

BEFORE: **JOANN LASALA CANDIDO**, ALAJ

STATEMENT OF THE CASE

Respondent, Board of Education of the Township of Union, seeks reimbursement of tuition from petitioner, parent of A.T. (DOB 11/09/1997) for a period of forty-five days, commencing September 6, 2016 and ending November 15, 2016, asserting that

petitioner and her son were not domiciled within the Union School District. The tuition is $78.28 per day for a total reimbursement sought of $3,522.60.

PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL) on September 15, 2016, for hearing as a contested case.

On due notice to all parties, the hearing was scheduled and heard on November 15, 2016.

ISSUE

The issues in this matter are whether A.T. is eligible to attend respondent's public schools free of charge in accordance with N.J.S.A. 18A:38-1 and, if not, whether respondent's requests for tuition reimbursement A.T. for forty-five days should be granted.

FINDINGS OF FACT

Respondent's residency inspector, John Matos, credibly testified that on at least sixteen occasions during the 2015-2016 school year, he never observed petitioner leaving a residence in Union to bring her son to school even though he reported to Union High School on those dates. A residency hearing was conducted on January 12, 2016 with petitioner and her children present. It was determined by the assistant superintendent that there was a residency violation. Matos continued his investigation and did spot checks late in the evening and petitioner was always at her mother's address in Irvington. However, the respondent is not seeking tuition for the previous school year. Matos continued surveillance from October 26, 2016 to November 9, 2016 as well as spot checks late in the evening. He determined that petitioner continued to be observed at the Irvington address and not the Union address. It now appears however that A.T. is residing at the Union address.

Petitioner presented rent receipts for the address in Union from June 2016 through November 2016. She was not able to produce the signor of these receipts at the hearing. Petitioner was also unable to present a lease with her name on it or a driver's license with the Union address.

LEGAL ANALYSIS

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J 238, 250 (1955). The domicile of an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

In support of its claim for tuition, respondent produced residency inspector John Matos, who testified in its behalf. He stated that the results of the investigation supported the finding that A.T. and his mother, S.M. are domiciled out-of-district, but

continued to attend public schools in the district for a total of forty-five days this school year. The cost of tuition for A.T for forty-five days at $78.28 per day is a total of $3,522.60.

The Board asserts that it is entitled to be reimbursed for tuition for the period of A.T.'s ineligible enrollment in its high school. Where, as here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

> If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

N.J.S.A. 18A: 38-1(b) likewise requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioner was not a domiciliary in the Union School District for the forty-five days sought and that respondent is entitled to reimbursement for the costs of audited tuition in the amount of $3,522.60.

DECISION AND ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that petitioner and her son were not residents and domiciliary in Union, New Jersey, and were not domiciled within its school district during the period of September 6, 2016 through November 15, 2016 is hereby **AFFIRMED**. It is further **ORDERED** that respondent is entitled to reimbursement from petitioner for the cost of audited tuition in the amount of $3,522.60.

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

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

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

November 29, 2016
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

Date Mailed to Parties: NOV 30 2016

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Petitioner:

S.M.

For Respondent:

John Matos

LIST OF EXHIBITS

For Petitioner:

P-1 Rent receipts – September, October and November 2016

P-2 Rent receipts June, July and August 2016

For Respondent:

R-1 Driver Inquiry

R-2 Registration Information Inquiry

R-3 Residency Hearing minutes

R-4 Letter from assistant superintendent dated May 27, 2016

R-5 Residency investigation

R-6 Residency investigation

R-7 School Calendar 2016-2017

R-8 2016-2017 tuition rates

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

14-17

IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE

DOE DOCKET NO.267-9/16

between

GREATER EGG HARBOR BOARD OF EDUCATION,

Petitioner

-and-

PATRICK LYNCH,

Respondent

OPINION

AND

AWARD

BEFORE: SUSAN WOOD OSBORN, ARBITRATOR

DATE OF HEARING: December 1, 2016
DATE OF AWARD: January 10, 2017

APPEARANCES:

For the Petitioner:
Law Offices of Louis Greco
(Louis Greco, of counsel)

For the Respondent:
Ned Rogovoy, attorney

Witnesses:
John Keenan, District Superintendent of Schools
Patrick Lynch, District Science Teacher/Respondent

BACKGROUND OF THE CASE

On September 27, 2016, the Greater Egg Harbor Regional High School District ("Board" or "District") served High School Teacher Patrick Lynch ("Lynch" or "Respondent") with tenure charges. Lynch is charged with engaging in unbecoming conduct in the work place by having consumed intoxicating beverages and testing legal intoxication on a blood-alcohol screening test. On September 30, the Commissioner of Education certified the tenure charges and on October 11, the Respondent filed an Answer with the Department of Education admitting to the consumption of alcohol in the work place during school hours and admitting to legal intoxication pursuant to a blood-alcohol screening test. The Respondent also proffered affirmative and mitigating defenses concerning his rehabilitation.

Pursuant to N.J.A.C. 6A:11-6.3, I was appointed on October 24, 2016 as the arbitrator to hear and decide the tenure charges filed by the Board against Lynch. An arbitration hearing was conducted on December 1, 2016, at which time the parties each presented witnesses and documentary evidence. The parties summarized their respective cases orally on the record and waived post-hearing briefs. N.J.A.C. 6A:11-6.3 provides that the decision in this matter shall be issued within forty-five days of the beginning of the hearing, and that the decision shall be final and binding.

On June 21, 2016, the Respondent's attorney wrote to the Board asking that the proposed tenure charges against Lynch be placed on hold pending his completion of an in-patient addiction recovery program. The Board agreed and held the charges in abeyance. On September 20, 2016, after completing the program, Respondent asked to be returned to work under a Last Chance Agreement (email dated September 20, 2016 from N. Rogovoy).

The Board denied the request and, on September 27, 2016, formally issued the above referenced Tenure Charges, and related documentation, referring them to Commissioner of Education David Hespe, on that date. On October 11, 2016, the Respondent filed an Answer to the Charges, admitting he consumed alcohol during school hours in the workplace and that he had been tested and discovered to have a blood alcohol content of .111% on May 26, 2016, while on duty in the workplace. He left the proofs of signs and symptoms of intoxication to the Board to prove.

STATUTORY AND REGULATORY CONSIDERATIONS

> **N.J.S.A. 18A:6-10: Dismissal and reduction in compensation of persons under tenure in public school system.** No person shall be dismissed or reduced in compensation,
>
> (a) If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state or
>
> (b) If he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the

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

* * *

18A:6-16 Proceedings before commissioner; written response; determination

* * *

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

18A:6-17.1 Panel of arbitrators

* * *

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

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

* * *

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict

between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

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

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

STATEMENT OF CHARGES

On September 27, 2016, the Board brought the following charges against Patrick Lynch:

CHARGE 1:

1. That on or about May 26, 2016, Patrick Lynch, a tenured professional staff employee of the Greater Egg Harbor Regional High School District Board of Education, while on school premises in his assigned workplace and during school hours and in the presence of students, was in a state of intoxication due to consumption of alcohol, all of the same constituting conduct unbecoming in the workplace.

2. That on or about May 26, 2016, Patrick Lynch, a tenured professional staff employee of the Greater Egg Harbor Regional High School District Board of Education, did manifest in the workplace and during school hours and in the presence of students, obvious signs and symptoms of having consumed intoxicating beverages, all of the same constituting conduct unbecoming in the workplace.

3. That on or about May 26, 2016, Patrick Lynch, a tenured professional staff employee of the Greater Egg Harbor Regional High School District Board of Education did, during school hours and at a time when he was responsible to be on duty in the workplace submitted to a blood alcohol screening test which yielded a result .111% blood alcohol content, all of the same constituting legal intoxication and unbecoming conduct.

* * * *

FINDINGS OF FACT

In May 2016, Patrick Lynch was a science teacher at the Oakcrest High School of the Board. The Board hired Lynch in about 2002 and he was tenured. Before May 2011, he had no performance issues and no medical or addiction issues. Lynch admitted that he began drinking in 1998 (P-4).

In 2011, after an incident where another staff member reported him, the Board required that Lynch (or Lynch volunteered) obtain treatment for alcohol addiction (P-4). In June 2011, he entered a 45-day inpatient addiction recovery program, but suffered a relapse about one month after completing it. He was readmitted for an additional 60 days (P-7, P-8). It appears he relapsed again later in 2011, but recovered and remained sober from January 2012. Lynch was apparently on a leave of absence and did not work at all during the 2011-2012 school year (P-4). Before permitting him to return to work, the Board required that Lynch be evaluated by its psychiatrist. On May 18, 2012, Lynch was evaluated by Dr. Gary

Michael Glass (P-4). Lynch testified the content of Glass' report was entirely accurate.

Report of Dr. Glass (Board's Psychiatrist)

Glass found Lynch fit to return to work but expressed concern that Lynch was not fully committed to his sobriety. Glass recommended that Lynch participate in Alcoholics Anonymous ("A.A.") at least four times per week, immediately obtain a temporary sponsor and then a permanent sponsor within two months, receive counselling and obtain a complete physical/medical examination.

On June 12, 2012, then-superintendent Steven Ciccariello wrote to Lynch advising he could return to work in the 2012-2013 school year, adding: "In closing, I informed you that there would be no second chances in the future and the Board is prepared to file tenure charges against you should there be another incident." (P-4) Lynch returned to work and appears to have worked without incident from 2012 until October 2015.

Lynch initially testified that between the time he returned to work in September 2012 and the May, 2016 incident, there were no further incidents at work. However, on cross examination, he admitted on one particular day in 2015, after a night he was drinking, he was called to a meeting in the principal's office.

On October 12, 2015, an incident report (P-2, P-3) was created by Principal Joseph Carruth, describing a complaint by another staff member (Gatto) who

thought Lynch may have been drunk. Lynch was questioned, denied being drunk but admitted to having been drinking alcohol the night before. Carruth thought Lynch was not drunk and decided not to order his blood alcohol levels to be tested. The principal asked him if there was anything the district could do to help him with his problem. Lynch declined and said he did not need any help. Carruth returned him to class but reported the incident to Keenan (P-2, P-3). The incident report was placed in Lynch's personnel file.[1]

On cross-examination, Lynch was referred to the "contingencies" set out in Dr. Glass' report for him to return to work in 2012. Lynch's testimony reveals he has not complied with the conditions:

Q: Do you attend AA meetings?
A: I have, yes.
Q: Do you attend now?
A: Umm, occasionally, yes.

May 26, 2016 Incident

On May 26, 2016, Superintendent John Keenan was out of his office at an awards ceremony. He received a call from Oakcrest High School Assistant Principal Michael Wilbraham, reporting that two employees had stated that Lynch smelled

[1] At the hearing, Respondent's attorney objected to admission of any documents in Lynch's personnel file, but I admitted them into evidence, including P-2 and P-3, because I found they were potentially relevant to the Board's decision-making in this matter. I find the documents are hearsay exceptions within the meaning of N.J.R.E. 803c (6) records of regularly conducted activity and/or (8) public records, reports and findings. Additionally, Lynch corroborated the contents of J-2 and J-3.

of alcohol and may be intoxicated. Keenan directed Wilbraham to remove Lynch from his classroom and investigate whether Lynch was intoxicated. Keenan also told Wilbraham that if he reasonably suspected Lynch had been drinking alcohol, he should immediately send him for a blood test. At 11:15 a.m., Wilbraham met with Lynch, Association President Stephanie Tarr, Association Representative Erin Chiappini, Supervisor Michele Mesghall and School Nurse Cindy Young (See, Statement of Evidence in Support of Tenure Charges). Wilbraham told Keenan that Lynch denied having been drinking that day but admitted he had been drinking heavily the night before. Lynch testified that during dinner with his parents the evening before, he learned that his mother had cancer and this news had gotten him upset and triggered his drinking.

After Lynch consulted privately with his Union representatives and Union attorney, he agreed to submit to blood alcohol testing. He then went to AtlanticCare Occupational Medicine (P-1), where he underwent alcohol testing, resulting in a blood alcohol reading of 0.111%. The lab test occurred at approximately 1:15 p. m., several hours after the initial report (P-1, pg. 2). Lynch acknowledged in testimony the legal minimum for intoxication is .02% and that on May 26, 2016, his reading was above the minimum.

Keenan received the lab report later that day. Keenan realized that Lynch's blood alcohol level constituted legal intoxication and placed him on paid

administrative leave pending further Board action (P-1). He reviewed Lynch's personnel file and learned of Lynch's prior history of treatment and relapses. Based on Lynch's intoxication at work on May 26, and his history, Keenan decided to recommend the Board bring tenure charges against Lynch.

On June 8, 2016, Keenan filed a Statement of Tenure Charges and a Statement of Evidence supporting the charges against Lynch with the Board. On June 21, 2016, Lynch filed a request for an unpaid leave of absence to enter a 60 to 90-day inpatient addiction treatment program. Through his attorney, he asked for a delay in the processing of the tenure charges. On June 27, 2016, the Board granted Lynch's request to hold the charges in abeyance pending his completion of the treatment program.

From June 18, 2016 to September 9, 2016, Lynch was enrolled in a treatment program at the Recovery Institute of South Florida. On September 9, 2016, the Institute's physician Dr. Emilio Mantero-Atienza, wrote that Lynch had successfully completed the program and was fit to return to work with no restrictions effective September 12, 2016. (R-1)

On September 26, 2016, the Board considered the tenure charges, statement of evidence and the response filed by Lynch's attorney and determined and voted that the charges were sufficient to warrant dismissal. Since that date, Lynch has been suspended without pay. On September 27, 2016, the Board forwarded the

certificate of determination and all supporting documentation (9 documents) to the Commissioner of Education.

POSITIONS OF THE PARTIES

The Board

The Board argues that the incidence of Lynch's intoxication on May 26, 2016, is not Lynch's first offense, and a review of his record shows he has a serious, ongoing problem. The Board opposes a last chance agreement, arguing it would only work to enable Lynch's condition and would ultimately be to the detriment of the safety and education of the students. It points out that high school students learn by example, and Lynch sets a bad example for students.

The Association

The Union acknowledges that Lynch came to work intoxicated. It asks that in lieu of termination, I return him to duty on the condition that he sign a "last chance agreement," in which any further intoxication over the legal limit of .02 would result in an immediate forfeiture of Lynch's teaching position. Lynch testified that he understood and will agree to these conditions.

ANALYSIS

In this matter, the Board has the burden of proving by a preponderance of the credible evidence that tenure charges are warranted under N.J.S.A. 18A:6-10, "Dismissal and reduction in compensation of persons under tenure in public school

system," providing no person under tenure shall be dismissed ". . .except for inefficiency, incapacity, unbecoming conduct or other just cause." The Board must also demonstrate that dismissal is the appropriate penalty.

The Board argues that Lynch should not be returned to a professional position given his history of relapses wherein he has been intoxicated while supervising and teaching students. The Association argues Lynch has a long history of satisfactory performance, struggles with a recognized disability and has attempted to recover from addiction. It asserts he should be given another final chance to retain his position.

Lynch testified he had not possessed nor drunk alcohol during school hours or in the workplace, however, in his formal Answer, dated October 11, 2016, he admits he consumed alcohol during school hours in the workplace. Moreover, the blood alcohol test administered at 1:15 p.m. -- several hours after the school day began -- showed a high blood alcohol content level of .111%, considerably beyond the legal intoxication level of .02%. The Board did not conduct a search of Lynch's classroom at the time it met with him on May 26, 2016, but given the above facts, I infer Lynch could have been drinking alcohol on the job or just before the workday began. The evidence presented at the hearing including the lab report and the testimony of both Keenan and Lynch, proves Lynch was intoxicated during school hours, at the workplace and in the presence of students. This shows very bad

judgment and lack of self-control on Lynch's part. This behavior constitutes unbecoming conduct warranting dismissal. Therefore, based on the above, I find the Board proved paragraphs 1 and 3 of the Charge.

However, paragraph 2 alleges that on May 26, 2016, Lynch manifested "obvious signs and symptoms" of being intoxicated. In this record, only hearsay evidence supports this assertion. No one who actually saw and interacted with Lynch on that day testified at the hearing. Some direct evidence is required for me to find Lynch appeared or was acting intoxicated. Those individuals who the record indicates encountered Lynch - the coworkers, Wilbraham, his Association representatives, and the school nurse – did not testify. I decline to make this finding absent some direct, non-hearsay evidence. Based on this record, I find the Board has not proven this allegation.

A Board is entitled to expect its teachers to model appropriate and responsible conduct to students, especially teenagers, including, at the appropriate age, moderate consumption of alcoholic beverages, abstention from alcohol and avoidance of intoxication during worktime and at the workplace. Teachers are required to have an "unusually high degree of self-restraint and controlled behavior." (Tenure of Sammons, 1972 S.L.D. 302, 321). Further, a Board is entitled to require teachers to maintain order and safe conditions for students; intoxication likely renders a teacher incapable of fulfilling this role.

I infer from Lynch's records and testimony that he was likely intoxicated in the workplace in the presence of students in both 2011 and 2015. Superintendent Ciccariello's June 2012 letter and Principal Carruth's October 2015 incident report refer to "incidents". His records indicate he was off duty from May 2011 until September 2012, receiving treatment for alcohol addiction. He took appropriate steps in both 2011 and 2016 and from fall, 2012 until late 2015, he maintained his sobriety at the workplace.

Lynch was made aware of steps to take to avoid relapses five years ago. He has participated in inpatient recovery programs and been absent for lengthy periods. However, some of his attendance in such programs was not entirely voluntary. He did not initiate all of these recovery efforts, rather he undertook them at times when he risked losing his job. Dr. Glass noted his concerns about Lynch's commitment to sobriety; however, it appears that Lynch is not currently taking the steps Glass recommended or pursuing alternatives to achieve and maintain sobriety. As of the date of this hearing, Lynch has acknowledged he is only occasionally active in AA and there is no evidence he has a sponsor. Lynch did not assert that he has received counseling or is pursuing other steps to maintain his sobriety. He has complied only minimally with the recommended actions. Lynch's lack of adherence to the advice he received is an indication that were he returned to work, he would likely be unable to avoid future relapses. It appears likely the

Board will be forced to contend with similar conduct in the future. The Board should not be required to worry about Lynch's next occurrence of being intoxicated at work, with potentially more serious consequences to himself, the students and the entire education community. Under these circumstances, termination is the appropriate penalty. Were he returned to work, he would likely continue his pattern.

NJ Court Disability/Accommodation cases

Respondent argues Lynch suffers from a disability and should be accommodated with a last chance order, citing Matter of Jackson, 294 N.J.Super 233 (1996); Matter of Cahill, 245 N.J. Super. 397 (1991) and Clowes v. Terminix Intern., Inc. , 109 N.J. 575 (1988). Clowes established that alcoholism is a handicap under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 *et seq*. Discrimination against an alcoholic employee is prohibited unless the employer reasonably believes that the person cannot perform the work in question because of the handicap.[2] In Jackson, the Appellate Division upheld a termination of a firefighter in an LAD case where the firefighter had been suspended for drug abuse,

[2] In Clowes the discharge was upheld because the complainant had not made a prima facie case that unlawful discrimination was the reason for his termination. Clowes' alcoholism was not known to the employer before it decided to terminate his employment for performance based reasons.

was given the opportunity to attend a drug rehabilitation program and returned to work under a last chance agreement. His return was contingent on abstaining from any use of illegal drugs or chemical substances on or off-duty. When, three years later, the firefighter tested positive for using an illegal drug, he was discharged. In reviewing the appeal, the court noted the LAD did not require a municipality to provide a second chance for rehabilitation. It reiterated an "employer is not required to assume or hope that the employee will limit drug use to off duty hours or that the effects of the drug use will be dissipated by the time the work day begins," 294 N.J. Super. 236, citing Cahill at 245 N.J.Super at 401.

In this case, even assuming the veracity of Lynch's testimony that he had not been drinking on the job but only during off-duty hours the prior evening, clearly, the effects of his alcohol consumption had not dissipated even by six hours after the beginning of the school day. While he has no record of poor classroom performance issues, it nevertheless can be said that he cannot perform his teaching responsibilities to the best of his ability while under the influence of alcohol. When he chooses to drink heavily even during off hours, he places the trust that the public must have in the Board in serious jeopardy. It appears the Board gave him a last chance in 2011, subject to his compliance with certain conditions. The superintendent provided Lynch with a written warning putting him on notice that the Board would not tolerate any repeat incidents involving intoxication and was

advised that further incidents would lead to tenure charges. He has only minimally complied with the conditions putting him back to work in 2012 and his efforts at rehabilitation were pursued primarily while he was under threat of losing his position. Under these circumstances, I decline to order a last chance agreement.

The Board's decision to terminate Lynch is, therefore, upheld.

AWARD

The Board proved Charge 1, paragraph 1, as follows:

> On or about May 26, 2016, Patrick Lynch, a tenured professional staff employee of the Greater Egg Harbor Regional High School District Board of Education, Oakcrest High School, while on school premises, during school hours and in the presence of students, was in a state of intoxication due to his consumption of alcohol, all of the same constituting conduct unbecoming in the workplace.

The Board proved Charge 1, paragraph 3 as follows:

> On or about May 26, 2016, Patrick Lynch, a tenured professional staff employee of the Greater Egg Harbor Regional High School District Board of Education, Oakcrest High School, during school hours and at a time when he was responsible to be on duty in the workplace submitted to a blood alcohol screening test which yielded a result of .111% blood alcohol content, constituting legal intoxication and unbecoming conduct.

The Board failed to prove Charge 1, paragraph 2:

> That on or about May 26, 2016, Patrick Lynch, a tenured professional staff employee of the Greater Egg Harbor Regional High School District Board of Education, while in the workplace and during school hours and in the presence of students, manifested obvious signs and symptoms of having consumed intoxicating beverages, constituting unbecoming conduct.

That charge is dismissed.

Patrick Lynch's tenure as a teacher with the Greater Egg Harbor Regional School District Trenton School District is revoked and he is terminated immediately.

Susan W Osborn

Susan Wood Osborn
Arbitrator

DATED: January 10, 2017
Trenton, New Jersey

State of New Jersey)
County of Mercer)

On this 10th day of January, 2017 before me personally came and appeared Susan Wood Osborn to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

Pamela Jean Sutton-Browning

PAMELA JEAN SUTTON-BROWNING
ID # 2424173
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires August 20, 2017

15-17

RASHIDA CHAUDRY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a teacher's aide formerly employed by the respondent Board – alleged that sick days were improperly docked from her bank after she sustained a work-related injury, in contravention of the requirements of *N.J.S.A.* 18A:30-2.1. Petitioner sought reimbursement for those days in accordance with the Collective Bargaining Agreement between the Board and the Elizabeth Education Association. The Board contended that petitioner did not provide timely notice that she had sustained a work-related injury. Cross motions for summary decision were filed by the parties.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner fell while attempting to restrain an unruly student on March 8, 2013, sustaining a work-related injury; petitioner returned to work after the accident, but was subsequently determined to be permanently disabled by the Division of Pensions; medical evidence in the record attributes the permanent disability to the injuries she sustained on March 8, 2013; the Board had actual notice that petitioner claimed to have a compensable injury on May 10, 2013; the Board's argument that petitioner did not provide timely notice of her work-related injury is therefore without merit; and, under the totality of the circumstances presented in this matter, the Commissioner's jurisdiction extends to the claim that petitioner should be reimbursed for her controverted sick days. The ALJ concluded that the Board improperly docked the petitioner's sick bank in contravention of the requirements of *N.J.S.A.* 18A:30-2.1(a), and ordered the Board to reimburse petitioner $480 for twenty-four sick days at the rate of $20 per day.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter, for the reasons expressed therein.

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

Issued 1/13/17

OAL DKT. NO. EDU 15515-15
AGENCY DKT. NO. 214-8/15

RASHIDA CHAUDRY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) – for the reasons thoroughly set forth in the Initial Decision – that the Board improperly docked petitioner's sick bank, in violation of *N.J.S.A.* 18A:30-2.1(a). The Commissioner is also in accord with the ALJ that petitioner is entitled to reimbursement for twenty-four sick days at the rate of $20 per day.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the Board is ordered to reimburse petitioner in the amount of $480.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/13/17
Date of Mailing: 1/13/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 15515-15
AGENCY DKT. NO. 214-8/15

RASHIDA CHAUDRY,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

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

Heather Ford-Savage, Esq., for respondent

Record Closed: October 31, 2016 Decided: November 29, 2016

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, Rashida Chaudry, a teacher's aide formerly employed by the respondent, Elizabeth Board of Education (the Board), alleges that sick days were improperly docked from her bank after she sustained a work-related injury, in contravention of the requirements of N.J.S.A. 18A:30-2.1. She seeks reimbursement

for those days, in accordance with the Collective Bargaining Agreement (CBA) between the Board and the Elizabeth Education Association (the Association). The Board replies that Chaudry did not provide timely notice that she had sustained a work-related injury. Accordingly, the Board asks that the petition of appeal be dismissed.

PROCEDURAL HISTORY

Chaudry filed her petition of appeal on August 6, 2015. An answer was filed by the Board on September 22, 2015, and matter was transmitted to the Office of Administrative Law on September 29, 2015. Chaudry filed a motion to amend her petition on May 6, 2016, which was unopposed, and was granted via order dated June 21, 2016. The amendment added the claim for reimbursement for the controverted sick days, pursuant to the CBA between the Board and the Association.

A joint stipulation of facts was filed by the parties on September 14, 2016. Cross-motions for summary decision were filed on or about October 16, 2016. Chaudry filed a reply on or about October 31, 2016, at which time the record closed.

FINDINGS OF FACT

The parties have stipulated to the salient facts and I **FIND** as follows:

1. When the events relevant to this dispute arose, Chaudry had been employed by the Board as a teacher's assistant for about twelve years.

2. On Friday, March 8, 2013, she sustained an accident during the course of her employment. She fell while attempting to restrain an unruly student.

3. Chaudry reported the accident to her principal the next school day, Monday, March 11, 2013.[1]

[1] It should be noted that the stipulation filed by the parties read as follows: "Ms. Chaudry said she reported the accident to her principal . . . ." But the Board offered nothing to counter Chaudry's statement in this regard; and I thus **FIND** that Chaudry did so notify her principal.

4. As a result of the accident, Chaudry claimed to have suffered severe injuries to her back and leg, which caused her to miss twenty-four work days, beginning on April 10, 2013.

5. On April 12, 2013, the Board received a medical certificate from Chaudry's primary care physician, Dr. Pilar Tan, who stated that Chaudry was unable to return to work from April 10, 2013, through May 7, 2013, due to "low back pain, sciatica and degenerative arthritis."

6. On May 3, 2013, the Board received another medical certificate from Dr. Tan stating that Chaudry could not return to work until June 26, 2013, due to back pain.

7. Chaudry was marked "sick" for these absences, and her sick leave bank was docked twenty-four days.

8. Chaudry first reported her claim to the Board's worker's compensation carrier, Inservco Insurance Services, Inc., on June 25, 2013.

9. Inservco denied the worker's compensation claim via notice dated July 1, 2013.

10. Chaudry retired from her position with the Board effective July 1, 2013, and was granted Ordinary Disability benefits by the State of New Jersey, Division of Pensions and Benefits.

11. Chaudry filed a claim petition with the Department of Labor and Workforce Development, Division of Worker's Compensation, but her petition was dismissed with prejudice on May 19, 2015, because she was already collecting ordinary disability benefits.

12. The CBA between the Board and the Association covers the terms of Chaudry's employment, and provides for payment for all unused sick days upon retirement at the rate of $20 per day, where an employee has accumulated 16-50 days.

13. To date, the Board has not compensated Chaudry for her accumulated sick leave, to include the twenty-four sick days at issue.

14. On June 27, 2016, Chaudry was evaluated by orthopedic surgeon Arthur Becan who determined that she was permanently disabled as follows:

> The work-related injury of March 8, 2013, was the competent producing factor for the claimant's subjective and objective findings of today . . . the patient's absence from work, including 24 days of absence, is reasonable and necessary to treat the claimant's work-related injuries.

The petition avers that on May 10, 2013, Chaudry, through counsel, challenged the docking of her sick days. A copy of counsel's letter to that effect accompanies the petition of appeal, and confirms that it was forwarded that day via telecopier to counsel for the Board. Although this correspondence goes unmentioned in the stipulation of fact, the Board does not dispute that the letter was sent and received, and I thus **FIND** that the Board had actual notice that Chaudry claimed to have a compensable injury as early as May 10, 2013.

ANALYSIS AND CONCLUSIONS OF LAW

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

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party,

are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, supra, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. I **CONCLUDE** that this matter is ripe for summary decision, and that Chaudry is entitled to judgment as a matter of law.

Chaudry's claims spring from N.J.S.A. 18A:30-2.1(a), which provides as follows:

> Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in N.J.S.A. 18A:30-2 and N.J.S.A. 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.

The purpose of this statute "is to guarantee that a school employee, who is absent from work due to an injury arising out of and in the course of employment, will receive his or her full salary for periods of absence up to one calendar year without losing annual or

accumulated sick leave." Outland v. Monmouth-Ocean Educ. Services Comm'n, 295 N.J. Super. 390, 395 (App. Div. 1996), rev'd, 154 N.J. 531 (1998).

Here, it is uncontroverted that Chaudry sustained an injury at work on March 8, 2013. It is likewise uncontroverted that, after a brief effort to return to work, she was unable to perform her job responsibilities and was determined to be permanently disabled by the Division of Pensions. The only medical evidence on record attributes that permanent disability to the injuries she sustained on March 8, 2013, while at work for the Elizabeth schools. I thus **CONCLUDE** that the Board improperly docked Chaudry's sick bank in contravention of the requirements of N.J.S.A. 18A:30-2.1(a).

The Board urges that Chaudry did not timely provide notice that she had sustained a work-related injury, and that accordingly her claims should be rejected. This argument lacks merit. N.J.S.A. 34:15-17 requires notice of a compensable injury "within ninety days after the occurrence of the injury, [or] no compensation shall be allowed." N.J.S.A. 34:15-18 makes it clear that such notice should be in writing. But Chaudry correctly points out that N.J.S.A. 18A:30-2.1 contains no analogous notice provision, and it is this school law statute, and not the provisions of the Worker's Compensation Law, that forms the basis of her claims before the Commissioner of Education.

But even assuming for argument's sake that the notice requirements of N.J.S.A. 34:15-17 are applicable here, Chaudry's attorney communicated with the Board, through counsel, in writing well within ninety days of March 8, 2013.[2] And the Division of Worker's Compensation did not dismiss Chaudry's complaint because it was late. Rather, as is plain from the order of dismissal, the Compensation Court determined that the matter before it was moot because Chaudry was receiving compensation via her disability pension.

[2] See Peraino v. Forstmann Wollen Co., 57 N.J. Super. 1 (App. Div. 1959), where the court held that an employee could proceed on an untimely worker's compensation claim because the employer was aware of the injuries and the accident was witnessed by other employees. Thus, the notice contemplated by N.J.S.A. 34:15-17 need not be notice to the worker's compensation carrier. Chaudry advised her principal that she had been injured as early as March 11, 2013.

Chaudry asks that she be compensated for her lost sick days, in accordance with the provisions of the CBA between the Board and her employee representative. Typically, an analysis of the provisions of this agreement would exceed the Commissioner's jurisdiction, which is limited to controversies arising under the school laws. N.J.S.A. 18A:6-9. The Commissioner will not entertain claims that are purely contractual in nature. See Demikoff v. Harrington Park Board of Education, 97 N.J.A.R.2d (EDU) 16, where the claims of a non-tenured school business administrator, whose employment was terminated pursuant to a contractual sixty-day-notice provision, were dismissed for lack of jurisdiction. The Commissioner, quoting the Initial Decision, held that "'the gist of the petition does not sufficiently implicate education law or statutory entitlement under education law to warrant or permit exercise of the Commissioner's dispute resolution jurisdiction over what are fundamentally contractual matters more properly cognizable in [a] judicial forum.'" Demikoff, supra, 97 N.J.A.R.2d (EDU) at 18; see also Paladino v. Bd. of Educ. of Lacey, 1989 S.L.D. 3063, 3065; Fanego v. State-Operated Sch. Dist. of Jersey City, EDU 10968-97, Initial Decision (April 27, 1999), adopted, Comm'r (June 14, 1999), <http://njlaw.rutgers.edu/collections/oal/>; Larsen v. Piscataway Bd. of Educ., OAL Dkt. No. 1445-81 (State Board, October 6, 1982).

But where an incidental interpretation of a contract is necessary to resolve a school law issue the Commissioner may extend his jurisdiction. The Commissioner has "jurisdiction over contractual claims which are incidental to his obligation to resolve education claims that are the subject of litigation." B.P. v. Bd. of Educ. of Lenape Reg'l High Sch. District., EDU 2782-02, Comm'r Decision (October 7, 2002), adopted, State Bd. (December 3, 2003), http://njlaw.rutgers.edu/collections/oal/; see also Sukin v. Northfield Bd. of Educ., 171 N.J. Super. 184 (App. Div. 1979). Our courts have recognized that "[w]here one aspect of a single integrated dispute is pending before an administrative agency and another aspect of the same dispute is pending before a court, logic commends that the entire matter be dealt with, at least initially, by the entity with plenary authority over the subject matter field involved." Archway Programs v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 424-25 (App. Div. 2002). I thus **CONCLUDE** that, under the totality of the circumstances presented here, the

Commissioner's jurisdiction should extend to the claim that Chaudry receive reimbursement for her controverted sick days.

Accordingly, I **CONCLUDE** that Chaudry is entitled to reimbursement for twenty-four sick days at the rate of $20 per day.

ORDER

Based on the foregoing, the Board is **ORDERED** to reimburse Chaudry in the amount of $480.

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

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

November 29, 2016

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: November 29, 2016

Date Mailed to Parties: NOV 30 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Joint Exhibits:

J-1 Medical certificate

J-2 Medical certificate

J-3 Intake report

J-4 Denial letter

J-5 Workers Compensation Claim Dismissal

J-6 Excerpt from Collective Bargaining Agreement

J-7 Becan Report

J-8 C.V.

16-17

OAL DKT. NO. EDU 8879-16
AGENCY DKT. NO. 139-5/16

NICOLE HECKMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LUMBERTON BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/13/17

Date of Mailing: 1/13/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08879-16

AGENCY DKT. NO. 139-5/16

NICOLE HECKMAM,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LUMBERTON, BURLINGTON COUNTY,

Respondent.

Steven R. Cohen, Esq., for petitioner (Selikoff & Cohen, attorneys)

Andrew W. Li, Esq., for respondent (Parker McCay, P.A., attorney)

Record Closed: November 23, 2016 Decided: November 30, 2016

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

This matter was transmitted to the Office of Administrative Law on June 15, 2016, for determination as a contested case, pursuant to N.J.A.C. 1:1-8.2, N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13

The parties have agreed to a settlement and have prepared a Settlement Agreement and Release, indicating the terms thereof, as well as the Board's minutes and Board Resolution, which is attached and fully incorporated herein.

Attorneys for the parties have executed a Stipulation If Dismissal With Prejudice and Without Costs form, which is attached hereto.

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

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

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

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

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

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

November 30, 2016
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 12/1/16

Date Mailed to Parties: 12/1/16

/lam

File No. 15473-0001
Andrew W. Li, Esq.
PARKER McCAY P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054
(856) 596-8900
Attorneys for Respondent, Lumberton Township Board of Education

2016 NOV 23 A 11:11

NICOLE HECKMAN, an individual, Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF LUMBERTON, BURLINGTON COUNTY, Respondent/Counter-Claimant.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY AGENCY DOCKET NO. 139-5/16 OAL DOCKET NO. 08879-2016S **SETTLEMENT AGREEMENT AND RELEASE**

THIS SETTLEMENT AGREEMENT AND RELEASE (hereinafter referred to as the "Agreement") is made this 16th day of November, 2016, by and between the Lumberton Township Board of Education (hereinafter referred to as the "Board"), with administrative offices located at 33 Municipal Drive, Lumberton, New Jersey 08048, and Nicole Heckman (hereinafter referred to as "Ms. Heckman") (collectively referred to as the "Parties").

WHEREAS, Ms. Heckman, as a teaching staff member of the Lumberton Public Schools, filed a Verified Petition of Appeal captioned as Nicole Heckman v. Board of Education of the Township of Lumberton, Burlington County, AGENCY DOCKET NO. 139-5/16, OAL DOCKET NO. 08879-2016S, against the Lumberton Township Board of Education seeking payment of certain money which she alleged to be owed to her by the Board; and

WHEREAS, the Lumberton Township Board of Education, as the local educational agency responsible for the operations of the Lumberton Township School District (the

LAW OFFICE
Parker McCay P.A.

"District"), a K-8 public school district serving students who reside within Lumberton Township, New Jersey and the employer of Ms. Heckman, filed an Answer to the Verified Petition of Appeal which included a Counter-Claim against Ms. Heckman seeking payment of certain money which the Board alleged to be owed to it by Ms. Heckman; and

WHEREAS, neither of the Parties admits or concedes any liability or wrongdoing by the respective Parties for any purposes whatsoever; but

WHEREAS, the Parties wish to avoid the time, expense and uncertainty associated with the petition of appeal process, and therefore are desirous of amicably resolving their differences in their mutual best interests and those of the public; it is

NOW THEREFORE, in view of the aforementioned premises, and in consideration of the mutual promises and terms set forth below, hereby agreed by the Parties as follows:

1. This Agreement shall fully resolve all issues between the Parties that were raised in the Verified Petition of Appeal filed by Ms. Heckman as the Petitioner named in Nicole Heckman v. Board of Education of the Township of Lumberton, Burlington County, AGENCY DOCKET NO. 139-5/16, OAL DOCKET NO. 08879-2016S, and those that were raised in the Counter-Claim filed by the Board as part of its Answer to the Verified Petition of Appeal.

2. Ms. Heckman agrees to waive the right to file or initiate, and shall not file, initiate, or cause to be initiated, any suit, demand, administrative, judicial or other proceeding, claim, complaint, due process petition, grievance, or action of any kind, in any forum whatsoever, regarding or relating to the issues and/or claims asserted in Nicole Heckman v. Board of Education of the Township of

Lumberton, Burlington County, AGENCY DOCKET NO. 139-5/16, OAL DOCKET NO. 08879-2016S.

3. The Board agrees to waive the right to file or initiate, and shall not file, initiate, or cause to be initiated, any suit, demand, administrative, judicial or other proceeding, claim, complaint, due process petition, grievance, or action of any kind, in any forum whatsoever, regarding or relating to the issues and/or claims asserted in its Counter-Claim in Nicole Heckman v. Board of Education of the Township of Lumberton, Burlington County, AGENCY DOCKET NO. 139-5/16, OAL DOCKET NO. 08879-2016S.

4. It is the intent and agreement of the Parties to mutually dismiss the pending claims respectively asserted against one another in this matter, and to proceed no further with the matter. It is expressly understood, however, that either Party may bring an action to enforce the terms of this Agreement.

5. Upon final execution of this Agreement by the Parties, the Parties (or their counsel) shall execute a Stipulation of Dismissal with Prejudice, which shall dismiss the claims and counter-claims asserted in the Verified Petition of Appeal, and said Stipulation shall be furnished to the New Jersey Office of Administrative Law, thus dispensing with and forever dismissing the matter of Nicole Heckman v. Board of Education of the Township of Lumberton, Burlington County, AGENCY DOCKET NO. 139-5/16, OAL DOCKET NO. 08879-2016S. The Parties fully agree to take any additional action that may be necessary to ensure the dismissal/withdrawal with prejudice of the aforementioned litigation with the New Jersey Department of Education.

6. The Parties have reached this Agreement to avoid the expense, uncertainty and inconvenience of a hearing under the education laws. It is understood that the execution of this Agreement does not constitute an admission by either Ms. Heckman or the Lumberton Township Board of Education as to any liability or wrongdoing. This Agreement represents the compromise of disputed claims and shall never be treated as an admission of liability by either Party for any purposes whatsoever.

7. This Agreement shall remain confidential to the maximum extent permitted by law and neither Party shall volunteer to disclose its form or contents to any third parties except as may be required by and/or in accordance with operation of law or lawful subpoena or order of court. Neither Party shall engage in disparaging or negative comments or statements regarding the other Party or the conduct of the other Party.

8. It is expressly understood and agreed that neither Party shall be considered a prevailing party under any statute, common law, or otherwise, for any purposes whatsoever, as a result of this Agreement or the compromise of claims as set forth herein. Except as provided in the Paragraphs above, each Party shall be responsible for their own attorney's fees, expert fees, and costs incurred in connection with this matter.

9. The Parties acknowledge and agree that they have entered into this Agreement based upon the facts and circumstances of this particular employment situation. Nothing in this Agreement shall constitute or be admitted as evidence of a past practice on the part of the Board in any subsequent proceeding of any kind, nor

shall it be binding on the Board with respect to any other employee or independent contractor utilized by the Lumberton Township School District, or any other employment situation that may arise in the future, at any time or for any purposes whatsoever.

10. The Parties each represent that they have the authority to enter into this Agreement.

11. Ms. Heckman understands and agrees that this Agreement is subject to formal approval by the Lumberton Township Board of Education, following full execution and approval of this Agreement by Ms. Heckman. In the event the Board thereafter approves the Agreement, it shall be executed forthwith by the Board and shall become effective immediately. A copy of the formal approval resolution by the Board, a copy of the Agreement approved and executed by the Board, and a copy of the signed Stipulation of Dismissal signed by counsel for the Board will be provided to counsel for Ms. Heckman. In the event that this Agreement is not approved by the Board, no agreement shall have been formed between the Parties, who shall return to *status quo ante*, and this Agreement shall be deemed null, void, and of no force and effect.

12. Counsel for Ms. Heckman will provide the formal approval resolution by the Board, a copy of the Agreement approved and executed by the Parties, and a copy of the Stipulation of Dismissal signed on behalf of the Parties by their counsel to the Administrative Law Judge in charge of this matter. The Parties fully agree to take any additional action as may be directed by the Administrative Law Judge.

13. The Parties acknowledge and agree that they have read and understand the terms of this Agreement and that they had an opportunity to have the Agreement read by their respective counsel. The Parties further acknowledge and agree that they are satisfied with the advice of their respective counsel, that they understand and agree with the terms of this Agreement, and that they are entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

14. In the event that any provision or clause of this Agreement shall be held invalid or unenforceable by a court or tribunal of competent jurisdiction, the remaining provisions of this Agreement are deemed severable and shall remain in full force and effect to the fullest extent permitted by law, unless the Agreement, as so construed, would substantially frustrate the purposes of the Parties in entering into this Agreement, in which case the Parties agree that they shall reform those aspect(s) of this Agreement as are necessary to meet its intended purpose.

15. This Agreement shall be interpreted, enforced, and governed under the laws of the State of New Jersey. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any Party. The Parties agree and acknowledge that this Agreement is the product of mutual draftsmanship and any rule of law requiring that it be construed against the drafter shall not apply.

16. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof, and supersedes all prior written or oral and all contemporaneous oral agreements, understandings and negotiations. This

Agreement may only be amended in writing by way of a document signed by all Parties.

17. This Agreement may be executed in multiple counterparts, and it shall be fully valid, legally binding, and enforceable whether executed in a single document or in such counterparts.

18. The Parties agree that a facsimile and/or electronic signature appearing herein shall be shall be deemed as fully valid, legally binding, and enforceable to the same extent as an original signature.

19. Should any written notice and/or demand be sent or given in accordance and/or furtherance of this Agreement, same shall be made by regular and/or certified mail to the respective Parties, with copies thereof sent by regular and/or electronic mail or facsimile to their respective counsel.

IN WITNESS HEREOF, the Parties have set their hands this 16th day of November, 2016.

Petitioner	**Respondent**
Nicole Heckman	
Nicole Heckman	**Board President** **Lumberton Board of Education**
Dated: 11/10/16	Dated: 11/16/16

LUMBERTON TOWNSHIP SCHOOL DISTRICT
33 Municipal Drive
Lumberton, NJ 08048

Thomas J. Fanuka
Business Administrator/Board Secretary

(609) 267-1406, ext. 6615
Fax (609) 267-0002
tfanuka@lumberton.k12.nj.us

November 17, 2016

I hereby certify that the attached is a true copy of the minutes of the Lumberton Township Board of Education Meeting of November 16, 2016.

Thomas J. Fanuka
Business Administrator/Board Secretary

TJF/ddh

State of New Jersey
County of Burlington

On this 17th day of November, 2016 before the subscriber a Notary Public of the State of New Jersey in and for the County of Burlington duly commissioned and qualified, came Thomas J. Fanuka of the Lumberton Township Board of Education, to me personally known to be the officer described herein, and who executed the preceding instrument and he acknowledged the execution of the same, and being duly sworn, deposed and said Board Seal and his signature as officer were duly affixed and subscribed to the said instrument by the authority and direction of the said Township.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at Lumberton, New Jersey this 17th day of November, 2016.

Notary Public

DEBBRA D. HARPER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 27, 2017

(BOARD SEAL) (SEAL)

PERSONNEL

A motion was made by Mrs. Bupp and seconded by Mrs. Ellis.

BE IT RESOLVED BY THE LUMBERTON TOWNSHIP BOARD OF EDUCATION to approve the following Personnel item:

1. Approve a settlement agreement with employee #4835 as per the attached exhibit.

The motion passed by the following roll call vote:
Ayes – 9
Nos – 0
Abstentions – 0

Steven R. Cohen (011921977)
Stephen B. Walton (046142011)
SELIKOFF & COHEN, P.A.
700 East Gate Drive, Suite 502
Mt. Laurel, NJ 08054-3823
(856) 778-6055
Counsel for Petitioner

NICOLE HECKMAN, an individual, Petitioner, v. BOARD OF EDUCATION OF TOWNSHIP OF LUMBERTON, BURLINGTON COUNTY, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW AGENCY DOCKET NO. 139-05/16 OAL DOCKET NO. 08879-2016S *STIPULATION OF DISMISSAL WITH PREJUDICE AND WITHOUT COSTS*

The issues in controversy in the above-entitled action having been amicably resolved by and between the parties, it is hereby stipulated that Petitioner's Verified Petition of Appeal and Respondent's Counterclaim in the above-captioned matter are dismissed with prejudice and without costs as to all claims and all parties.

SELIKOFF & COHEN, P.A.
Counsel for Petitioner
Nicole Heckman

BY: _____
STEVEN R. COHEN
STEPHEN B. WALTON

Dated: 11/18/2016

PARKER MCCAY, P.A.
Counsel for Respondent
Lumberton Township School Board

BY: _____
ANDREW W. LI

Dated: 11-18-2016

17-17

R.S., ON BEHALF OF MINOR CHILD, G.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioning parent, R.S., appealed the decision of the respondent District that her daughter, G.M., was not the victim of acts of Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* Petitioner alleged that G.M. was bullied on the basis of her diagnosis of Autism Spectrum Disorder and Selective Mutism, and was the target of several specific incidents in April 2015 and June 2015 which caused G.M. emotional distress. The petitioner sought a proper full investigation of the matter. The District asserted that the alleged incidents did not constitute HIB under the Act, and further claimed that the matter has now been mooted by the graduation of all of the students involved, including G.M. The District filed a motion to dismiss.

The ALJ found, *inter alia*, that: petitioner R.S. reported several incidents of alleged HIB to the bullying specialist at her daughter's high school; petitioner sent numerous emails to the bullying specialist, a guidance counselor, and the school principal; petitioner's email correspondence was timely answered and informed R.S. of the process and provided her with timely updates; the emails also reveal the preventative measures the school took to prevent future incidents of bullying; the District's anti-bullying specialist informed petitioner by letter that the investigation had been completed pursuant to the Act, and determined that there was no evidence of HIB; petitioner timely filed her petition challenging these results; the respondent's motion sought the dismissal of the within case for mootness based on the graduation of all of the individuals implicated in the alleged HIB incidents; there is no compelling reason set forth in the case as to why petitioner needs to seek relief in this matter, given that the school disciplined the children involved and gave a seminar regarding bullying prevention during the pendency of the case; and none of the students have any reason to be involved with the school District going forward. Accordingly, the ALJ concluded that the case is now moot, and dismissed the petition.

Upon review, the Commissioner disagreed with the ALJ's conclusion that the controversy is now moot. In so determining, the Commissioner found, *inter alia*, that: petitioner sought and was entitled to a determination of whether or not the District's finding that G.M. was not the victim of HIB was arbitrary, capricious or unreasonable; whether petitioner's daughter has graduated from the District is not relevant to whether the alleged conduct constituted HIB; and the challenge to the District's finding that the alleged conduct did not rise to the level of HIB has not yet been addressed. Accordingly, the case was remanded to the OAL for proceedings to resolve the underlying claim on the merits.

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

Issued 1/13/17

OAL DKT. NO. EDU 14769-15
AGENCY DKT. NO. 205-8/15

R.S., ON BEHALF OF MINOR CHILD, G.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner and the Board's reply thereto.

This case involves a challenge by petitioner to the District's determination that her daughter was not the victim of acts of Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* Petitioner alleges that her daughter was bullied based upon her diagnosis of Autism Spectrum Disorder and Selective Mutism. Specifically, in April 2015, petitioner contends that a student grabbed her daughter by her shoulder and when she did not respond, the student grabbed the phone out of her hands. Petitioner also alleges that the same student stopped her from entering gym class, resulting in G.M. spending the class in the bathroom. Petitioner further alleges that in June 2015, the same student told four students in gym class – including G.M. – to get up from their seats, resulting in a fight between two of the students. G.M. consequently had a panic attack and was excused from school for a week. Finally, petitioner alleges that in June 2015, the same student and a friend blocked

G.M. from going in her locker.[1] As all of the students involved have since graduated, the Administrative Law Judge (ALJ) dismissed the petition as moot.

In her exceptions, petitioner argues that the ALJ erred by not considering all of the incidents of alleged harassment. Further, petitioner contends that this matter is not moot because her daughter experiences severe anxiety and emotional concerns as a result of the incidents, and she must be heard. Petitioner argues that this matter is justiciable because the procedure followed in the HIB investigation was unclear and the District failed to complete investigations without prompting from her. Finally, petitioner asserts that this matter was held in abeyance until the students graduated in order to avoid further issues between her daughter and the alleged bully. As such, it should not be considered moot; petitioner allowed the matter to be held in abeyance for the well-being of the students involved, with the expectation that it would move forward upon their graduation.

In reply, the District argues that petitioner's exceptions do not comply with *N.J.A.C.* 1:1-18.4 because they do not refer to specific paragraphs or findings in the Initial Decision. Further, some of petitioner's arguments were not part of her opposition to the District's Motion to Dismiss, and she should not be permitted to make additional arguments by way of exceptions.

The Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*, was enacted "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school

[1] Although the Administrative Law Judge found that only the first incident in April 2015 could be considered in this case, it is clear that petitioner alleged all four of these incidents in her August 2015 petition. To the extent that the HIB investigation may not have been completed at the time of the complaint, it appears that these investigations should be completed. Indeed, petitioner requested that her petition be amended in order to include the District's latest HIB determinations.

and off school premises." *N.J.S.A.* 18A:37-13.1(f). Pursuant to *N.J.S.A.* 18A:37-15(b)(5), all school districts are required to adopt a policy that outlines a procedure for reporting an act of harassment, intimidation, or bullying. At a minimum, after a potential violation of the school district's HIB policy is reported, "the investigation shall be initiated by the principal or the principal's designee within one school day of the report of the incident and shall be conducted by a school anti-bullying specialist." *N.J.S.A.* 18A:37-15(b)(6)(a). Thereafter, the results of the investigation shall be reported to the superintendent and then to the board of education. *N.J.S.A.* 18A:37-15(b)(6)(b) and (b)(6)(c). Parents or guardians are entitled to receive information about the investigation within five school days after the results of the investigation are reported to the board. *N.J.S.A.* 18A:37-15(b)(6)(d). The parent or guardian may then request a hearing before the board, which shall be held within ten days of the request. *Id.* After the board determines whether to affirm, reject or modify the superintendent's decision, "[t]he board's decision may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, no later than 90 days after issuance of the board's decision." *N.J.S.A.* 18A:37-15(b)(6)(e).

After consideration and review of the record in this matter, the Commissioner finds that the ALJ erroneously granted the District's motion to dismiss the petition of appeal as moot. Pursuant to the Act, petitioner had the right to appeal the District's HIB determination to the Commissioner. *N.J.S.A.* 18A:37-15(b)(6)(e). Petitioner sought – and was entitled by the Act – to a determination of whether the District's finding that her daughter was not the victim of acts of HIB was arbitrary, capricious, or unreasonable. Whether petitioner's daughter has graduated from the District is not relevant to the issue of whether the alleged conduct constituted HIB. *See J.M., on behalf of minor child, T.M. v. Board of Education of the Town of Tinton Falls,*

Monmouth County, Commissioner Decision No. 39-14, decided January 23, 2014 (finding that even though the coach alleged to have committed acts of HIB was no longer working in a coaching position, petitioner's requested relief of a finding that the coach had engaged in acts of HIB had not been rendered moot).

A matter becomes moot when an issue becomes hypothetical in nature, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. *Anderson v. Sills*, 143 *N.J. Super.* 432, 437 (Ch. Div. 1976). Here, the issue is not hypothetical; petitioner challenged the HIB investigation and sought to reverse the District's finding. The challenge to the District's finding that the alleged conduct did not rise to the level of harassment or bullying has not yet been addressed. As such, the remedy that petitioner sought is still available.

Accordingly, for the reasons expressed herein, the Commissioner hereby remands this matter to the OAL for further proceedings in order to resolve the underlying claim on the merits.

IT IS SO ORDERED.[2]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/13/17

Date of Mailing: 1/13/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION TO DISMISS
OAL DKT. NO. EDU 14769-15
AGENCY DKT. NO. 205-8/15

R.S. o/b/o G.M. ,
Petitioner,
v.
STATE-OPERATED SCHOOL DIST.
OF THE CITY OF PATERSON,
Respondent.

Farrah Irving, Esq. for Petitioner (Law Office of Farrah Irving, attorney)

Joanne Butler, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: October 28, 2016 Decided: December 2, 2016

BEFORE **DANIELLE PASQUALE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner G.M. filed an appeal which appears to challenge the City of Paterson Board of Education's ("Board") Harassment Intimidation & Bullying ("HIB")

determination. The Board based the denial on its determination that G.M. was not bullied under the auspices of HIB. On August 4, 2015, G.M.'s mother filed a petition with the Commissioner, and on September 22, 2015, the Bureau transmitted the matter to the Office of Administrative Law (OAL) as a contested case. The case was assigned to me on September 29, 2015. Petitioner's mother originally represented her daughter's interests pro se, then asked for additional time to consider offers as proposed by the school, then she sought counsel from the Volunteer Lawyers for Justice in January 13, 2016 when negotiations fell through. On February 12, 2016 mom R.S. hired Ms. Irving and I conducted additional prehearing conferences in an effort to resolve the matter as counseling and programming was taking place at the school. On October 28, 2016 Ms. Irving notified this Tribunal and established a schedule for additional submissions by the parties. To that end, I closed the record on October 28, 2016 when Ms. Irving notified this tribunal that her clients opted not to withdraw the matter as originally contemplated.

FACTUAL DISCUSSION

Respondent's motion seeks the dismissal of R.S.'s case due to mootness as the individuals involved have all graduated the school in question. In order to decide this motion, I am relying on the following **FINDINGS OF FACT:**

In April 2015, Petitioner notified Rosa Parks High School in Paterson N.J., regarding several bullying incidents concerning her daughter and the same individual. She claims that this student grabbed her daughter G.M. by the shoulder and when her daughter did not respond, she grabbed her phone out of her hands.

The second alleged incident involved the same student preventing G.M. from entering her gym class. As a result, G.M. spent the class in the bathroom. This incident is not at issue in the present case as at the time of the answer that investigation was underway and this court is not aware of a result.

G.M. suffers from selective mutism and her mother reported these alleged incidents to Ms. Van Hoven, the bullying specialist at Rosa Parks High School. G.M.'s

mother reports that Ms. Van Hoven stated that the individual that confronted her daughter did, in fact, get loud and admitted grabbing G.M.'s phone and touching her shoulder. She also admitted telling G.M. that she was not allowed to enter the gym class. But after her investigation, Ms. Van Hoven found that the child was "only playing."

In June of 2015, there was an alleged incident with the same student in gym class where she told four students including G.M. to get up from their seats. When one of the students refused to get up, it led to an argument which involved the principal to break up a fight with two of the students. This incident caused G.M. to be scared and anxious and her mother kept her out of school for a week due to her daughter's panic attacks.

In June of 2015, apparently the same student blocked G.M. from her locker. Again, these June incidents are not to be included in the case at bar, but are included for completeness and will not affect the outcome of this motion.

Bullying specialist Van Hoven along with Ms. Stephens of the guidance department, and Jalyn Lyde of Paterson School District timely answered R.S.'s numerous emails informing her of the process and giving her timely updates of said procedure. The email correspondence also reveals preventative measures the school took to prevent future incidents of bullying.

G.M. is diagnosed with Autistic Spectrum Disorder and Selective Mutism and as a result, as her Psychologist reveals, struggles with expressing feelings and experiences feelings of inadequacy or helplessness.

In June of 2015, Theodore Best, Jr., Anti-bullying coordinator for the Paterson Public School District informed G.M.'s mother that the investigation was completed pursuant to the laws of Harassment, Intimidation and Bullying ("HIB") and N.J.S.A. 18A:37-13. To that end, Mr. Best revealed that the determination was that there was no evidence of HIB but that "consequences were imposed for the student(s) who committed the act(s) along with remedial measures to eliminate this behavior in the

future. Additional resources have been provided to your child as a result of the incident." See Best Letter dated June 15, 2015, HIB report.

As a result of the aforementioned investigation, Donnie W. Evans, Superintendent of Schools and the Board of Education reviewed and accepted said findings in the HIB report.

On July 20, 2015 petitioner R.S. challenged the aforementioned HIB report in a timely fashion.

The Paterson School District had a working HIB policy and the appropriate personnel to conduct appropriate investigations to determine whether the alleged acts rose to the level of the HIB laws.

Neither G.M. nor the other students involved attend Rosa Parks High School as they graduated in June of 2016.

LEGAL DISCUSSION AND ANALYSIS

The Board argues that its motion to dismiss should be granted due to mootness due to the graduation of all students involved in the alleged incidents.

An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For reasons of judicial economy and restraint it is appropriate to refrain from decision-making when an issue presented is hypothetical, judgment cannot grant effective relief, or the parties do not have a concrete adversity of interest. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff'd, Comm'r (May 3, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>; S.J. v. Bd. of Educ. of Mountain Lakes, EDU 07081-03, Initial Decision (October 7, 2003), aff'd, Comm'r (Nov. 17, 2003), aff'd, St. Bd. (Feb. 3, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>.

When a decision being sought in a particular matter will have no practical effect on the existing controversy, it is considered moot. M.D. o/b/o E.D. v. Moorestown Bd. Of Educ., supra at 2. "Therefore, when there has been a change in circumstances that raises doubt concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot, regardless of the stage to which litigation has progressed." Id., citing Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976).

In the instant matter, none of the individuals involved attend the high school in question. In fact, as this is a high school graduation, this Tribunal takes judicial notice that none of the individuals should have reason to even be involved with the Paterson School District going forward. To that end, I am unable to find any compelling reason set forth in the record before me why R.S. needs to seek this relief as the school disciplined the children involved and gave a seminar regarding bullying prevention during the pendency of this matter. Therefore, I **CONCLUDE** that the petition is moot because G.M. has graduated from the District Schools as have the other students involved in giving rise to the investigations. The alleged offenders can no longer be counseled or disciplined and the students were disciplined and programs were proactively established in an effort for the district to be proactive and prevent even a future perceived problem. As such, the alleged incident(s) constituting harassment, intimidation or bullying is no longer a "present, live controversy." S.U. o/b/o M.U. v. Roxbury Bd. Of Educ, supra.

Petitioner's contention that her claims before the Commissioner require resolution to overcome "an attempt to prevent judicial review of the State Operated School District of Paterson's widespread, unlawful practice of ignoring the New Jersey mandated Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13 et seq" is unpersuasive. Dismissal of this action does not preclude petitioner from later bringing other claims before the appropriate court. Indeed, the administrative forum exists to afford concrete relief to litigants, not simply to create a record for use in a subsequent proceeding. For this matter to be justiciable here, petitioner must have suffered a distinct injury or harm that can be remedied by the Commissioner. See e.g. :New Jersey Turnpike Auth. v Parsons, 3 N.J. 235, 240 (1949). It is not the role of the Commissioner to function in the abstract or to enter rulings that are advisory. See: N.J. Civil Serv. Ass'n v. State of New

Jersey, 88 N.J. 605, 611 (1982); Crescent Park Tenants Assoc. v Realty Eq. Corp. of New York, 58 N.J. 98,107.

Nor does this case prove any widespread practice compelling a definitive resolution of the issues raised despite their mootness. Id. at 303. As a result, and because there is no effective relief that could be granted to G.M. in this forum, I **CONCLUDE** that the claims raised by the petition should be dismissed.

DECISION AND ORDER

Based on the foregoing, respondent's motion to dismiss petitioner's petition of appeal as moot is **GRANTED**, and petitioner's petition is hereby **DISMISSED**.

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

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

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

December 2, 2016
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency:

Date Mailed to Parties:

rr

APPENDIX:

LIST OF EXHIBITS:

For petitioner:

For respondent:

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION TO DISMISS
OAL DKT. NO. EDU 14769-15
AGENCY DKT. NO. 205-8/15

R.S. o/b/o G.M. ,
Petitioner,
v.
STATE-OPERATED SCHOOL DIST.
OF THE CITY OF PATERSON,
Respondent.

Farrah Irving, Esq. for Petitioner (Law Office of Farrah Irving, attorney)

Joanne Butler, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: October 28, 2016 Decided: December 2, 2016

BEFORE **DANIELLE PASQUALE**, ALJ:

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2003), aff'd, Comm'r (Nov. 17, 2003), aff'd, St. Bd. (Feb. 3, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>.

When a decision being sought in a particular matter will have no practical effect on the existing controversy, it is considered moot. M.D. o/b/o E.D. v. Moorestown Bd. Of Educ., supra at 2. "Therefore, when there has been a change in circumstances that raises doubt concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot, regardless of the stage to which litigation has progressed." Id., citing Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976).

In the instant matter, none of the individuals involved attend the high school in question. In fact, as this is a high school graduation, this Tribunal takes judicial notice that none of the individuals should have reason to even be involved with the Paterson School District going forward. To that end, I am unable to find any compelling reason set forth in the record before me why R.S. needs to seek this relief as the school disciplined the children involved and gave a seminar regarding bullying prevention during the pendency of this matter. Therefore, I **CONCLUDE** that the petition is moot because G.M. has graduated from the District Schools as have the other students involved in giving rise to the investigations. The alleged offenders can no longer be counseled or disciplined and the students were already disciplined and programs were proactively established in an effort for the district to be proactive and prevent even a future perceived problem. As such, the alleged incident(s) constituting harassment, intimidation or bullying is no longer a "present, live controversy." S.U. o/b/o M.U. v. Roxbury Bd. Of Educ, supra.

Petitioner's contention that her claims before the Commissioner require resolution to overcome "an attempt to prevent judicial review of the State Operated School District of Paterson's widespread, unlawful practice of ignoring the New Jersey mandated Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13 et seq" is unpersuasive. Dismissal of this action does not preclude petitioner from later bringing other claims before the appropriate court. Indeed, the administrative forum exists to afford concrete relief to litigants, not simply to create a record for use in a subsequent proceeding. For this matter to be justiciable here, petitioner must have suffered a distinct injury or harm that can be remedied by the Commissioner. See e.g. :New Jersey Turnpike Auth. v

Parsons, 3 N.J. 235, 240 (1949). It is not the role of the Commissioner to function in the abstract or to enter rulings that are advisory. See: N.J. Civil Serv. Ass'n v. State of New Jersey, 88 N.J. 605, 611 (1982); Crescent Park Tenants Assoc. v Realty Eq. Corp. of New York, 58 N.J. 98,107.

Nor does this case prove any widespread practice compelling a definitive resolution of the issues raised despite their mootness. Id. at 303. As a result, and because there is no effective relief that could be granted to G.M. in this forum, I **CONCLUDE** that the claims raised by the petition should be dismissed.

DECISION AND ORDER

Based on the foregoing, respondent's motion to dismiss petitioner's petition of appeal as moot is **GRANTED**, and petitioner's petition is hereby **DISMISSED**.

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

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

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

December 2, 2016
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency:

Date Mailed to Parties: DEC 5 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

rr

APPENDIX:

LIST OF EXHIBITS:

For petitioner:

P-1 Letter from Petitioner's Counsel notifying court they will proceed, dated 10/28/16.

P-2 Petitioner's opposition

P-3 Petitioner's petition and supporting documents.

For respondent:

R-1 Motion to Dismiss

R-2 Respondent's Answer

20-17

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

IN THE MATTER OF THE TENURE CHARGES)
)
- against -)
) OPINION
John Vingara,) AND
Respondent-Teacher) DECISION
- filed by -)
)
SOMERSET COUNTY VOCATIONAL AND TECHNICAL)
HIGH SCHOOL BOARD OF EDUCATION,)
)
District-Petitioner)
)
AGENCY DOCKET NO. 121-4/16)

Before: Prof. Robert T. Simmelkjaer, Esq.
Arbitrator

APPEARANCES

FOR THE SCHOOL DISTRICT

Lisa M. Fittipaldi, Esq., Di Francesco, Bateman, Kunzman, Davis, Lehrer & Flaum, P.C.

FOR THE RESPONDENT

Edward A. Cridge, Esq., Mellk O'Neill

ALSO PRESENT

John Vingara, Respondent
Chrys Harttraft, Superintendent
Diane Ziegler, Principal

BACKGROUND

At the April 25, 2016 meeting conducted by the Somerset County Vocational Technical School Board (hereinafter the "Board" or the "District"), the Board certified tenure charges against John Vingara (hereinafter "Vingara" or the "Respondent"), a Culinary Arts Teacher at the Vocational Technical School. On or about April 27, 2016, the Respondent was served with the Certified Tenure Charges. The Charges were: "(a) conduct unbecoming of a teacher; (2) neglect of duty; and (c) theft of goods and services."

In support of the Tenure Charge, the District provided Vingara with an audit conducted by a Forensic Accountant, the notes of Virginia Fanelli, Security Guard, Big Blue Barbeque catering menus, New York Giants Football schedule, and Camp Cromwell menus. The Respondent was given "the opportunity to submit a written statement of Position and a written Statement of Evidence under oath with respect to the charge for consideration by the Board at its April 11, 2016 meeting."

Vingara did not file any reply to the charges and did not appear at the meeting. By letter dated May 12, 2016, Vingara filed an Answer to the Tenure Charges, denying the allegations in the Preamble, Charges (a) through (q), and 5-9.

In an Affidavit submitted by Ms. Raelene Catterson ("Catterson"), the Business Administrator for the District, the factual basis for the Tenure Charges was set forth as follows:

> In or about August 10, 2015, I became concerned regarding items missing from the Twiight Program and requests for purchases of

goods made by John Vingara allegedly for the Culinary Arts Program. Specifically, I could not find backup for the purchases he was making and I began to investigate the history of purchasing back to June, 2015. As a result of physical examination and counting of items in the refrigerator/freezer in the Culinary Arts Department, it was determined that items were missing that had been ordered and did not correlate to menus or special events. An interview of security personnel and a review of security videotape revealed showed him leaving with items purchased by SCVTS from June 23, 2015 forward.

a. On June 23, 2015 and July 23, 2015, two orders for vacuum sealer bags were delivered to John Vingara at SCVTS. The vacuum sealer bags are missing.

b. On August 10, 2015, the following items were missing that were ordered for the Twilight Summer Program: cases of cereal, cases of water, a box of mayonnaise packets, half pints of milk, and half pints of orange juice.

c. Additionally, John Vingara was observed by security personnel making trips to the school freezer with a full cart and unloaded it back at his car. He was seen to do this on June 23, 2015 at 5:32 p.m., July 13, 2015 at 6:47 p.m. where he is seen carrying crates of milk to his car. On August 10, 2015, at 11:17 a.m., he made three trips to the school freezer coming out with a full cart and unloading it into his car. On August 10, 2015, the security guard observed him returning empty crates and saw frozen ground beef and a large bag of frosted flakes boxes approximately 100 pieces, and hamburger rolls. An employee from Linkages (who oversees the Twilight Program) expressed concern to the security guard on August 10, 2015, with respect to missing four large boxes of cereal (100 pieces within each bag) from the Twilight area and 10 cases of water, all of which were to be brought to the Linkages office for students to use the following school year.

d. On September 24, 2015 at 6:33 a.m., on the security camera he is seen entering the school, unlocking the freezer and taking out a milk crate with meatballs in it, placing it on a cart and removing it out of the school building. He then returned to the freezer and took out sautéed peppers and onions and exited the school with them. On September 24, 2015 at 6:58 a.m., he is again observed on camera loading packaged meatballs into a rectangular tray and he and a student came outside with the tray. He then went to the freezer and loaded two milk crates

with ice and wheeled them outside. On September 24, 2015 at 9:17 a.m., he is observed on the camera with a student rolling hot boxes out of the school on carts. At 6:32 a.m. that same day, he is seen coming out with a cart loaded with meatballs and putting them in his car. He then returned to the cart at 9:35 a.m., which is empty.

e. On September 26, 2015, he arrived at 7:52 a.m. and unloaded his car with a large white cooler, unlocked the outside freezer and placed the large cooler inside. He then returned milk crates to the side of the building and exited with a cart to unload hot boxes to return them to the school.

f. On October 6, 2015 at 8:18 a.m., he is observed on camera taking the chardonnay chicken prepared by the students the day before, repacking it in a ziplock bag, placing it in a red reusable bag and putting it back in the refrigerator. He then added another ziplock bag to the red bag in the refrigerator. At 2:13 p.m., he is seen exiting the refrigerator with the red bag; it is clear how heavy it is and when leaving the school.

g. On October 8, 2015 he is viewed on camera at 11:33 a.m. filling a ziplock bag with two trays of items and placing them in a black bag. He then placed it in a red hot box and at 2:10 p.m. carried the black bag outside to his car.

h. On October 9, 2015 he took a crate of ice out of the freezer and there is another item on top which is labeled beef.

i. On October 12, 2015, he is seen on the security camera taking 26 eggs, a roast, several potatoes and spices. He also is seen bringing dirty dishes back for the students to wash.

j. On October 14, 2015, the café freezer camera at 10:54 a.m. shows him carrying out two large bags of macaroni.

k. On October 20, 2015, at 8:15 a.m., the security guard observed a student packaging Bolognese sauce into several heat seal bags and observed defrosted pork shoulders outside of the refrigerator on a rack. On October 20, 2015, at approximately 2:22 p.m., Vingara is seen carrying the bags to his car. The security guard observed that pork butts were defrosting. On October 27, 2015, she observed students using one pork butt for sausage, but the rest were missing.

l. On October 21, 2015 at 10:40 a.m., he was observed slicing a roast beef into disposable rectangular large pans. When the guard inquired as to what he was doing, he said that this was for his daughter's baby shower. The guard asked where he got the meat he replied that he purchased it at Restaurant Depot and claimed he paid around $9.00.

m. On October 21, 2015, the security guard, Superintendent and Business Administrator took an inventory of the refrigerator and found that the sliced beef from earlier in the day was missing and he was seen carrying bags to his car on camera.

n. On October 22, 2015, during the 4th period, students were observed frying parmesan crusted chicken and then loading the finished pieces into a disposal tin, approximately seven to eight pounds of cutlets. On October 22, 2015, the camera shows Vingara taking the disposal tins outside to his car from the freezer.

o. On November 12, 2015, Vingara was interviewed by the Somerset County Prosecutor's Office detectives and admitted he used the students to prepare food for his private business because he was lazy.

p. He has been observed since September, 2015, on multiple days sitting at his desk for hours during instructional time without interaction with the students.

q. Since September, 2015, students expressed concern to the Principal that they were not learning during culinary arts shop after freshman year and felt they were being used as free labor.

5. I reviewed menus for the Teacher lunch line, the student lunch line and for the school operated TradeWins Restaurant to see if the ingredients he ordered or removed were used for any school purpose. They were not.

6. As a result of my inquiries about missing food items from the Twilight Program the Principal told me that Vingara had a business called Big Blue BBQ. We reviewed menus from September, 2015 forward and found that on several of the dates he was observed removing food from SCVTS that were corresponding Giant football games.

7. I also investigated his school computer hard drive and discovered menus for Camp Cromwell and an invoice for Magic Chef Catering.

It appears the missing items from the summer Twilight Program corresponded to the menus at Camp Cromwell.

8. I checked with the companies through whom the school orders meat, other foodstuffs and supplies. John Vingara did not pay them for the items we saw that he took from the freezer. I found invoices for those items that were paid for by SCVTS. He did not reimburse SCVTS for these items.

9. The Board hired a forensic accountant who reviewed invoices, menus, the security guard's notes and concluded that Vingara wrongfully took items paid for by SCVTS. (Jt. Ex. #1).

Procedural History

Hearings were conducted on September 2nd, September 6th and October 7, 2016. At the conclusion of the District's case, the Respondent rested his case without testifying himself or calling any witnesses on his behalf. The record consists of two (2) Joint Exhibits, six (6) District Exhibits, including a flash drive (B. Ex. #F), and thirteen (13) Respondent Exhibits. In addition, the parties submitted post-hearing briefs dated November 22, 2016 and reply briefs dated December 5, 2016 (Respondent) and December 8, 2016 (District).

Respondent's Employment History

The Respondent has been employed by the District for more than 30 years. Over the years, he has received numerous commendations from his supervisors and other Board administrators for his performance as a Culinary Arts teacher. Vingara's annual teaching evaluations have been superior. He was rated as "outstanding" or "above average" in every category on his 2009 Professional Performance Report. R-6. Likewise, he received a rating of "above average" on his 2011 and 2012 Professional Performance Reports. R-7, R-8. In 2013, Mr. Vingara received an "Effective" rating in 2014 (missing "Highly

Effective" by only 8/100s of a point) and improved to a "Highly Effective" rating in 2015. R-10, R-11. It is noteworthy that in both of the last two years, Mr. Vingara's "'Student Growth Objective' scores – the measure of his students' improvement under his tutelage – were perfect."

In February 2015, Superintendent Chrys Harttraft wrote to Mr. Vingara to congratulate him on being nominated for "Teacher of the Year." R-12. This was, in fact, the second time that Mr. Vingara had received such a nomination. R-13, p902.

STATEMENT OF FACTS

The Respondent is a Culinary Arts teacher, who teaches high school level students divided among Shops A, B and C. He shares this teaching responsibility with Mr. Mastrobatista. There are nine (9) periods per day, with both teachers having only two (2) non-instructional periods per day. Most teachers get paid for six (6) periods, and a few teachers, including Vingara and Mastrobatista, get paid for seven (7) periods. (T3 @ 121-122) (Testimony of Harttraft).

The Twilight Program, run by Linkages, is a summer program for students where they receive breakfast and lunch throughout the month of July, 4 days a week. On August 10, 2015, Catterson became suspicious when she received an invoice in June from the school's food supplier, Sysco, for vacuum bags that were not needed during the summer. Also, on that date, Linkages reported to Principal Ziegler that they were missing food. Ziegler told Catterson that the

Respondent had an outside catering business called Big Blue BBQ and a catering business at a camp called Camp Cromwell.

Given these developments, Catterson began an investigation to ascertain whether Vingara had ordered food through their food service program from Mascio's – the supplier for the student lunch line and not for the culinary arts program. She also looked into his computer to view his emails. The school then installed a camera in the culinary area that showed the walk-in refrigerator freezer, Vingara's office, and the door to the outside. (Tr. 1 @ 15-16).

Subsequently, Catterson and Harttraft contacted the Bridgewater police, who advised the administrators to look at the Respondent's computer and to install another camera. They also met with the Somerset County Prosecutor's Office on September 29, 2015 to determine whether they could assist in the investigation. The Prosecutor's office suggested that they start conducting inventories to compare the food preparation done for the TradeWins, and the lunch line with the menus for Vingara's Big Blue BBQ. (Tr. 1 @ 17-18).

TradeWins is the restaurant the culinary arts students work for in order to learn how to prepare food like an outside business. There were sandwiches served at some of these events and they were listed on menus, but no sandwich meat was ordered through Sysco. Everything ordered by the school district from Sysco is listed in Joint Exhibit No. 1.

Vingara did the ordering for the Culinary Arts program. Unless Catterson saw a Sysco invoice that Vingara signed off on, she would not pay the invoice. When the food was delivered, he was given the paperwork and had to sign off on

it to verify that everything on it was received. The Respondent's signature on the purchase order constituted verification that the food was delivered. (T3 @ 63-64).

The Respondent ran a catering business called Big Blue BBQ. The catering occurred before New York Giant football games. In 2015, there were games on September 20th, October 11th, October 25th, November 15th, December 6th and December 20, 2015. The menu states: "All menu items are professionally prepared by Chef Johnny V." (B. Ex. #A).

The Respondent's BBQ catering dates are juxtaposed against the school calendar for September, October and November 2015. (Jt. Ex. #1). The following events are noted: a Giants evening game on September 3rd; an event on September 11th at Trade Wins for a group of superintendents; a Somerset County Business Officials meeting catered at TradeWins on September 8th; sandwiches and salads for 12 to 15 people served at TradeWins; a retreat on October 1st and 2nd for 25 people (breakfast on 10/1 and lunch on 10/2); insurance breakfast for 20 people on October 6th; a tea on October 8th for guidance counselors; a school business administrators meeting/lunch on October 15th for 35 people; a student council lunch on October 16h for 20 people; continental breakfast on October 29th for 15 people; a harvest buffet lunch for 35 people on November 5th; JIF breakfast for 20 people on November 10th; a lunch for seniors and a dinner for New Jersey skills on November 11th; Fall sports banquet on November 12th.

On September 11th, Vingara attended a professional development day. On September 24th, he took half a personal day.

The last day Vingara worked was November 12th. (T3 @ 63). The last day he was paid was April 25, 2016, and he began to receive payment again in August 2016.

The Respondent also operated Magic Chef Caterers and prepared menus for Camp Cromwell in the summer. The Camp Cromwell summer camp operated out of the Martinsville Inn. On October 15, 2015, Vingara had food delivered to the VoTech for his business at Magic Chef Caterers by a company called Performer Foods. (Tr. 1 @ 56-57). The superintendent had the security guard inquire about the Performance truck. When asked about this delivery, Vingara claimed that he was doing a favor for a person named "Carlos." Later, Harttraft spoke to a woman named Gyla from Camp Cromwell, who was unaware that food was being delivered to the VoTech. "Vingara then packed up all of the items delivered by Performance Food, and Fanelli escorted him to the Martinsville Inn, which is where Gyla is located."

The District hired Eisner Amper, an accounting firm, specifically Theresa Simonds, Forensic Accountant, to provide an opinion as to the cost of the product that Vingara allegedly took. Simonds estimated the value of the missing items was $826.00 for the period of time they reviewed the documents; that is, the beginning of September to November 12, 2015. (T3 @ 140-141).

District Position

The District, which has the ultimate burden of proof in a Tenure Charge brought under the TEACHNJ Act, N.J.S.A. 18A:6-10, maintains that it has proven the Respondent, John Vingara, guilty of conduct unbecoming a teacher by a preponderance of the credible evidence. According to the District, "the evidence presented by way of surveillance, forensic accounting and the expert's report clearly demonstrates that 'it is more probable than not' that Vingara stole the District's food, stole time and used the students as free labor all to promote his private business."

In support of its position that Vingara "misappropriated food and supplies paid for by the District and used the District's resources for his personal catering businesses, utilized the students as free labor to prepare food for his businesses, and devoted substantial portions of his work day while being paid as a teacher to further his private business," the District relied on the testimony of the Business Administrator Catterson, Principal Ziegler, Security Guard Fanelli, and forensic account Simonds. Their testimony, in the aggregate, convinces the District that Vingara "engaged in theft of the District's Food, Supplies and Resources."

Testimony

In addition to her affidavit submitted in support of the tenure charges, Catterson testified that after her suspicions were aroused regarding Vingara's purported "wrongful conduct on August 10, 2015," she began to compare the menus of "the events that were taking place for different functions on campus in

the early autumn 2015 time frame" to the food that Vingara was ordering and found no match. For example, "[s]he said there were sandwiches served at some of these [Trade Wins] events and they were listed on menus, but no sandwich meat was ordered through Sysco. There were thousands of dollars worth of food being ordered and none of it matched anything that was listed on a menu which correspond to a school event." (Tr. 1 @ 22).

Catterson further testified that she did find a correlation between the menu items on the Respondent's Big Blue BBQ when Giants games were taking place and when Vingara took a sick/personal day and the list of food items that Vingara had ordered from Sysco that were later discovered to have been missing, and presumably utilized by Vingara. These were the orders placed by the District beginning September 2015 through the middle of November 2015. Referring to the "schedule of missing items from our inventories that went missing from the school district that we paid for" and were verified as delivered to the school, "Catterson testified that she, the superintendent and the security guard went into the freezer before and after the dates of the Giants home games to compare what was ordered through Sysco and the food that was listed on the [Big Blue Barbeque] menus to [determine] what food that was then missing." (Tr.1@34).

Since the school never served fire braised barbeque ribs, sausage and peppers, sweet and sour meatballs, or barbeque shredded beef, but she did find those foods were ordered and paid for through Sysco by the school, Catterson deduced that the Respondent had ordered these foods for his Big Blue

Barbeque catering for sale at Giants football games. For example, Catterson testified that prior to the Giants home game of October 25, 2015, "she saw sausage and peppers, meatballs and meatballs marinara in the freezer"; however, "by game day they were all gone." (Tr. 1 @ 42-44).

Catterson also examined menus on Vingara's hard drive and found an invoice for Magic Chef Caterers and menus for Camp Cromwell. For example, she found cereal purchased on Sysco invoices that was shown on part of the menus for Camp Cromwell and discovered that this product was missing from the Twilight Program.

With respect to an anticipated Respondent defense that he paid the District for food he utilized in his business, Catterson noted that "[t]here were no procedures in place for Vingara to utilize food ordered by the school and then pay for it." (Tr.1@50-51).

Principal Ziegler corroborated the testimony of Catterson that the school's investigation began on August 10, 2015 when the security guard alerted her that food items were missing from the Twilight program. She was informed by Security Guard Fanelli that although she observed the items on August 7th, Thursday, they were discovered missing on August 10th – the next school day. Ziegler was also concerned when Vingara took a professional development day on September 11th when school had begun only two days before.

Ziegler's final concern was raised by some students coming to her in October 2015 complaining that they were not happy in their culinary arts shop because "they were not learning any new material and felt they were being used

as free labor to do work for Vingara." Shortly thereafter, she asked Fanelli to frequent the culinary arts area to let her know what was going on.

The crux of the District's case is the testimony of Virginia Fanelli, Security Guard. Fanelli, a former detective in the criminal warrant division of the Union County Sheriff's Office, where she was on loan to the drug enforcement agency for 2-1/2 years as an undercover heroine courier, worked in the summer Twilight Program. She testified that she "was first on the campus in the morning, so every day she set up breakfast for the program for which they had 70-80 students."

On August 10, 2015, at approximately lunch time, Fanelli testified that she saw Vingara "back his car up to the culinary arts section exit doors and shut his trunk to prevent her from seeing what was in the trunk." (Tr. 1 @ 134-135). Nevertheless, "she observed in the trunk black hefty garbage bag, a 10 pound log of ground beef, a case of frosted flakes containing about 100 pieces, hamburger buns and water." (Tr. 1 @ 134-135). She noted that the Twilight store room closet, from where items had been reported missing, was in an area adjacent to the culinary arts department. As the person who set up the breakfast for the Twilight program, Fanelli was familiar with the items taken. Once she saw the missing items in Vingara's car, Fanelli reported her observations to Ziegler, who then authorized her to begin an investigation.

Fanelli testified that the handwritten notes she compiled have been marked as Board Exhibit #E. "The notes in Exhibit E are her observations of the video surveillance, but also contain her personal observations of things that

happened in the culinary arts area and her conversations with Vingara." (Tr. 1 @ 140-142).

Among the equipment the District discovered missing were "hot boxes" used to store hot meals when they are transported. "There are three sets of hot boxes which were stored in the main cafeteria store rooms, then a red set and a beige set in the culinary area." (Tr. 1 @ 144-145).

> Fanelli testified she started to pay attention to what the students were making around the time of the Giants' home games. She noticed they would cook similar items. For instance, chicken tenders, frying up peppers and onions, and baked sausage in the oven. Since the students did mass amounts of onions and peppers, she believed it was a regular routine for the students. Fanelli also stated depending on what the Giants' home schedule was, that would dictate what the students prepared that week. She also checked to see what was being served at the school operated TradeWins restaurant to see if any of the things she saw them cooking were being served at the restaurant. She concluded they were not being served at the school run restaurant. (T1, 148:6-25;____).

Referring to her notes, Fanelli testified that on October 5, 2015, she observed the A shop students preparing chicken with mushrooms (chicken chardonnay) and place it in a big rectangular container. "She had taken a picture of it when it was in the refrigerator/freezer. When she went back at 10 a.m. it was gone and it corresponded with a Giants menu for that weekend." Moreover, "the expert notes that poultry and produce had been ordered on September 22, 2015 and September 29, 2015, and paid for by the school was missing." (Tr. 1 @ 149-151).

As her investigation continued, Fanelli described a "regular dish" as a food preparation that coincided with the menu for the Giants games. "The food that

she saw being prepared such as sausage and peppers, chicken fingers, chicken chardonnay, were not served anywhere else in the school during that time frame." (Tr. 1 @ 145).

Referring to the video for October 11th, showing Vingara filling in a ziplock bag with chicken chardonnay, retrieving a red reusable shop bag, placing the red bag on a red hot box, carrying the hot box to the refrigerator, and exiting the building early at 2:15 p.m., Fanelli apparently deduced that Vingara had stolen the District's food products, had the students prepare meals for the Giants game, and improperly took the items out of the building.

Pursuant to her investigation, Fanelli would arrive daily around 6:00 a.m. Using her key to the freezer, she would take photographs of the items stored in the freezer in anticipation of Giants menus listing these items. The District argues that "Fanelli used the schedule to associate the items that were being made by the students as compared to the items that were in the refrigerator, which would eventually disappear."

Fanelli testified that she had a conversation with Vingara on October 21, 2015 as he was slicing a roast beef. He explained that the roast beef was for his daughter's baby shower at the Martinsville Volunteer Fire Department and he had bought it at Restaurant Depot. However, Fanelli had recently been in the freezer and saw Butcher Block beef loins (brand name sold by Sysco) alongside a very large container of parmesan encrusted chicken cutlets, prepared by a student named Anthony Thompson, a senior in the Culinary Arts program. Pursuant to the inventory the school had begun on a Sunday, they did not see

any roast beef in the freezer labeled Restaurant Depot. Later, Fanelli called Restaurant Depot to ascertain if they carried the Butcher Block brand name. They did not. (Tr. 1 @ 161-162).

On October 20, 2015, Fanelli saw students preparing a Bolognese sauce that was not served anywhere on campus. She also observed a Sysco product of pork shoulders being thawed out, which had the Butcher Block label. On October 22nd, she also observed the students cook parmesan encrusted chicken.

According to Fanelli's notes, an inventory was performed on October 25, 2015. The parmesan encrusted chicken made by the students a couple of days earlier as well as one of the roast beefs were missing. Having learned from Vingara that these items were served at the baby shower, Fanelli made a notation in her handwritten notes, "Nicole's baby shower." On October 21st, when she saw Vingara slicing the roast beef at the end of the day, she, Catterson and the Superintendent conducted an inventory of the refrigerator and found the roast beef he had sliced earlier in the day was missing. The video footage indicates that the two bags Vingara was carrying when he left school earlier appeared to be very heavy.

On November 1, 2015, Fanelli, referring to her notes, testified that she saw "four bags of buffalo wings and a bag of kielbasa on the right side of the refrigerator." An entry in her notes indicates that "she inventoried the refrigerator and saw two bags of chicken tenders defrosted, 30 to 40 pieces, and on Monday at 10:40 a.m. when she went into the refrigerator they were gone and were not being prepared by A Shop." (Tr. 1 @ 174).

On September 6, 2016, Fanelli testified referring the videotape, which corresponds to her notes. She reviewed videotape surveillance footage from the café freezer camera, the B&G outside door camera, and the dumpster camera, and the video footage was then transferred to a flash drive. She also testified that the scenes depicted on the video camera reflect the areas on the day that the pictures were taken. (T2, 4:17-25; 5:1-8). She reviewed videotape footage showing Vingara removing items from the walk-in freezer/refrigerator, placing them in opaque bags and walking out the door of the culinary arts department with them. "Fanelli explained the café freezer camera showed the hallway where the walk -in refrigerator/freezer are [located] as well as the dry goods closet and Vingara's office. (Tr.2@6-7). She also explained that on the other side of the door, which has a view into the culinary arts section is where the buildings and grounds camera is located, where Vingara is seen leaving the building. It also shows an outside freezer where Mascio's, who sells breakfast and lunch for the students, keeps their food in an outside freezer. Their freezer is not mingled with the Sysco orders loaded in the interior freezer/refrigerator." (Tr.2 @7-8).

On October 22nd at 2:16 p.m., 14 minutes before school was dismissed for teachers, Vingara is seen on video "walking out with the parmesan encrusted chicken in a large rectangular tin that he placed in a sheet cake box." According to Fanelli, Vingara would routinely leave school carrying two full bags, "the same ones that he would use to take food from the school on a regular basis."

Fanelli testified that Vingara had a black and white reusable Shop Rite shopping bag and a yellow and black shopping bag that he came to school with

in the morning empty and left with them full. She observed these bags in his office behind a chair, laying down flat, and leaving with them full at the end of the day. He is seen leaving on October 28th at 1:15 p.m., and October 29th at 2:08 in the afternoon before school ends at 2:30 p.m.

On November 3rd, the video shows Vingara receiving an order from Sysco. He took two bags of shredded cheese and placed them on the chair in his office. Fanelli verified that the cheese had been ordered by Vingara and not Mastrobattista and was delivered to the school by reference to the invoices. Vingara is next observed changing his shirt while school is in session in the middle of the hallway, and then walking out of the two doors of the culinary department with the bag in which he had put the shredded cheese . (Tr. 2 @ 27).

Notwithstanding the assurance Vingara gave to Ziegler that he would not be on campus during non-school hours and obey the rules, in addition to the above early departures, he is seen on August 4, 2015 in the evening coming and going from the culinary arts department. Also, on September 24, 2015, he is seen in the culinary arts freezer/refrigerator at 6:33 a.m. – more than one hour prior to teachers starting the day. On this occasion, he is seen coming out of the freezer with "heat sealed zip lock bags full of meatballs which were not served in school that day. He is also seen taking items out of the dry goods store room, placing them in a cart, taking aluminum tins, and carrying out a large tray of food." These activities on September 24th at 6:30 a.m. preceded a Giants home game that Thursday night. His activities regarding the milk crates and rolling hot boxes are described above.

The video of September 28th at 2:38 p.m. shows Vingara dressed in his Magic Chef Catering shirt during the school day. Fanelli recalled that a bag Vingara had been filing up with meatballs, cheese, etc. was gone. The video was played until the end and demonstrated that when Vingara left, wearing his Magic Chef Catering t-shirt, and carrying a bag of food that Vingara placed in the refrigerator from earlier in the day. He did not return. (Tr. 2 @ 53- 54).

On October 6th at 8:18 a.m., the Respondent is seen going into the refrigerator/freezer with a heat sealed plastic bag, filling the bag, and placing it in a reusable Shop Rite shopping bag. "Vingara is viewed clearly in his office with an empty red bag taking it out and putting it outside the red hot box after loading an item into the bag." (Tr. @55-56).

The District maintains that "the theft of tortellini was clearly established by viewing the October 8th video at 11:33 a.m., the café freezer camera. He is clearly depicted with his bare hands stuffing tortellini into ziplock bags. Fanelli testified the students cooked the tortellini. (T2, 61:19-25; 62:1-25; 63:1-22; 64:1-23). Vingara is seen loading the tortellini into a black bag. Based upon Fanelli's recollection, the bag is shown being carried out by Vingara at 2:11 p.m. in the afternoon, 20 minutes before school is supposed to be dismissed. (Tr2@ 68).

Fanelli began to testify about October 12 at 16 minutes after 2 p.m. in the afternoon. In that video, Vingara is seen with his reusable red shopping bag placed on a stainless steel cart. Vingara is seen exiting the school refrigerator with a piece of meat and placing it in the red shopping bag. He then is seen to take potatoes, load them in the red bag, in addition to salt and some other dried

items. He enters the refrigerator and comes out with three dozen eggs, and he is seen trying to fold the cardboard over and putting it into his red reusable bag. At 2:26 p.m. he leaves. (Tr2@ 68-70). October 12th was Columbus Day and since there were no students in school, there was no reason for Vingara to be utilizing food products at all on that date. However, the day before October 12th was a Giants home game and the menu reflected on J1 lists a tortellini dish with pesto sauce. (Tr.2 @69-70).

On 10:54 a.m. on October 14, the café freezer camera shows that Vingara was carrying out two large bags of macaroni according to the notes provided by the security guard.

Fanelli testified that on November 12th, the day she was called to escort Vingara off campus, "he was very agitated about getting his 'Turducken' out of the school oven that he needed for Sunday's Giants game menu on November 15, 2015. Fanelli confirmed that she never saw anyone else in the security footage leaving the culinary area with food. For example, on Sunday, November 1st, she, the Superintendent and Catterson observed several bags of chicken tenders defrosting. On November 2nd, when they went back to the refrigerator at 10:40 a.m., they were gone.

Fanelli clarified her testimony regarding missing pork butts. While she initially testified that she had seen the students preparing sausage that was served for breakfast at Trade Wins, she later testified that "there were other pork butts that were not used for the sausage that were found to be missing and it is clear they were defrosting." Moreover, on October 28th at 2:15 p.m., Vingara is

seen leaving the school carrying a black and white bag filled with items and when Fanelli went to check the refrigerator that day "the pork butts that had not been used for sausage were then missing."

With respect to the Respondent's potential claim that the food he used was food he purchased through a company called Performance Foods, the District avers that "no witness corroborated deliveries from Performance Foods, with the exception of one delivery in October 2015. In this connection, Fanelli testified about a conversation she overheard between Vingara and a friend wherein he was allegedly "constructing a story about why the food was delivered to the VoTech...The person on the other end of the phone was told he would be receiving a phone call and that he was to say that he was an alumnus, that this was a fund raiser, and that Vingara was doing him a favor." (Tr.2 @ 152-155). "Additionally, on October 14, 2015, both Fanelli and Harttraft testified regarding the delivery by Performance Foods of food items to the school."

Finally, on direct examination, Fanelli testified that "once Vingara asked her about the camera being installed in the culinary arts section he changed his behavior." "Rather than place bags in the open, he started putting them in the corner and not in front of the camera as he previously did. He started putting things down by a red hot box or in his office or covering milk crates with his uniform and carrying them out because he wasn't sure if the cameras were working or not." (Tr.2 @ 217-218).

On cross-examination, Fanelli testified that in compiling her notes, her "general practice," she would start taking notes during the day and continue

when she got home. "So if I went home for that night, then the very next morning before I start any of my duties other than locking doors, I would write down everything I observed from the camera views." She would "write down whatever she observed from the security cameras." (Tr. 1 @ 82-83).

Fanelli testified that there were three different shops for students: A Shop, B Shop and C Shop. She testified that A Shop had approximately 10-15 students, but she was unsure who the instructor was. A Shop has sophomores, B Shop juniors and seniors, and C Shop freshmen. B Shop students would be scheduled for a class of 2-3 periods, approximately 2 hours. She recalled that the Respondent taught the B Shop, and Mr. Mastrobatista taught C Shop from 12:10 to 2:15 p.m.

The students prepared food for Trade Wing as well as lunch for the teachers' line. Fanelli testified that she had no knowledge of what food A Group, B Group or C Group prepared on September 8th, 9th, 10th, 14th, 15th, 16th, 17th, 21st, 22nd, 23rd, 24th, 25th, 28th, 29th, or 30th. Similarly, she had no knowledge of the foods prepared by the three groups on October 1st, 2nd, 6th, 7th, 8th, 9th, 13th, 14th, 15th, 16th, 19th, 20th, 22nd, 23rd, 26th, 27th, 28th, 29th or 30th. For October 5th, Fanelli testified that A Shop prepared chicken chardonnay. She spent 5 to 10 minutes walking around the class and "they explained to me that they were making chicken chardonnay." (Tr. 1 @ 110). She also observed the ingredients being used. On October 21st, she observed students preparing a 10-12 pound beef loin. At 10:40 a.m., she testified that she was standing at the slicer when

Vingara and Mastrobatista sliced a beef loin and placed it in an aluminum tray. (Tr. 1 @ 126).

She had no knowledge of what foods any of the shops prepared on November 3rd, 4th, 5th, 6th, 9th, 10th or 11th. On November 12th, A Shop prepared Turduckens. She had no knowledge of the foods prepared by B Shop and C Shop on November 12th.

Fanelli testified that she had no knowledge of a policy or procedure that governs what is to be done with what food students have prepared if there is no function at Trade Wins and there is no faculty food line. (Tr. @ 134).

Fanelli further testified that on August 10, 2015, she saw Vingara outside with a black garbage bag filled with hamburger buns, cases of water, a big box of Frosted Flakes and approximately 10 lbs. of ground beef. As a Security Officer, she did not detain him, although she believed those items were school property. She neither asked him about the items nor saw him putting any of these items into his vehicle. (Tr. 1 @ 136-137). She had not received confirmation to begin an investigation at that time. Fanelli recalled that there were 10-12 cases of water in the storage area before Vingara put two in his trunk, but didn't know how many were left afterwards. She also didn't know how many packages of ground beef were in the refrigerator after August 8th when Vingara left. (Tr. 1 @ 141-142).

Viewing the video from October 20th at 2:22 p.m., Fanelli could not determine what was in the bag Vingara was taking out. At 1:38 p.m., there is no video footage of Vingara putting something in a box at the bottom of a cart. She

could not ascertain whether the Respondent arrived for school empty-handed on October 22nd. (Tr. 1 @ 152).

On October 28th at 2:15 p.m., Vingara is seen walking out with a bag in his hand. Fanelli was not present in the culinary arts room at this time and did not see him put items in the bag. On October 29th at 2:08 p.m., Vingara is seen sitting in his office and then appears to be walking toward the exit with a bag in his hand. Fanelli did not observe him putting things in the bag that he's observed carrying out on the video. (Tr. 1 @ 156-157). On November 3, 2015 at 2:06 p.m., Vingara is seen in the hallway area wearing a tee-shirt. Next, he is seen in the video heading toward the door wearing a black jacket.

With respect to the milk crates on September 24th at 2:33 p.m., she didn't count the bags of meatballs in the refrigerator. A blip in the motion detectors of the surveillance camera stopped as Vingara was in the act of moving out of the doorway. Fanelli testified that one of the milk crates on the cart that Vingara is seen pushing toward the door contains sausage and peppers. (Tr. 2 @ 171). Although she didn't inspect the rectangular tray or knew what the student groups were preparing, Fanelli testified that it contained sausage and peppers because "I knew what was their normal routine of cooking things. Sometimes once or twice a week we'd make peppers and onions." (Tr. 1 @ 174). Also on September 24, 2015, she was neither in the culinary arts area nor saw Vingara loading the hot/black boxes.

On October 6th at 8:18 a.m., Fanelli didn't know what food was in the plastic bag. Although she had seen earlier from the surveillance camera a red

bag in the refrigerator around 8:18 a.m., she did not actually see him remove the red bag. (Tr. 1 @ 182). On October 8th at 11:33 a.m., during class time, Fanelli testified that the Respondent is packing up two tins of tortellini. Alluding to her notes for October 12, 2015, Fanelli testified that she confirmed that the red bag was empty, but at 2:16 p.m., Vingara left with a pork butt in the red bag. Prior to October 15th, she had not taken a written inventory detailing the number of pork butts in the freezer. (Tr. 1 @ 190).

On October 13th at 2:13 p.m., Fanelli could not determine what Vingara did with the garbage bag he carried out. (Tr. 1 @ 192).

On redirect examination, Fanelli testified that when she went into the refrigerator on Sunday, November 1st, she saw several bags of chicken tenders and chicken cutlets already cut and defrosting. On Monday, November 2nd at 10:40 a.m., they were no longer there. She saw no evidence that the A Shop students were using these items. On October 27th, she saw the A Shop students preparing breakfast sausage, and was informed by Mastrobatista that pork butts were used to make sausage. On October 28th, she wrote that the remaining pork butts were gone. Between October 27th and 28th, she checked the security footage and wrote "John walks out of the school carrying a black and white bag filled with items. When I had gone in to check the refrigerator that day, the remaining pork butts that they hadn't used for sausage were gone."

Referring to the October 22, 2015 footage and her notes, she testified that the students were frying parmesan-crusted chicken. Next, she saw Vingara loading the finished pieces onto a disposable tray. During an inventory on

Sunday, October 25th, she discovered that the parmesan-crusted chicken was gone. (Tr. 1 @ 212). In the period between October 22nd and October 25th, she saw no one remove any objects that were in the shape of the tin that the chicken was placed in. (Tr.1@213).

The Giants menu for October 11th included tortellini with pesto sauce. On October 8th, she saw him filling bags with tortellini, but not putting it back in the refrigerator. On November 15th, the Giants menu included Turducken and on November 12th, Fanelli saw Vingara removing them from the campus – food that the students had cooked. (Tr.1 @ 219).

On recross examination, Fanelli testified that she didn't watch everything that happened on every camera on a daily basis.

With respect to her testimony that the chicken tenders that were in the refrigerator on November 1st had disappeared by November 2nd, Fanelli could not ascertain whether they had been used by B Shop. On November 12th at 11:00 a.m., Fanelli did not actually observe Vingara cooking Turduckens, but saw him remove them from the school ovens.

Fanelli didn't know whether B Shop had prepared any chicken dish. She did not inventory the freezer on October 27th but her notes on October 28th stating "10/28. I entered the fridge and freezer to check on the remaining pork butts. All were gone." The Respondent challenged the authenticity of this entry. He claims that "the line of it is on the original document that Ms. Fanelli has been referring to the entire time was not on the page when it was photocopied." (Tr. 3 @ 21).

Finally, on re-direct, Fanelli testified that she never saw anyone other than Vingara walking out of the school with food items.

Superintendent Chrys Harttraft ("Harttraft") discussed her concerns about Vingara once she was informed that food items were missing from the Twilight Program. She clarified that Mascio's, the foodservice company that cooks the students' lunches, did not utilize the walk-in refrigerator/freezer in the culinary arts program because they had a separate freezer located outside.

Harttraft testified that in accordance with the instructions she had received from the Bridgewater Police, she and Catterson inventoried items in the refrigerator/freezer and dry goods room. Illustrative of her activities is the following:

> Harttraft took the opportunity to go into the dry storage and focused on a rack that fits 150 number 10 cans. During the four inventories she went into the dry goods room and charted all of the number 10 can products which were things like caramel, tomato based items, or any kind of sauce. (T3, 46:19-25). The items are included in the report prepared by the forensic accountant which is part of Exhibit J1. She looked specifically to see things that would go missing that were peculiar either to the TradeWins menu, or also coincided with Big Blue BBQ menus and she identified that about a quarter of the page down on Exhibit 2, page 1 of 4, there were four one-gallon Frank sauce wing buffalo which is really a hot sauce, but no food served at the school in TradeWins or anywhere else involved Frank's Hot Sauce. She also kept an eye on what new items were ordered. So, if something was missing and then three more were ordered, she counted them in her inventory to come up with items that were missing and not used for in-house purposes. (T3, 48:17-24). She found 6-1/2 gallons of various barbeque sauce, 16 tomato based items were missing. (T3, 49:2-3). She reiterated it was 16 number 10 cans of tomato based products which are tomato sauce, whole tomatoes and puree. (T3, 50:3-25; 51:1-6). There was also barbeque sauce missing (T3, 51:19-21; 52:3-5). So, four one-gallon Sweet Baby Ray's BBQ sauce was ordered and paid for by the school and two were found to be missing. (T3, 52:22-25). Then, further down the page there is tomato puree, six

> cans were gone; tomato whole, six of those cans, two gallons of barbeque orange chipotle sauce, one of those cans was missing; five cans of hoisin sauce; three gallons of the Frank's Hot Sauce; and 16 cans of other tomato products were missing. (T3, 53:2-25; 54:1-3). The cost of the missing number 10 cans was approximately $150.00. (Tr. 3 @ 66).
>
> After she did the inventory for the number 10 cans, she checked the menus for items that were served at the school Barbeque sauce was not used for anything on the school menu and she did not look at the Big Blue BBQ menus that were part of J1 and found that it was used for buffalo chicken meatballs for the September 20th game and the shredded barbeque beef which was served on October 11, the braised barbeque ribs on October 11, and sweet and sour meatballs which used the orange chipotle sauce on October 11. The value of the orange chipotle barbeque sauce that was missing was $39.19. (Tr. 3 @ 54-56). She testified that hoisin barbeque riblets were served on the Giants menu and barbeque shredded beef on the Giants menu and barbeque shredded beef on the Giants menu on October 25 and fire braised barbeque ribs and barbeque pork were served on the November 15 game. She further identified that the Frank's hot sauce was probably used for the buffalo chicken meatballs, specifically for the buffalo sauce, and tomato based items were used for sausage and peppers for the September 20th game, the October 11th game, and the October 25th game where sausage and peppers, meatballs marinara and chicken cacciatore were on the menu and on November 15th came, buffalo chicken meatballs, sausage and peppers, jambalaya with scallions, chicken and sausage were served. (Tr. 3 @ 56-58).

A study of the amount of chicken ordered from the middle of September to the middle of October – specifically 230 lbs.—led to their conclusion that since approximately 35 pounds of chicken could be accounted for at the TradeWins events, yet every game day menu for Big Blue BBQ included chicken, school products were being stolen.

Harttraft also testified that the Respondent's sick leave on October 18th before an October 20th Giants home game, an unapproved professional development day on October 11th, and a one-half personal day on September

24th raised suspicion that "he was really working on his Big Blue BBQ because the professional days he took off in September coincided with the Giants home games." (Tr. 3 @ 60-61).

The Superintendent then reviewed the September-October 2015 calendar of events and juxtaposed these events against the Big Blue BBQ menus for Giants home games.

With respect to the $79.00 check that Vingara submitted to show that he paid for the beef for his daughter Nicole's baby shower, Harttraft testified that the school "usually does not receive checks from teachers for anything. When they searched the backup, they found that it was for chicken, some kind of sauce, and a dessert [and] not for beef." (Tr. 3 @ 64). She added that there was no procedure for anyone to purchase goods and then reimburse the school. (Tr. 3 @ 66).

Since Vingara left the school on November 12th and the teacher lunch line started on November 18th, "there was no possibility that any of the food that he had taken and the District could not find was used in a teacher lunch line."

Harttraft was further concerned that Vingara had used the students to prepare food for his business and the limited scope of the food they were learning to prepare. After watching the videos, the Superintendent maintained that the amount of time Vingara spent at his desk "could never be characterized as teaching, and certainly on his last day of work when he was cooking Turduckens to serve at the Giants home game, it was very clear that he was

more concerned about his business and his Turduckens than he was about what was going to happen to his students."

Dr. Harttraft reiterated the particulars of the Performance Foods delivery on October 15, 2015, described supra. This episode convinced her that Vingara was "clearly having food delivered to the school, utilizing school time and school resources to promote his other business operated out of the Martinsville Inn." (Tr. 3 @ 70-74).

According to Harttraft, Vingara was never given permission to take food to school, paid for, or take out garbage bags for culinary arts, since the school provides a custodial service. "The only food students prepare officially are for TradeWins and the teacher lunch line, which did not start until November."

Ms. Theresa Simonds ("Simonds"), forensic accountant from Eisner Amper, testified that she was tasked with providing "an opinion as to the cost of the product that Vingara allegedly took." (Jt. Ex. #1). Simonds reviewed the inventory of the freezer-refrigerator prepared by the school, its subsequent investigation, portions of Fanelli's notes, the calendar showing what meals were being served at the school, and a document showing what was ordered from Sysco. These documents distinguished the items alleged to have been taken by Vingara from items used at the school as part of the lunch or breakfast program.

Simonds testified that to a "reasonable degree of accounting certainly, her opinion as to the value of the missing items was $828.00 for the period of time between the beginning of September to November 12, 2015." Additional items

that she was told were missing were not quantified (i.e., number 10 cans, potatoes, etc.).

In addition, another level of value, rather than simply cost, such as hours of labor, could not be calculated. "There was also the cost of the time Vingara spent ordering the food. Also, if the meat was left in inventory, Vingara was not charged with the cost."

Respondent Position

The Respondent, on the other hand, has argued that the District has not proven the tenure charges of "unbecoming conduct, neglect of (duty) and theft of goods" against Vingara. The Respondent maintains that "the gravamen of these allegations that Mr. Vingara was ordering food and other items from the Board's Culinary Arts program vendors, Sysco Metro NY Services ('Sysco') and then converting them to his own business use" has not been proven by a preponderance of the evidence.

In asserting that "the Board has failed to prove the factual prerequisites which are foundationally necessary to its case," the Respondent first claims that "the Board has failed to prove what food items were actually utilized by the students in the Culinary Arts Program during the relevant time period. This being the case, it is impossible to determine whether the items allegedly converted by Mr. Vingara were, in fact, used by students in class."

Second, the Board has failed to prove that Mr. Vingara failed to follow any syllabus curriculum, or other instructional guidelines pertaining to the Culinary Arts Program. Consequently, the Board cannot demonstrate that the foods

ordered by Mr. Vingara and prepared by the students in connection with the Culinary Arts Program were not educationally appropriate.

Third, the Board has failed to prove that Mr. Vingara failed to follow any policy, procedure, practice, or guidelines concerning the disposition / disposal of food prepared by students in the Culinary Arts Program.

Based on the Board's lack of proof regarding the above elements of its case against the Respondent, the Respondent concludes that since "the Board has failed that Mr. Vingara engaged in conduct unbecoming, neglect of duty and/or theft of goods/services, the tenure charges must, consequently be dismissed."

With respect to the Board's failure to prove which items were used in the Culinary Arts Program, the Respondent notes that "none of the Board's witnesses had any knowledge of what was cooked on a daily basis in the Culinary Arts Program." The Arbitrator's summary of Board witness Catterson's testimony on this subject is cited as follows:

> All right. Then, Mr. Cridge, maybe you can note the fact that the witness is not his direct supervisor. She doesn't know the curriculum on any given day. Her testimony is limited to items she saw in the freezer on day one and on day two that they were missing. That's the extent of her testimony...(Tr. 1 @ 72).

Similarly, Superintendent Harttraft's testimony that she could "absolutely not" provide a day to day recitation of what the Culinary Arts students did in class each day during the relevant time period reinforces the Respondent's contention on this point.

The Respondent deems noteworthy the testimony of Superintendent Harttraft that until she heard the testimony of Fanelli that Vingara and the other Culinary Arts Teacher, Mr. Mastrobatista, taught different sections of the Culinary Arts Program, she had assumed that they "co-taught" all of the Culinary Arts sections (i.e., Group A, Group B and Group C). The Board did not call Mastrobatista as a witness to differentiate his menu and instruction from that of the Respondent.

The Respondent takes issue with the testimony of Ms. Fanelli, the District's key witness, who, in conducting her investigation, "had very little knowledge of what food items were prepared by the students in the Culinary Arts Program." Although she testified that there were three groups of Culinary Arts students, "A Shop" (sophomores and some juniors), "B Shop" (juniors and seniors), and "C Shop" (freshmen), in her responses to questions about every day on the school calendar from the beginning of school on or about September 8, 2015 until Vingara's suspension on or about November 12, 2015, she could not provide specificity regarding the food each shop prepared on a daily basis as follows:

> She testified that "A Shop" students made chicken chardonnay on October 5, 2015. T2:109-3-6. She testified that "B Shop" students prepared beef loin on October 21, 2015. T2:123:23-124:13. She testified that "B Shop" students prepared parmesan encrusted chicken on October 22, 2015. T2:126:13-127:6. Finally, she testified that "A shop" students prepared Turduckens on November 12, 2015. T2:131:9-19. Besides these four dishes, she did not know what foods, dishes, or ingredients students in "A Shop," "B Shop," or "C Shop" utilized or prepared on all of the other school days. Compounding the Board's unawareness of items which were used by students is the fact that it has no record of ordering items which it knows were utilized:

> The food that was ordered? No. We had sandwiches [at School events], and there was no sandwich meat ordered through Sysco. (Tr. 1 @ 22). (T1:22:1-3).

Given this testimony, the Respondent argues that "the Board's claim that certain food items/ingredients were 'missing' from the Culinary Arts Program cannot be substantiated: admittedly, the Board does not know whether or not these items were used by students." As a result, "the Board cannot demonstrate that Mr. Vingara converted these food items for his own purposes."

In addressing the Board's claim that the Respondent, in addition to taking food items, had the students cook these food items for his catering business, the Respondent contends that "the Board has failed to demonstrate that Mr. Vingara was not following the school curriculum or otherwise having his students undertake educationally appropriate work in class. "The Superintendent's admission on this point is considered significant" as follows:

> The Arbitrator: I would just reiterate for the record there is no curriculum in evidence indicating what the students and the various grade levels should be doing each year of their instructional experience, sophomores, juniors, seniors, safety, training, and the like. We don't have a comprehensive curriculum document that lays that out; is that correct? (Tr. 3 @ 125).

According to the Respondent, not only did the Board fail to produce a curriculum in connection with its case, "there is no evidence that Mr. Vingara was warned, corrected or reprimanded during the Fall of 2015 with respect to his instruction of Culinary Arts students. Mr. Vingara was not required to submit menus as a part of his instructional activity." (Tr. 1 @ 21).

Moreover, prior to his suspension in November 2015, "the Board did not even stop Mr. Vingara from ordering the allegedly inappropriate food. This being the case, the Board cannot demonstrate that any item ordered from Sysco by Mr. Vingara in connection with the Culinary Arts program was not legitimately related to his teaching duties." Considering his evaluation as a "Highly Effective" teacher in prior several years, the Respondent maintains that he had no reason to believe that there was any problem with his instructional delivery."

The Respondent takes issue with the District's position that the absence of a "teacher's line" during most of the fall semester "extinguished the students' need to learn to prepare hot foods. It is unimaginable, as claimed by the Superintendent, that students, including seniors, would spend an entire semester preparing sandwiches and breakfast food in satisfaction of a legitimate Culinary Arts curriculum."

The Respondent further contends that "[u]nder these circumstances, the Board cannot demonstrate that [he] engaged in conduct unbecoming a staff member vis-à-vis either the foods prepared in the Culinary Arts Program, or the manner in which those foods were disposed."

The Respondent maintains that "the Board failed to prove that [he] violated any Board Policy or Procedure." According to the Respondent, "the Board did not offer into evidence any policy, practice or procedure which [he] violated during the time period relevant to the tenure charges." The testimony of Catterson that "she was unaware of any policy prohibiting an employee from ordering food and then reimbursing the Board for same is deemed significant.

Notwithstanding Catterson's testimony that there was a policy prohibiting "conducting business out of the district," the Respondent notes that "no such policy was actually identified or admitted into evidence." Also, "[t]here was no policy pertaining to the use of expired food in the District; however, such food could not be served to staff." (Tr. 1 @ 97-98).

Whereas Principal Ziegler testified that she gave Vingara "a directive in September 2011 not to conduct business on school property and that she directed him not to be on school property when school was not in session," there is no evidence that Vingara was warned or reprimanded for insubordination when he disregarded this directive as Ziegler claimed. In the absence of corrective discipline regarding the directive, the Respondent considers this assertion unproven. Conversely, when Superintendent Harttraft told Vingara not to have Performance Foods deliver food to him, personally, he complied with this directive.

The Respondent acknowledges that he personally purchased food which was delivered to the school, but subsequently reimbursed the school. With the exception of Fanelli's identification of the Turduckens as one of the four meals the Culinary Arts students prepared without using food supplies ordered by the school, the other food items ordered are presumably addressed by his checks. Specifically, the beef loin dish that Vingara prepared for his daughter Nicole's baby shower was paid for with a $79.00 check made out to "Somerset County VoTech," with a memo on the check reading "Food for Nicole." Catterson testified that the check was received and deposited by the Board. (Tr. 1 @ 61).

Also admitted into evidence was a check from Vingara in the amount of $212.03 made out to Sysco. (R. Ex. #3). An invoice from Performance Foods, listing food ordered paid for by Vingara, and delivered to the school was admitted. The invoice listed the following items:

- PERF CAB BEEF AND BRISKET BNLS
- HORMEL PORK RIB ST SOUIS FIRE BRAISE
- ROMA PASTA TORTELLINI CHEESE
- ROMA SAUSAGE HOT ROPE FZ
- STFFDS*APTZ BUFFALO CHICKEN MEATBALL
- AUS BLU%PORK RIB TIPS ¾" SL FC
- STUFFDS*APTZ CHICKEN SPINACH MEATBALL

The total cost of this invoice was $1,437.96. "Even if, arguendo, Mr. Vingara paid for food delivered to the school for students to prepare in connection with a private business venture, there is no evidence that the preparation of these foods contravened school curriculum."

With respect to the allegation that the food missing from the refrigerator/freezer and storage area is attributable to theft on Vingara's part, the Respondent argues that "many people had access to the Culinary Arts Program Area. Students and staff had open access to the Culinary Arts Program facilities, including the kitchen/refrigerator area from which the food was allegedly 'missing.'" Since the Board did not review all of the footage from the security cameras in the area of the Culinary Arts Program, and "it was not clear from the camera footage offered into evidence by the Board what items Mr. Vingara brought in and out of the kitchen," the Respondent argues that "[u]nder all of these circumstances, even if the Board was to prove that a certain item was

missing and unaccounted for, the Board cannot establish that Mr. Vingara is responsible."

Finally, the Respondent argues that the Board failed to follow its own Discipline Policy Board Policy 3150 concerning Discipline. It provides:

> The Superintendent shall deal with disciplinary matters on a case-by-case basis. Discipline measures will include verbal and written warnings as appropriate and will provide, wherever possible, for progressive penalties for repeated violations...
>
> In the event disciplinary action is contemplated, notice will be given to the teaching staff member in ordinary and concise language of the specific acts and omissions upon which the disciplinary action is based; the text of the statute, policy, or rule that the member is alleged to have violated; a date when the member may be heard and the administrator who will hear the matter and the penalty that may be imposed. (R. Ex. #1).

"First, the Board did not notify Vingara that disciplinary action was contemplated. When the Board became concerned that Vingara was misappropriating food or engaged in conduct unbecoming in August 2015, it should have confronted him and taken appropriate action. "The Board concealed its investigation and, in fact, enabled Vingara to engage in the conduct* of which it now complains."

"Second, the Board did not use progressive discipline. "There is no evidence that Mr. Vingara had ever been disciplined in connection with his instructional delivery, or ordering, or utilization of school supplies."

The Respondent did not testify as was his right. He did not call any witnesses on his behalf.

Based on the foregoing, the Respondent maintains that he should be reinstated and the tenure charges against him dismissed.

DISCUSSION

Considering the evidence in its entirety, the Arbitrator is not persuaded that the District has met its burden of proof by a preponderance of the credible evidence. There is no dispute that the District bears the ultimate burden of proving the tenure charges of (a) conduct unbecoming a teacher, (b) neglect of duty, and (c) theft of goods and services by a preponderance of the competent, credible evidence. See, In re Polic, 99 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 43, 149 (1962).

As the Board correctly notes, in order to meet its burden of proof, it had to establish that the "evidence it presented by way of surveillance, forensic accounting and expert report clearly demonstrates that 'it is more probable than not' that Vingara stole the District's food, stole time and used the students free labor to promote his private business." Although the Respondent notes that he "may still be, the subject of a criminal investigation undertaken by the local police and/or Somerset County Prosecutor's office," the criminal standard of proof, namely beyond a reasonable doubt, is not applicable in the instant case. Also not applicable is the intermediate standard of proof of clear and convincing evidence occasionally used by arbitrators where the alleged cause for disciplinary action or discharge is misconduct recognized and punished by the criminal law such as "theft of goods and services."

As an initial matter, the Arbitrator finds that the District presented no direct evidence that Vingara had engaged in theft of goods and services. Direct evidence is evidence which proves a proposition directly, provided by an "eye

witness" to a specific event. Although the District's key witness, Ms. Fanelli, testified regarding her observations of the Respondent's behavior, made notes regarding these observations, reviewed video surveillance of the refrigerator/freezer and the area outside the Culinary Arts building, and with the assistance of District administrators conducted comparative inventories of the food products ordered by the District from Sysco and used in the preparation of TradeWins meals, no direct evidence of theft was presented.

Instead, the District has offered circumstantial evidence of the Respondent's alleged misconduct and theft. "Circumstantial evidence is a combination of persuasive facts that when taken together, leave only the one reasonable factual conclusion sought by the advocate." See, McCormick on Evidence, 6th Ed., West Group (1999). Circumstantial evidence is the use of known facts to determine if they raise reasonable inferences or concepts concerning the occurrence under investigation. As the U.S. Supreme Court held in Leary v. U.S. 395 U.S. 6, 23 (1969), "a rational connection between facts proved directly and ones to be inferred from them require substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."

In other words, "the circumstances relied upon must be consistent with the theory of guilt and inconsistent with any reasonable theory of innocence." Therefore, the District has the burden of establishing a clear link between the Respondent's conduct and the property he is alleged to have stolen. In a termination entirely based on circumstantial evidence, the District has to prove

that the "web of circumstances was so persuasive that a conclusion of guilt was inescapable." See, Evidence in Arbitration, Hill and Sinicropl, BNA (1980). As the District has correctly observed, "[i]t is true that if two possibilities can be inferred from the evidence, neither can be said to have been proved by a preponderance of the evidence required to sustain a burden of necessary proof. Aluminum Co. of America v. Preferred Metal Prod., 37 F.R.D. 218 (D. N.J. 1965), aff'd, 354 F.2d 658 (3d Cir. 1966).

In the Arbitrator's opinion, the crux of the District's case relies on circumstantial evidence which, in the aggregate, does not inescapably lead to the conclusion or support the inference that Vingara stole food products the District had ordered and/or improperly converted them for use in his private catering business. The testimonial and documentary evidence adduced by the District also permits other inferences to be drawn supportive of innocence. These inferences may be drawn not only from the August 10, 2015 incident of food reported missing from the Twilight Program run by Linkages, but also with respect to several of the claims made by the District that food the Respondent had ordered from Sysco was used in his Big Blue Barbeque business rather than in the Culinary Arts Program where he taught.

Moreover, the District cannot, in lieu of meeting its burden of proof, shift the burden to the Respondent. Since the Respondent was not compelled to testify, the Arbitrator may not draw an adverse inference from his decision. Therefore, assertions by the District such as "Vingara has not presented any factual reasoning to even come close to defending his conduct" and Vingara

never introduced his lesson plans so there was no proof that his supervisor would be award that his students prepared the same food over and over again during the semester" are irrelevant absent the District's establishment of a *prima facie* case, including Board policies that Vingara violated.

The insufficiency of the evidence involving the food allegedly missing from the Twilight Program is illustrated by the District's omission of alternative explanations. Fanelli's testimony that on August 10, 2015, she observed in the Respondent's car trunk "a black hefty garbage bag, a 10 lb. log of ground beef, a case of Frosted Flakes containing about 100 pieces, hamburger buns and bottles of water" has been construed by the District as preponderant evidence that Vingara stole the missing Twilight items from that program's storage closet.

Although Fanelli testified that she saw the missing items from the storage closet in Vingara's car, she acknowledged that she did not confront him about the items in her capacity as security guard, did not observe him place any of the items in his vehicle, and could not ascertain the whereabouts of three additional boxes of Frosted Flakes also missing since August 6, 2015. (Tr. 2 @ 141-145).

Fanelli further testified that before she looked in Vingara's car she didn't see any hamburger rolls in the storage area. Moreover, there is no evidence that Vingara had exclusive access to the Twilight storage area and no inventory was taken before and after the incident of the refrigerator/freezer or other storage areas. Also, unless specifically tagged or earmarked, a fungible item such as Frosted Flakes could have been acquired at several places.

It is noteworthy, given the District's acknowledgement that since the Twilight Program had closed by August 10th, the leftover food (dried goods) were often disbursed to either the school nurse or the Linkages area for students to use during the course of the year. Therefore, it is not inconceivable that Vingara was taking food that would be used in his classes or had taken expired or disposable food. Moreover, there was no testimony from Linkages' employees or documentation to corroborate the hearsay testimony that the program was actually missing the breakfast food Vingara was accused of taking.

The impetus for the District's investigation began in August 2015, and pursuant to advice from the Bridgewater Police and Somerset County Prosecutor's Office, the District administration installed surveillance cameras in the refrigerator/freezer area and began taking inventories of the food items ordered from Sysco, from the beginning of September 2015 through the Respondent's suspension in mid-November.

The District's investigation was multi-faceted in that three dimensions were compared and contrasted to determine Vingara's alleged culpability in the theft of school property. Evidence obtained from the inventory of Sysco orders and deliveries, Fanelli's personal and video surveillance observations of Vingara's activities in the Culinary Arts area, including the freezer-refrigerator as well classroom instruction of the students, and the menus of the Big Blue Barbeque were compared to determine whether Vingara was ordering food items exclusively for his business or was ordering food items usable both for the

Culinary Arts Program and his business and misappropriating several items for his business purposes.

According to Fanelli, as she proceeded to associate the items that were being made by the Culinary Arts students, as compared to the items that remained in the refrigerator, she noticed that the items made by the students, which were also listed on the Giants menu, would begin to disappear. Implicit in Fanelli's analysis was that none of the food items which disappeared were used by the other student groups or Mr. Mastrobattista in his Culinary Arts classes.

Fanelli's testimony that the Shop A students prepared chicken chardonnay on October 5th, which was not served in the school in TradeWins or on the teacher lunch line (which did not begin until November), combined with documentary evidence that chicken chardonnay is listed on the Giants menu for October 11, 2015 is deemed evidence tantamount to finding the Respondent's theft of District food items and his use of student labor to prepare the food. According to Fanelli, the October 6th video shows Vingara filling a ziplock bag with chicken chardonnay for the October 11th Giants game menu. He is also shown retrieving a red reusable shop bag, putting it in a hot box, carrying it to the refrigerator, and leaving the building early at 2:15 p.m.

However, in the absence of a curriculum showing that the students did not or were not supposed to cook chicken chardonnay on October 5, 2015, the subsequent removal of these cooked products from the school, without a policy prohibiting such removal, cannot be construed as theft. Unless it could be shown that the ordering and preparation of chicken chardonnay deviated from

the prescribed curriculum and was made exclusively for Vingara's catering business, an inference cannot be drawn to support the allegation of theft. Moreover, given the difficulty of corroborating Fanelli's testimony with the video footage regarding what the contents were of the items that Vingara was putting in the hot box, and given the District's decision not to inspect the bag upon Vingara's departure due to its ongoing investigation, the Arbitrator finds this circumstantial evidence insufficient to sustain tenure charge.

Similarly problematic from an evidentiary standpoint is Fanelli's testimony that she observed the students cook parmesan encrusted chicken which Vingara then loaded in disposable tins. She noted that the chicken breasts were not served at any meal in school that day. Subsequently, the administration performed an inventory on October 25th and discovered that the parmesan encrusted chicken was missing. This item, along with a missing roast beef that Vingara had claimed was purchased for his daughter Nicole's shower from Restaurant Depot, was allegedly stolen. After Fanelli observed the Butcher Block brand label (sold by Sysco) on the beef loin and called Restaurant Depot to discover that they did not carry Butcher Block, Fanelli deduced that Vingara had misappropriated these food products.

Notwithstanding Fanelli's testimony that following the inventory of October 25th, both the encrusted parmesan chicken placed in a long tray and the Sysco roast beef were gone, she did not personally see or observe on video Vingara putting this item in a box. She also did not see him on the security footage remove these items from the building after he was observed loading them on to

a disposable tray. (Tr.2@ 150). Here again, there is no evidence that the preparation of these food items was inconsistent with the curriculum or constituted improper instruction for the student who cooked the food, Anthony Thompson.

Since Fanelli learned from Vingara that parmesan encrusted chicken and roast beef were served at his daughter Nicole's baby shower, the charge of theft is offset, in large part, by a $79.00 check Vingara wrote to "Somerset County VoTech," with a memo stating "Food for Nicole." Catterson confirmed that the check was received and deposited by the Board, without questioning the Respondent. The Respondent was not confronted or disciplined when the $79.00 check he gave the District purportedly for his daughter Nicole's shower did not match the backup invoice.

On October 28th at 2:15 p.m., Vingara is seen on the video walking out with a bag in his hand. However, since Fanelli was not present in the culinary arts area, she did not see him put items, food or otherwise, in his bag. A similar situation transpires on October 29th. Fanelli records in her notes that the bag Vingara is carrying to his car "appears to be very heavy"; however, she did not determine whether he arrived at the school with a bag or what the contents were.

On Sunday, November 1st, Fanelli testified that she observed "two bags of boneless chicken fingers defrosted – 30 to 40 pieces." On Monday, November 2nd, she could not find these items. She noted that none of these items were being prepared by A Shop.

However, there is no evidence that these missing chicken fingers weren't used by Vingara for A Shop instruction or by Mastrobattista in B Shop. Considering Fanelli's testimony that she didn't know what any of the shops prepared on November 2nd or November 3rd, it is not inconceivable that the purported missing chicken fingers were used by one or more of the Student Shops to prepare food dishes.

Since faculty and students, other than Respondent, had access to the refrigerator/freezer in the Culinary Arts Program area and Fanelli was not able to view all of the video footage during the November 1st to November 2nd timeframe, alternative explanations for this "missing" chicken fingers food item are possible.

On October 27, 2015, Fanelli wrote in her notes that she had observed "A Shop students making breakfast sausage. I asked Mark what cut of meat do you use for that? He said they used pork butts." In her testimony, Fanelli indicated that these were the pork butts that she had observed earlier in the refrigerator. (Tr. 2 @ 207). Although Fanelli acknowledges that some of the pork butts were used for breakfast at the TradeWins, she made an entry on October 28th that "I entered the fridge and freezer to check on the remaining pork butts. All were gone. John must have walked out with pork butts on Monday afternoon."

Fanelli testified that on October 28th, she reviewed "the café freezer camera at 2:15. John walks out of the school carrying a black and white bag filled with items. When I had gone to check the refrigerator that day, the remaining pork butts that they hadn't used for sausage were now gone." (Tr. 2 @

208). Since she hadn't seen anyone else on the video from October 28th, Fanelli concluded that Vingara had removed the remaining pork butts from the refrigerator.

On cross-examination, Fanelli acknowledged that she did not take an inventory of everything in the freezer on October 27th, but rather made "a physical observation."

With respect to her conversation with Mastrobattista, Fanelli was uncertain which student shop had made the sausage or what the various shops made on October 28th – but "believed" it was A Shop.

It is noteworthy that the District did not call Mastrobattista as a witness to clarify his utilization of pork butts on October 27th or testify generally about his interaction with Vingara, the instructional program, and the disposition of food the students had cooked.

Although Fanelli testified that she had written in her notes "I observed pork butts in the fridge at 10:32 a.m.," this entry does not appear in the copy of her notes admitted in the record as Joint Exhibit No. 1. An inspection of Fanelli's notes by Respondent's counsel revealed that the contested entry was written with another pen. At this point, Respondent's counsel challenged the authenticity of the 10:32 a.m. entry and asked the Arbitrator "to strike the testimony of this witness."

The Arbitrator acknowledges the problematic aspects of the 10:32 a.m. entry and will exclude it as evidence in support of this element of the tenure charge.

Given this dubious entry, evidence that Fanelli had not conducted a complete inventory of the refrigerator on October 27th, and her inability to exclude other student groups and their instructor as possible users of the pork butts, the Arbitrator is disinclined to sustain this October 27th to October 28th element of the tenure charge.

To sustain a charge of theft, one incident is sufficient. Neither the number of times the misappropriation occurs nor the quantity of the product stolen mitigate the act of theft, which is a terminable offense. However, in an administrative proceeding, the evidence of theft must be preponderant and unequivocal. The District, at minimum, would have needed to prove that the Respondent took possession of its food product for his business purposes, left the school premises with the product for non-school purposes, and such conduct was unauthorized. Moreover, it would also have to prove that he did not reimburse the District for the product removed.

Clearly, several scenes depicted in the video surveillance entail suspicious behavior by Vingara. For example, on November 3rd, it appears on the video that a Sysco order is delivered. Fanelli testified that the delivery was made and Vingara signed for it. Next, the Respondent is seen taking what appears to be two bags of shredded cheese, walking to his desk, and placing them on the chair. Later, after changing his shirt in the hallway, and shortly after a female student is seen exiting the girls' room, Vingara is seen walking out the two doors of the Culinary Department with the bag, in which, the District alleges he put the shredded cheese.

However, Vingara is not apprehended by Security. His bag is not inspected to confirm that it contains shredded cheese. Moreover, considering the Respondent's argument that the Board had no policy prohibiting him from ordering a food item and subsequently reimbursing the Board, the Arbitrator finds that the video and testimonial evidence in support of the November 3rd element of the tenure charge is not proven by a preponderance of the evidence. Since the Respondent submitted a check dated October 6, 2015 and made out to Sysco for $213.03, there is evidence that this practice was not prohibited by Board policy. Also, an invoice dated October 14, 2015 lists "pasta tortellini cheese." (R. Ex. #2).

On this point, Catterson testified that she was unaware of any policy that prohibited an employee from ordering food and then reimbursing the Board for same. (Tr. 1 @ 55-56). Although Catterson testified that a written policy existed prohibiting the "conducting business out of the District," this purported policy was not admitted into evidence.

The last of four foods that Fanelli identified was made by Culinary Arts students was Turducken on November 12th – the same day he was escorted off campus. She testified that to her knowledge the Turduckens that Fanelli was eager to get out of the oven on November 12th were not made with school supplies. (T3 @ 32-33).

Insofar as the incident wherein Superintendent Harttraft directed Vingara not to have Performance Foods deliver food to him personally at the school is concerned, there is no evidence that after the October 15, 2015 delivery episode

there was a recurrence. However, there is evidence that prior to October 15, 2014, Vingara personally purchased food which was delivered to the school for his Magic Chef Caterer business. An invoice dated October 14, 2015 itemizes several food items, and totals $1,437.96. (R. Ex. #2). It is noteworthy that many of these food items are similar to food served at Giant football games.

In the absence of a clear directive prohibiting this practice prior to October 15, 2015 or a written policy to this effect, the Respondent's practice cannot be subject to discipline or support the District's tenure charge. Despite Principal Ziegler's claim that she gave Vingara a directive in September 2011 not to conduct business on school property and directed him not to be on school property when school was not in session, she did not discipline him for being on campus after hours in the 2012-2013 school year such as his evening appearance on August 4th, 2015 and arrival at 6:33 a.m. on September 24th, 2015. There is no documentary evidence that Ziegler ever disciplined Vingara for insubordination pursuant to his violation of the undocumented directive. (Tr. 1 @ 123). Clearly, Ziegler reasonably deferred any discipline of the Respondent's violation of the directive observed on the video surveillance during the District's ongoing investigation.

With respect to the one page/undated inventory of the refrigerator/freezer and storage room conducted by the administration from mid-September to mid-November and relied upon by the District's expert, the District has urged the Arbitrator to draw an inference that the amount of unaccounted for food items, such as approximately 200 lbs. of chicken, 16 Number 10 cans of tomato based

products and 3 gallons of Frank's Hot Sauce can only be attributed to the Respondent's misappropriation of these items for his off-campus business.

Considering the paucity of evidence specifying which items were used in the Culinary Arts Program, including the curricula for A, B and C Shops, the authorization given Vingara to purchase food for the program as well as no prohibition against him personally purchasing food and later reimbursing the Board, and the fact that several people had access to the Culinary Arts facilities, including the kitchen/refrigerator-freezer/dry storage areas where the food items allegedly became missing, the Arbitrator cannot sustain the theft charge given alternative explanations for the unaccounted for items.

Conclusion

In the final analysis, the Arbitrator is not persuaded that the District has met its burden of proof by a preponderance of the credible evidence. While the District adduced a plethora of circumstantial evidence, predominantly provided through the testimony of Security Guard Fanelli and the video surveillance of the Respondent's activities in the Culinary Arts area, in the aggregate, this evidence does not constitute preponderant evidence of theft. Allegations of theft were either negated in full or offset, in part, by alternative explanations for the Respondent's actions.

Given the absence of the Culinary Arts curriculum, it could not be reasonably inferred that the foods he had the students prepare were inappropriate or in violation of Board policy.

When food items were deemed missing from the refrigerator/freezer, these missing items could not be solely attributed to the Respondent because others had access to the Culinary Arts storage areas. Without knowledge of the foods prepared by the other culinary arts teacher in Shops A, B and C, the Arbitrator cannot deduce that these food items were improperly ordered or used.

Assuming arguendo that Vingara had instructed the students prepare foods that he subsequently used in his catering business, rather than disposed of as waste, there is insufficient evidence that these food preparations and disposals deviated from the curriculum of the Culinary Arts Program, were otherwise educationally inappropriate, or violated Board policy.

The scenario implied by the Respondent in his post-hearing brief that "Vingara had students prepare hot food dishes which he later used in catering (as opposed to throwing out since there was no teachers' line)" has not been proven to be a violation of Board policy, administrative directive, or conduct unbecoming. Notwithstanding the problematic appearance of such conduct on Vingara's part, even if proven, it would not serve as the basis for a tenure charge in the absence of a specific prohibitive policy. Clearly, the Respondent was not warned that such conduct was prohibited and, if disciplined for a violation, a penalty of less than termination may have been appropriate.

When Vingara is seen on the video or by Fanelli leaving with bags she previously observed being filled with alleged food items, without inspecting the bags, it could not be ascertained whether Vingara had converted school

property for his own use or disposing of food that would have been otherwise discarded.

There is certainly a gray ethical area alluded to by the Respondent in his argument that in the absence of a policy prohibition, he may have used the food he purchased with the District's funds and prepared by the students in his classes, which subsequently would have been discarded as waste, for his profit-making catering business. However, the Respondent is charged with misconduct rather than being ethically challenged. Given Catterson's uncorroborated hearsay testimony based on a conversation with Mastrobattista that "the only food [the] students make is for the TradeWins or the teacher line," the disposal of the foods prepared before the teacher line began in November was not addressed by Board policy or administrative directive. Since Catterson testified that there is no policy or procedure that governs the use of expired or perishable food and such food could not be served to the staff, Vingara may have been removing perishable food prepared by his students or expired food from the freezer/refrigerator to use for his own business purposes.

Assuming Vingara was ordering food items which were not proven to be educationally inappropriate, preparing foods in his classes with his students that did not deviate from the school curriculum and disposing of perishable, expired or waste food in a manner that did not violate school policy, the Board cannot reasonably charge him with conduct unbecoming a teacher, neglect of duty, or theft of goods or services. Moreover, evidence that Vingara personally ordered food and subsequently reimbursed the Board negates the Board's claim that

some of that food was used for his catering business, since this practice was not shown to be a violation of Board policy. The Board's claim that it has a "Zero tolerance policy regarding the operation of a private business during school hours" was not proven.

Although the charge of theft is not amenable to progressive discipline, there is no evidence that the Respondent was warned or disciplined for any aspect of the District's concerns, such as his being on campus during non-school hours, ordering food for which he later reimbursed the District, deviating from the Culinary Arts curriculum, or "conducting business out of the district."

Remedy

As an employee with 30 years of experience in the District, having received many commendations, and superior teaching evaluations, any discipline appropriate for his proven misconduct, except theft of property, would be mitigated by his length of exemplary service. However, since the Board has failed to prove any of the tenure charges, the charges are dismissed.

As a remedy, the Respondent, John Vingara, shall be reinstated to his tenured teaching position as a Culinary Arts Teacher at the Somerset County Vocational and Technical High School Board of Education, effective immediately. He is granted back pay for the 120 day period of his suspension pursuant to N.J.S.A. 18A:6-14.

NOW THEREFORE, as the duly selected Arbitrator, having heard the evidence presented, I hereby issue the following:

AWARD

(1) The District did not meet its burden of proving its tenure charges that the Respondent, John Vingara, engaged in conduct unbecoming, neglect of duty, or theft of goods or services by a preponderance of the evidence.

(2) As a remedy, the Respondent shall be reinstated to his tenured teaching position of Culinary Arts Teacher at the Somerset County Vocational and Technical High School, effective immediately.

(3) The Respondent is granted back pay for the 120 day period of his suspension pursuant to N.J.S.A. 18A:6-14.

(4) The Arbitrator will retain jurisdiction sine die to address any issues that may arise in the interpretation or implementation of the remedy portion of this award.

January 17, 2017

Robert T. Simmelkjaer
Arbitrator

STATE OF NEW JERSEY}
COUNTY OF BERGEN}

On the 17th day of January 2017, before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument and he acknowledged to me that he executed his Award in Agency Docket Case No. 261-9/15 dismissing tenure charges as set forth above.

January 17, 2017

Notary Public

Jin An
Notary Public
New Jersey
My Commission Expires 5-4-2021
No. 50037586

22-17

AGENCY DOCKET NO. 4-10/15A
SEC DOCKET NO. C58-14

MATTHEW CHENG,	:	
COMPLAINANT,	:	
V.	:	COMMISSIONER OF EDUCATION
STEVEN RODAS, WEST NEW YORK BOARD OF EDUCATION, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

This matter involves an appeal of the School Ethics Commission's September 22, 2015 determination that respondent Steven Rodas, Board President, West New York Board of Education (the Board), violated *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members when he personally issued a *Rice*[1] notice to the Board Secretary/Business Administrator (B.A.) and when he directed the Board attorney to issue a second *Rice* notice to the B.A., both without prior notification to the Board nor the superintendent's recommendation.[2] The Commission recommended a penalty of reprimand for the violation. Having carefully reviewed the Commission's decision and the record in its entirety, the Commissioner finds that the Commission's decision is supported by sufficient, credible evidence, and that respondent failed to establish that the decision is arbitrary, capricious

[1] *Rice v. Union County Regional High School Board of Education*, 155 *N.J. Super.* 64 (App. Div. 1977), *certif. denied*, 76 *N.J.* 238 (1978).

[2] At the hearing, complainant withdrew the allegations set forth in Paragraphs 9 through 12 of the Complaint that respondent violated *N.J.S.A.* 18A:12-24.1(e) and (j) of the Code of Ethics for School Board Members. The matter proceeded on claims that respondent violated *N.J.S.A.* 18A:12-24.1(e) as alleged in Paragraphs 3 through 8 of the Complaint. Upon review, the Commission dismissed the allegations in Paragraphs 3 and 6 through 8 of the Complaint, but found that respondent violated *N.J.S.A.* 18A:12-24.1(e) as to Paragraphs 4 and 5 of the Complaint.

or contrary to law. *N.J.A.C.* 6A:4-1.1(a). Additionally, the Commissioner finds that a penalty of reprimand is appropriate.

In his appeal to the Commissioner, respondent maintains that he did not violate *N.J.S.A.* 18A:12-24.1(e) because he was advised by the Board attorney that – according to his interpretation of *Melindo Persi v. Daniel Woska, Township of Brick Board of Education, Ocean County*, Commissioner's Decision No. 260-14A, decided June 17, 2014 – the Board president had authority to issue a *Rice* notice to the B.A., and respondent relied upon that advice. Specifically, the Board attorney reasoned that since the Commissioner found in *Persi* that a Board president was permitted to issue a *Rice* notice to the superintendent, one could draw the conclusion that the Board president should also be permitted to issue a *Rice* notice to the B.A. Respondent also argues that he did not violate *N.J.S.A.* 18A:12-24.1(e) because he did not make personal promises or take private action to compromise the Board; while his action may have been individual action, it was taken on behalf of the board and not himself.

Respondent contends that he should not be penalized for conduct that was not a clear violation of the School Ethics Act. He points out that the School Ethics Commission's September 22, 2015 decision recommends a change to the *Persi* decision so that authority to issue a *Rice* notice would lie with the Board president *and* a majority of the Board, rather than the Board president *or* the full majority of the Board. (*SEC Decision* at 9 n. 4) Respondent argues that there was no way he could have known about this change of interpretation at the time of his actions.

Alternatively, respondent argues that even if the Board attorney was incorrect in his interpretation of *Persi*, respondent should not be penalized because he relied upon the good faith advice of counsel, and "relying upon the advice of counsel insulates board members from

blame." (Respondent's brief at 15) Respondent relies upon three Commission decisions – *In the Matter of Lorraine Perrino, Little Egg Harbor Township Board of Education, Ocean County*, SEC Dkt. No. C30-14, July 29, 2015; *In the Matter of Carmine Cimino, Little Egg Harbor Township Board of Education, Ocean County*, SEC Dkt. No. C31-14, July 29, 2015; and *In the Matter of Martha "June" Palan, Little Egg Harbor Township Board of Education, Ocean County*, SEC Dkt. No. C32-14, July 29, 2015 – in which board members did not suffer a penalty when they relied upon the advice of counsel that their actions would not likely result in an ethical violation.

Finally, respondent contends that at the ethics training for board members, he was instructed to consult with a board attorney for specific advice. He argues that he should not be penalized for relying upon the advice of board counsel when he was told by the New Jersey School Board Association to seek such advice. Respondent further points out that the cases cited by the Commission in support of a reprimand are not similar to this matter, as his actions do not rise to the same level of the misuse of power as the respondents in those cases. As such, respondent maintains that he did not violate *N.J.S.A.* 18A:12-24.1(e), and – even if he did – he should not suffer a penalty.

Upon a comprehensive review of the record, the Commissioner finds that the decision of the Commission as to a determination of a violation of *N.J.S.A.* 18A:12-24.1(e) is supported by sufficient credible evidence, and the respondent has not established that the Commission's decision is arbitrary, capricious or contrary to law.[3] *N.J.A.C.* 6A:4-4.1(a). The evidence in the record fully supports the Commission's determination that respondent took action beyond the scope of his authority when he unilaterally issued a *Rice* notice to the B.A. and

[3] The Commissioner is also in accord with the Commission's determination that the respondent did not violate *N.J.S.A.* 18A:12-24.1(e) based on the allegations in Paragraphs 3 and 6 through 8 of the Complaint, but rather only for the allegations in Paragraphs 4 and 5 of the Complaint.

when he directed the Board attorney to issue a second *Rice* notice to the B.A., both without notice to the Board or the superintendent's recommendation. The respondent – in his Answer – admitted to issuing the *Rice* notice and directing the Board attorney to issue a *Rice* notice, without any advance notice or discussion. Such action can only be construed as private action, as it was taken independently and without the recommendation of the Board. Issuing a *Rice* notice, and directing another to issue said notice – without either notification to the Board or the recommendation of the superintendent – compromised the Board because it implied that respondent was acting on behalf of that body, when in fact no one authorized the *Rice* notice to be issued – resulting in the B.A.'s resignation. For the reasons expressed in the Commission's comprehensive decision, the respondent's conduct violated *N.J.S.A.* 18A:12-24.1(e).

The Commissioner does not find respondent's arguments to be persuasive. With respect to respondent's argument that he relied on the advice of Board counsel, the Commissioner notes – at the outset – that there is no evidence in the record that respondent actually relied upon the advice of Board counsel. Respondent did not testify to set forth the facts upon which he relies for this argument. Nevertheless, the Board attorney's advice – upon which respondent claims to have relied – was incorrect.

In *Persi*, the Commissioner was charged with determining who has the authority to issue a *Rice* notice to a school superintendent. *Persi*, Commissioner's Decision No. 260-14A, decided June 17, 2014. The Commissioner found that "a single board member is without authority to direct issuance of a *Rice* notice to the chief school administrator of a district. Rather, that authority lies with the president of a district board of education or a majority of the full

membership of a district board of education."[4] *Id.* at 3. The testimony in the *Persi* matter indicated that "ordinarily, a *Rice* notice would be signed by the Business Administrator, the Superintendent or Assistant Superintendent, in this instance, the Interim Superintendent was to be the subject of the discussion." *Persi*, SEC Docket No. C25-08, dated February 28, 2012, at 7. Thus, as the chief school administrator could not issue a *Rice* notice to himself or herself, the procedure changed and the Commissioner found that a Board president or majority of the board had the authority to issue the *Rice* notice to the superintendent in that unique circumstance. It does not follow that a Board president would have the authority to issue a *Rice* notice to any other employee, because there would be no need for an exception to the standard procedure. Accordingly, the Board president here was required to consult with the superintendent rather than unilaterally issuing a *Rice* notice to the B.A.

Although respondent argues that the *Perrino*, *Cimino*, and *Palan* decisions demonstrate that his reliance on the advice of counsel insulates him from blame, such a conclusion is without basis. In those matters, the complainant alleged that the respondents violated the Code of Ethics for School Board Members when they participated in the hiring process for the new superintendent, even though they each had an immediate family member who was a district employee. *Perrino*, *Cimino*, and *Palan, supra,* at 2. Specifically, the Board attorney had advised them that although they need to be recused from the search and selection process and from voting on the candidate, it would not likely violate the School Ethics Act if they participated in the process of selecting and appointing the consulting firm to conduct the search for the superintendent. *Ibid.* After the Commission issued an advisory opinion indicating that Board members may not participate in any aspect of the superintendent's search, the Board

[4] The Commission recommended that the ruling in *Persi* be modified to require that the authority to issue a *Rice* notice to the chief school administrator lies with the president *and* a majority of a district board of education. (SEC Decision, at p. 9, n. 4) As that is not an issue in this matter, the Commissioner need not reach that issue.

voted to rescind the vote to select the consulting firm and allow only the non-conflicted Board members to vote on a new firm. *Id.* at 3.

The respondents in the above-cited cases argued that they should not be held accountable for their actions because they "followed advice of counsel and there was not prevailing authority to prohibit [their] voting for the firm to conduct the search." *Id.* at 5. The Commission found that "[t]he respondent[s] also argue[] that the legal advice the Board received insulates [them] from blame for [their] conduct. It does not. Each Board member undergoes ethics training as each is responsible for [his or her] own ethical conduct. That responsibility cannot be delegated or avoided." *Id.* at 6. As such, the Commission found that the respondents were in violation of the School Ethics Act. *Id.* at 7. Nevertheless, the Commission declined to issue a penalty because "the non-conflicted Board members summarily took remedial action to rescind the vote of June 10, 2014, corrected the minutes and voted to select a different consulting firm to lead the search without the Respondent[s'] involvement." *Ibid.*

As such, those decisions make clear that respondent is not "insulated from blame" by relying upon the advice of counsel. To the contrary, the Commission reiterated that respondents are responsible for their own actions. Here, as noted in the Commission's decision, respondent should have completed his ethics training and has a duty to act prudently and cautiously. In this matter, the Board attorney did not provide legal support for his finding that the Board president could issue a *Rice* notice to the B.A. Given the sufficient uncertainty, respondent should have filed a request for an Advisory Opinion with the Commission on the matter, rather than taking action on his own. Although the Commission chose not to impose a penalty on the respondents in *Perrino*, *Cimino*, and *Palan* since their actions had been remediated and the vote had been rescinded, such circumstances do not exist here. No remedial

action was taken; instead, the B.A. resigned based on the *Rice* notice. Respondent's actions resulted in a permanent outcome.

As such, the Commissioner accepts the Commission's recommendation – for the reasons expressed in the Commission's decision – that a reprimand is the appropriate penalty in this matter. In so ruling, the Commissioner finds that issuance of a reprimand here is consistent with penalties in prior cases involving violations of *N.J.S.A.* 18A:12-24.1(e). Therefore, the Commission's recommended penalty will not be disturbed.

Accordingly, IT IS ORDERED that Steven Rodas is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[5]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/20/17

Date of Mailing: 1/20/17

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

MATTHEW CHENG	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
STEVEN RODAS	:	**DOCKET NO. C58-14**
WEST NEW YORK BOARD OF EDUCATION	:	
HUDSON COUNTY	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed on December 17, 2014, by Matthew Cheng, a member of the West New York Board of Education (Board), alleging that Board President, Steven Rodas, violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. He specifically alleged that the Respondent violated N.J.S.A. 18A:12-24.1(e) and (j) of the Code of Ethics for School Board Members. The School Ethics Commission (Commission) served the Respondent with the Complaint on December 29, 2014 by certified and regular mail, advising him that he had 20 days from receipt of the Complaint to file a responsive pleading.

By letter of February 10, 2015 the Commission again notified the Respondent that he had an additional ten (10) days to respond or he would be deemed to have admitted to all of the allegations in the Complaint and that the matter would be decided in a summary manner, pursuant to N.J.A.C. 6A:28-7.3(b). On February 19, 2015, Respondent's newly retained attorney requested and received a brief extension of time to file a responsive pleading, and on March 20, 2015, the Respondent filed his Answer.

By letter dated April 2, 2015, the parties were notified that the Commission would review this matter at its April 28, 2015 meeting. At its meeting on April 28, 2015, pursuant to N.J.A.C. 6A:28-10.8(a), the Commission voted to retain the Complaint, docketed as C58-14, for a hearing at a later date.

The Commission notified the Complainant and Respondent by letter of June 10, 2015 that, at its meeting on July 28, 2015, it would conduct a plenary proceeding to hear testimony and consider evidence in support of their respective positions. On the day of the meeting, prior to the commencement of the hearing, the Complainant agreed to withdraw the allegations in Paragraphs 9 through 12 of his Complaint. The Commission voted to grant the withdrawal of those claims, and the matter proceeded on Complainant's claims that Respondent violated N.J.S.A. 18A:12-24.1(e) as alleged in Paragraphs 3 through 8.

The Complainant, Matthew Cheng, appeared *pro se*. Respondent Rodas appeared with his attorney, Adam S. Weiss, Esq. After the Complainant testified, was cross-examined and questioned by the Commission, he rested. Respondent's counsel made a Motion to Dismiss the Complaint for failure to state a claim upon which relief could be granted. After deliberation, the

Commission decided to reserve its decision on the Motion until the Respondent presented his case. The Commission heard only Complainant Cheng's testimony on all remaining Counts of the Complaint on direct and cross examination, and the Commission further questioned the Complainant and accepted the documentary evidence he presented, as well as the documentary evidence presented by Respondent Rodas' counsel. Respondent Rodas decided not to testify or call any witnesses after the Complainant rested at which point the Commission advised the parties that it would not render a decision that day and required them to submit a brief explaining their respective positions regarding a Board President's authority to unilaterally issue a *Rice*[1] notice to an employee of the District without Board or Superintendent approval. The parties were advised that upon receipt of the briefs, the matter would be placed on the Commission's August 25, 2015 agenda.

On August 6, 2015, the parties simultaneously transmitted their briefs for review and consideration. Based on the testimony, the evidence summarized below, and the parties' briefs, the Commission determined that the Complainant had established a *prima facie* case and met his burden of proof by a preponderance of the credible, uncontested evidence.

SUMMARY OF THE PLEADINGS

Paragraph 3

Complainant/Board member alleges that between November 3, 2014 and November 10, 2014, the Respondent/Board President, without consulting the other Trustees, instructed the Board Attorney to research and/or prepare memos regarding: a) the non-renewal of the Superintendent, b) replacing an employee after new elections have been held but before the new Board is reorganized, c) whether a school board can take action to bind a future board by replacing an employee's position prior to the end of his contract, and d) addressing personnel actions taken to avoid granting tenure. The Complainant asserts this was a violation of N.J.S.A. 18A:12-24.1(e).

Paragraph 4

The Complainant also asserts that the Respondent personally issued a *Rice* notice to the Business Administrator/Board Secretary (BA) without prior notification to the Board or with the Superintendent's recommendation. The complainant asserts this was a violation of N.J.S.A. 18A:12-24.1(e).

Paragraph 5

The Complainant also asserts that on December 8, 2014, the Respondent directed the Board Attorney to issue a *Rice* notice to the BA without prior notification to the Board or with

[1] "Rice" notice refers to the matter entitled, Rice v. Union County Regional High School Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977), certif. den. 76 N.J. 238 (1978) which established the right of employees to obtain notice when they will be discussed by the Board of Education.

the Superintendent's recommendation. The Complainant avers that such action is outside the scope of the Respondent's duties as a Board member. The Complainant asserts this was a violation of N.J.S.A. 18A:12-24.1(e).

Paragraphs 6—8

The Complainant further alleges that the Respondent took private action in violation of the Act when on December 10, 2014 he surreptitiously met with the Board Attorney and certain Board members to discuss a plan to terminate the Superintendent or place him on leave. The Complainant also alleges that after the BA submitted his irrevocable letter of resignation to the Board prior to Executive Session, the Board did not discuss the Superintendent's employment. The Complainant asserts this was a violation of N.J.S.A. 18A:12-24.1(e).

The Respondent admitted that he composed and delivered the document identified as Exhibit E, the *Rice* notice for the BA, that he consulted with and requested the Board Attorney compose and deliver the notice, but otherwise will let the documents speak for themselves and leave the Complainant to his proofs.

SUMMARY OF THE RECORD

Each party was given the opportunity to make an opening statement. In his opening remarks, Complainant Cheng requested leave to withdraw Paragraphs 9 through 12 of his Complaint and agreed to rely on Respondent's Exhibits 1 through 64 when referring to documentary evidence for identification and admission. The Complainant stated that the central issue in this matter is whether the Board President has the authority to unilaterally or at the direction of the Board Attorney issue a *Rice* notice to an employee. He stated that he recognizes that the Commissioner of Education decided that the Board President may issue a *Rice* notice to the Superintendent, but argues that the Commissioner did not grant that same authority regarding an employee.

Mr. Cheng further explained that he brought this Complaint because he thought that Respondent Rodas' actions in directly serving a *Rice* notice to the BA was an "egregious" misuse of power, which forced the BA to retire or be fired. He stated, "In my opinion, the BA was given an ultimatum due to his contract." He provided that the BA's contract was voted on by the Board before the County Superintendent approved it, instead of first receiving approval by the County. Though a technicality, the County Superintendent approved the BA's contract and never took a position as to the validity of the contract. In the course of this, it was the Complainant's belief that Mr. Rodas or the Board attorney had asked the Superintendent to place on the agenda a notice to terminate the BA if he did not resign; and, when the Superintendent did not put this on the agenda, he too was given a *Rice* notice. The Complainant's major concern and purpose for filing this Complaint is to review the Board President's authority to issue a *Rice* notice to any employee of his or her choosing at any time.

In his opening remarks, counsel for the Respondent stated that after Complainant's withdrawal of the allegations in Paragraphs 9-12, the sole remaining issue is whether or not a

Board president, who relies upon the advice of Board counsel, can issue a *Rice* notice to a BA and whether that issuance or that directive to issue such a *Rice* notice violates the School Ethics Act. He respectfully advised the Commission that it was not going to be able to determine the type and number of employees to whom a Board president may issue a *Rice* notice but that the sole issue before it is whether the Respondent violated the School Ethics Act as a result of his reliance upon Board attorney advice that was given during a public meeting. That advice confirmed the Board attorney's opinion that the issuance or the directive to issue the notice by the Board President, Mr. Rodas, to the BA is appropriate.

COMPLAINANT'S TESTIMONY: Matthew Cheng—Board Member

After being sworn in, Mr. Cheng testified that on June 25, 2014, the Board had passed a resolution to appoint the BA, and on July 9, 2014, the County Superintendent approved this contract. Complainant asserted that sometime between November 3, 2014 and November 10, 2014, the Respondent, without consultation with the Complainant or, to his understanding, other Board members, instructed the Board attorney to research and prepare memos regarding: a) non-renewal of the Superintendent; b) replacing an employee after elections have been held but two months before the Board is reorganized; c) whether a Board can take binding action on a future Board by replacing an employee prior to the end of a contract and before new Board members are seated; and, d) address personnel actions to avoid granting tenure to an employee. Mr. Cheng asserts that Exhibit E documents the conversations counsel had with Mr. Rodas.

According to the BA's contract, he would have received tenure in the middle of contract's duration. The Complainant asserts that Respondent Rodas personally composed and handed the Rice notice directly to the BA (Exhibit E), and at the November Board meeting, the members discussed the BA's employment, which was not an item on the Board agenda that evening. Mr. Cheng testified that he did not know that the conversation was going to take place and was surprised that the Board was contemplating terminating the BA. The Complainant stated that, at that time, he inquired of the Superintendent if he was aware of the situation and was informed that the Superintendent was "very surprised" that this matter had come up and that this was the first point where he became aware of the first *Rice* notice.

Mr. Cheng stated that on December 8, 2015, Mr. Rodas directed the Board attorney to issue a second *Rice* notice directly on the BA. Exhibit F. Again, Mr. Cheng states that the Superintendent, as well as the other Board members, had not agreed to place the BA's employment on the agenda for the December meeting. After a long discussion in Executive Session, the BA submitted his resignation letter due to the public discussion that his contract was not valid and that if he did not he would be terminated. The Complainant believes that the BA signed his letter of termination under duress. The Complainant argues that in both instances of these *Rice* notices the Respondent failed to adhere to the principle that authority rests with the Board and that a member, including the Board President, must not take any private action which may compromise the Board in violation of N.J.S.A. 18A:12-24.1(e).

On cross examination, counsel for Respondent Rodas questioned Mr. Cheng as to whether he had any personal knowledge of Mr. Rodas giving any instructions to the Board

attorney to conduct research, prepare memoranda, or giving personal instructions. The Complainant said he did not have any personal knowledge of the interaction between Mr. Rodas and the Board attorney except for Exhibit D, the memo itself. Mr. Cheng testified that the only source of his knowledge concerning allegations that Mr. Rodas directed the Board attorney to either conduct research or prepare memos are the bills that he received from the Board of Education, pursuant to an OPRA request. With the Complainant's consent, Respondent marked these bills for identification as Rodas 28-32. At the same time Mr. Cheng entered his Exhibits A—H into evidence.

Mr. Weiss next inquired about Complainant's Exhibit D (Rodas 28 through 32), the invoice from the law firm of Schwartz, Simon, Edelstein for services rendered to the West New York BOE. Mr. Cheng responded that the items, together with their descriptions, represent the work which the law firm performed. He also stated that there was no indication that Respondent Rodas initiated the request for services. Mr. Cheng further stated that Board members were told that the Board President was the only member who could speak with the attorney, and that the only way for those items to be billed would have to come from the Respondent. Mr. Cheng did admit, however, that the research conducted could have been initiated by the attorney himself on certain areas of law which would then be given as advice to the Board. He also admitted on cross that he had also requested that the Board attorney research the issue regarding whether a Board President can issue a *Rice* notice because the Board attorney stated at a meeting in public that it was possible for the Board President to unilaterally issue a *Rice* notice to the BA. Mr. Cheng stated that he publicly disagreed with the Board attorney at that same public portion of the meeting because he had called the New Jersey School Boards Association and was advised that the Board President could not issue a *Rice* notice to any employee other than the Superintendent.

Mr. Weiss then turned his attention to the *Rice* notice served on the Superintendent. Mr. Cheng testified that the Superintendent, as well as other Board members, was not aware that the BA was to receive a *Rice* notice for discussion at the November meeting. Mr. Cheng also testified that he was unaware whether Mr. Rodas consulted with any member prior to the issuance of a *Rice* notice to the Superintendent or to the BA. He further testified that three of the nine Board members, including him, were not aware of the notices.

Mr. Weiss's final question to the Complainant regarded Mr. Rodas' alleged surreptitious discussion with the Board attorney to place the Superintendent on leave if the BA did not submit a letter of resignation. In response, Mr. Cheng testified that the only knowledge he had resulted from his review of the Board attorney's invoice and his conclusion that the Superintendent received a *Rice* notice subsequent to the BA's submission of his irrevocable letter of resignation. (Complainant's Exhibit D at Rodas 28-32)

At the conclusion of cross examination, members of the Commission and counsel further questioned Mr. Cheng. He testified that the Superintendent's employment was not discussed at the December 10, 2014 meeting and expressed concern that if a Board President is permitted to issue a *Rice* notice to an employee and the Superintendent does not agree, then the Board President could just issue a *Rice* notice to the Superintendent in retaliation. The Complainant

also testified that Mr. Rodas never gave a reason why he issued a *Rice* notice to the BA, and opined that it was because of the technicality in his contract approval.

When asked if the Board attorney gave his reasons in public as to why he thought the Board President could issue a *Rice* notice to an employee, Mr. Cheng responded that the attorney cited the decision in Melindo Persi v. Daniel Woska, Board of Education of the Twp. of Brick, Ocean County, 6/17/14, Commissioner of Education Dkt. #260-14A, SEC #C03-14, in which the Commissioner of Education determined that a Board President could issue a *Rice* notice to a Superintendent, and that the attorney felt, therefore, that a Board President could do it to other employees including the BA. Counsel for Mr. Rodas added that at the meeting the Board attorney gave his opinion as to the abilities of a Board President concerning the issuance of *Rice* notices.

Mr. Cheng was asked about the two meeting dates at the end of 2014. He testified that the sequence of events started in November with a *Rice* notice issued to the BA, at which time his employment was discussed. In December, just before the meeting, the BA received a second *Rice* notice. Right after the BA received the second *Rice* notice, the Superintendent, who had submitted his resignation letter, received a *Rice* notice as well. The dates were very close together—December 8th and December 10th—as stated in his Complaint. In November and December both discussions took place in Executive Session. After discussion in Executive Session where the BA submitted his irrevocable letter of resignation, the item was added to the agenda after members left the room. During the public portion of the meeting in December, a public discussion ensued regarding the BA's resignation, the Board's acceptance of his resignation, and a debate among the Board members and the Board attorney over the authority of a Board President to issue a *Rice* notice to the BA.

After the Complainant rested, counsel for the Respondent made a Motion for Directed Verdict[2] claiming that Mr. Cheng's submissions were mere speculation concerning conversations that may have happened or may not have happened. In the counsel's view, it was admitted by Mr. Cheng that the Board attorney advised, in public session on December 10, 2014, that it was his opinion that the Board President, Mr. Rodas, was authorized or otherwise empowered to issue a *Rice* notice to the BA.

After a short recess to deliberate, the Commission advised the parties that it would reserve its decision on the Motion for a Directed Verdict until the Respondent presented his case.

At this point, counsel for the Respondent advised the Commission that his client would not testify or call witnesses on his behalf and rested his case.

In summation, Mr. Cheng spoke of the public session discussion of the December meeting in which he and other Board members disagreed with the Board attorney over his advice to the Board that a Board President could issue a *Rice* notice to an employee directly. Again, he

[2] N.J.A.C. 6A:28-6.9(c) provides that all hearings shall be conducted in accordance with the rules of the OAL. Such rules permit a party to make an oral motion during a hearing and to state the grounds for the motion. N.J.A.C. 1:1-12.1(a)1 and 2.

asserted that this advice was egregious. Although the Board attorney did issue a memo on the subject, he did not cite any cases in support of his position. Mr. Cheng also remarked that he and other Board members argued with the Board attorney about whether or not his opinion was reliable and "confident" legal advice.

Counsel for Respondent Rodas made no closing remarks and relied on his presentation of his Motion for Directed Verdict.

Before adjournment of the hearing, the Deputy Attorney General for the Commission requested on behalf of the Commission that each party submit a brief legal memorandum, specifically addressing the authority or lack of authority of the Board President to issue a *Rice* notice to an employee other than the Superintendent. The briefs were to be submitted by August 10, 2015.

Complainant's Exhibits

C-1	Complaint and Exhibits A—H (Rodas 1-55 Complaint and Exhibits)

Respondent's Exhibits

R-1	Bills for Attorney's fees Rodas 28-32 (Complainant's Exhibit D) Entered into evidence by Complainant as Exhibit D.

FINDINGS OF FACT

As the trier of fact in this matter, the Commission had the opportunity to observe the demeanor of the witness and to judge his credibility. As such, the Commission found Matthew Cheng to be a credible witness, who offered consistent testimony which was unaltered by cross examination. As Respondent Rodas did not offer testimony or documentary evidence in his defense, except for R-1, the testimony of Complainant Cheng stands undisputed and unopposed. The Commission found the Complainant's testimony to be credible and uncontroverted.

Accordingly, based on the pleadings, documents in the record, and credible, relevant testimony, the Commission makes the following factual findings on the issues of whether the Respondent took private action without Board authority in violation of N.J.S.A. 18A:24.1(e):

1. At all times relevant to this matter, the Complainant Cheng was a member of the West New York Board of Education (Board).

2. At all times relevant to this matter, Respondent Rodas was the President of the West New York Board of Education.

3. The BA was served with a *Rice* notice on November 10, 2014 and again with a second notice on December 8, 2014.

4. Respondent Rodas admitted in his Answer that on November 10, 2014, he composed and delivered the first *Rice* notice to the BA and that he did not inform the Superintendent that he was serving this *Rice* notice on the BA.

5. Respondent Rodas admitted in his Answer that he did not inform Complainant Cheng or any other of the Board members that he was serving this *Rice* notice on the BA.

6. Respondent Rodas admitted in his Answer that on December 8, 2014, he directed the Board attorney to compose and deliver a second *Rice* notice to the BA.

7. Respondent Rodas admitted in his Answer that on December 8, 2014, he did not inform the Superintendent that he was serving a second *Rice* notice on the BA.

8. Respondent Rodas admitted in his Answer that on December 8, 2014, he did not inform the Complainant Cheng or any other of the Board members that he was serving a second *Rice* notice on the BA.

9. During cross examination, Complainant admitted that he had no personal knowledge of the discussions that Respondent had with the Board attorney relative to his issuance of legal advice regarding the non-renewal of the Superintendent, replacing an employee after new elections have been held but before the new Board is reorganized, whether a school board can take action to bind a future board by replacing an employee's position prior to the end of his contract, and addressing personnel actions taken to avoid granting tenure without discussion with the Board as a whole.

10. During cross examination, Complainant Matthew Cheng admitted that he had no knowledge of an alleged surreptitious meeting between the Respondent Steven Rodas and the Board attorney to discuss placing the Superintendent on a leave of absence if the BA did not submit a letter of resignation.

11. The minutes of the December 10, 2014 meeting demonstrate that there was a dispute among some Board members and the Board attorney over his legal opinion, unsupported by legal precedent or statute, regarding the Board President's authority to issue a *Rice* notice to a school employee.

ANALYSIS

MOTION FOR DIRECTED VERDICT

Pursuant to N.J.A.C. 6A:28-8.1(d), upon completion of the Complainant's case, and prior to the Respondent's testimony, counsel for Respondent Rodas moved for a Directed Verdict on behalf of the Respondent on the grounds that the Complainant's case and testimony was based on speculation and that the Board attorney rendered his opinion that a Board President is authorized or otherwise empowered to issue a *Rice* notice to an employee, here the BA. To grant a Directed Verdict, this Commission must determine that the evidence weighs so heavily in favor of one party, and so lightly in favor of the other, that there is only one reasonable result and that no reasonable fact-finder could reach a decision to the contrary. The Respondent would have

this tribunal determine that this is the appropriate matter to so rule. The Commission discerns that it is not.

As N.J.A.C. 1:1-1 *et. seq.*[3] is silent on a Directed Verdict, N.J.A.C. 1:1-1.3(a) permits reference to the New Jersey Court Rules. Under R. 4:37-2(b), a motion for a Directed Verdict is granted only if, accepting the plaintiff's facts and considering the applicable law, "no rational jury could draw from the evidence presented" that the plaintiff is entitled to relief. Pitts v. Newark Bd. of Educ., 337 N.J. Super. 331, 340, 766 A.2d 1206 (App.Div.2001). See also R. 4:37-2(b) ("[A] motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor."). "[I]f reasonable minds could differ, as to whether any negligence has been shown, the motion should be denied." Bozza v. Vornado, Inc., 42 N.J. 355, 357-58, 200 A.2d 777 (1964) (citing Bell v. E. Beef Co., 42 N.J. 126, 199 A.2d 646 (1964)).

The guidance is applicable to the administrative setting as well. In this matter before the Commission, the Complainant asserts that the Respondent took private action when he personally composed and delivered a *Rice* notice to the BA, an employee of the District, and then directed the Board attorney to compose and deliver a second *Rice* notice to the same BA. The Respondent admitted responsibility for both notices, but argues that Board counsel advised him that he had the authority to do so and publicly stated his legal opinion which was without reference to statute, court ruling, or administrative action. The minutes of the December 10, 2014 meeting, submitted with the Complainant's brief, demonstrates that the Board attorney could cite no legal authority to support his opinion that the Board President had this power. When some Board members asked for precedents supporting his position at the December meeting, he offered nothing but his own opinion and rebuffed further inquiry.

Moreover, in review of the parties' legal briefs submitted on August 6, 2015, the Respondent did not provide any legal authority but continued to rely on the decision in Persi v. Woska, *supra.* He argued that because the Board President has the authority to unilaterally issue a *Rice* notice to the Superintendent, it must follow that the he has the power to issue a *Rice* notice to the BA, a school employee.

Under this theory, the Board President should then have the authority to issue a notice to any principal, teacher, coach, nurse, or custodian—any employee of his choosing. The Commission is concerned that extending this unilateral authority to a Board President to interfere with the employment of a BA or a custodian is the grant of unbridled power ripe for abuse, in violation of the School Ethics Act.[4] Conducting one's office in such a manner would lead to violations of the statute, N.J.S.A. 18A:24.1(c), (e) and (i), for acting beyond the scope of a Board member's authority, taking private action with the potential to compromise the Board or interfering with the proper performance of the employee's duties. It is the Commission's

[3] N.J.A.C. 6A:28-6.9(c) provides that all hearings shall be conducted in accordance with the rules of the OAL.

[4] The School Ethics Commission recommends that the ruling in Persi v. Woska be modified to advise "that authority lies with the president of a district board of education and a majority of the full membership of a district board of education."

considered determination that the entire Board must be consulted as it was when the employee was hired.

The Respondent also argues that the legal advice the Board received insulates him from blame for his conduct. It does not. Each Board member undergoes ethics training and each is responsible for his own ethical conduct. That responsibility cannot be delegated or avoided. Respondent Rodas should have completed his ethics training, and it is his duty as an elected official to act prudently and cautiously, as is properly to be expected by a reasonable person under the particular circumstances so as not to compromise the Board. Here, the Board attorney could not, and the Respondent did not, provide support for the Board President's alleged powers. Further, there was sufficient uncertainty to warrant the Respondent/Board President or Board attorney to have filed a request for an Advisory Opinion with the Commission on the matter.

Consequently, the Commission denies the Respondent's Motion for Directed Verdict as the Respondent's admissions in his Answer that he took the actions that the Complainant alleged and together with the Commission's long held position that each Board member is responsible for his own conduct may be sufficient to sustain a finding for the Complainant.

Accordingly, the question before the Commission is whether the Complainant alleged facts and provided testimony which, if true, could support a finding that the Respondent violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members.

CODE VIOLATIONS

The Commission again notes that the Complainant bears the burden of factually proving any violations of the Code of Ethics for School Board Members in accordance with the standards set forth at N.J.A.C. 6A:28-6.4(a). See also, N.J.S.A. 18A:12-29(b). The Complainant asserts that the Respondent violated N.J.S.A. 18A:12-24.1(e) in Paragraphs 3 through 8 of the Code of Ethics for School Board Members.

The Commission first considers the allegation that the Respondent violated N.J.S.A. 18A:12-24.1(e) as set forth in Paragraph 3 of the Complaint, which states:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

The Commission's regulations require that:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(e) shall include evidence that the Respondent made personal promises or took action beyond the scope of his or her duties such that, by its nature, had the potential to compromise the board. N.J.A.C. 6A:28-6.4(a)5.

The Complainant alleges that between November 3, 2014 and November 10, 2014, the Respondent/Board President, without consulting the other Trustees, instructed the Board Attorney to research and/or prepare memos regarding, a) the non-renewal of the Superintendent, b) replacing an employee after new elections have been held but before the new Board is reorganized, c) whether a school board can take action to bind a future board by replacing an employee's position prior to the end of his contract, and d) addressing personnel actions taken to avoid granting tenure. The Respondent argues that the Board attorney could have decided to do this research *sua sponte* in preparation for some future issue that may arise before the Board, but a review of the topics indicates that these questions were not of the Board attorney's creation but were most likely urged by someone other than the Board attorney. Nonetheless, when asked on cross examination, the Complainant stated that he had no personal knowledge who prompted these assignments for legal advice nor did he provide any support for his suspicions. Consequently, the Commission finds that the Complainant has not established that the Respondent violated N.J.S.A. 18A:12-24.1(e) as alleged in Paragraph 3 of the Complainant. Accordingly, this allegation is dismissed.

The Commission next considers the allegation that the Respondent violated N.J.S.A. 18A:12-24.1(e) as set forth in Paragraphs 6-8 of the Complaint. Similar to the claim in Paragraph 3, the Complainant asserts that the Respondent took private action in violation of the Act when, on December 10, 2014, he surreptitiously met with the Board Attorney and certain Board members to discuss a plan to terminate the Superintendent or place him on leave. Again, when asked on cross examination, the Complainant stated that he had no personal knowledge of who attended or further information regarding the putative clandestine meeting. Moreover, he did not produce anyone who witnessed or participated in the meeting. Consequently, the Commission finds that the Complainant has not established that the Respondent violated N.J.S.A. 18A:12-24.1(e) as alleged in Paragraphs 6 through 8 of the Complainant. Accordingly, these allegations are dismissed.

The Commission next considers the allegation that the Respondent violated N.J.S.A. 18A:12-24.1(e) as set forth in Paragraphs 4 and 5 of the Complaint. The Complainant asserts in each Paragraph, respectively, that on November 10, 2014, the Respondent personally issued a *Rice* notice to the BA without prior notification to the Board or with the Superintendent's recommendation, and again on December 8, 2014, the Respondent directed the Board Attorney to issue a second *Rice* notice to the BA without prior notification to the Board or with the Superintendent's recommendation. The Complainant further alleges that the Respondent also neglected to consult the other Board members on either notice. Although the Respondent did not testify at the hearing, the Answer he submitted to the Commission in response to the Complaint speaks for him.

Respondent Rodas admitted under a Certification of Oath in his Answer to the Complaint that on November 10, 2014, he composed and delivered the first *Rice* notice to the BA and that he did not inform the Superintendent that he was serving this *Rice* notice on the BA and that he did not inform Complainant Cheng or any other of the Board members of his actions. Respondent Rodas also admitted in his Answer that on December 8, 2014, he directed the Board

attorney to compose and deliver a second *Rice* notice to the BA, and again did not inform the Superintendent or the Board of his actions.

Respondent Rodas elected not to testify nor call witnesses on his behalf. He offers no defense to his actions; however, counsel for the Respondent in his oral argument and brief to the Commission advances the notion that the Respondent was following the opinion of the Board attorney that he was authorized to serve *Rice* notices on the District employee. Yet, as revealed in the minutes of the December 10, 2014 meeting, the Board attorney provided no authority in support of permitting the Board President to take such steps beyond his authority as a Board member, and similarly, the Respondent's brief was also devoid of any. Moreover, reliance on the Commissioner of Education's decision in Persi v. Woska, *supra*, is an overreach. The Commissioner, perhaps mindful that such a broad grant of power to the Board President would further destabilize the equipoise necessary for the Superintendent, Board President and the Board to function in their respective roles, declined to find a Board President's authority to issue a *Rice* notice to employees of a District other than the Superintendent. Given that the Commissioner did not extend the grant of authority to the Board President claimed by the Respondent to issue a *Rice* notice to an employee, neither can this Commission do so in his stead.

Consistent with this foregoing reasoning, the Commission reviewed these actions to determine the manner in which the Respondent violated the Code. In doing so, the Commission finds that the Complainant has met his burden to prove by a preponderance of the credible evidence, that Respondent Rodas violated N.J.S.A. 18A:12-24.1(e) when he took board action beyond the scope of his authority when, without Board authority or consultation, he unilaterally issued a Rice notice to an employee of the District so as to compromise the Board.

In finding a violation of N.J.S.A. 18A:12-24.1(e), it is not necessary for the Commission to find that the Respondent's action, in fact, compromised the Board. Rather, it is sufficient that the action was of such a nature that it might have compromised the Board. See, Tony John et al. v. Ken Gordon, Willingboro Bd. of Ed., Burlington County, C34-08 (October 27, 2009), *aff'd* Commission of Education Decision No. 102-10ASEC, decided March 30, 2010.

Accordingly, the Commission finds that based on the preponderance of the relevant, credible evidence, Respondent Rodas took private action when he unilaterally prepared and had served the *Rice* notice to the Business Administrator, a District employee, without the authority of the Board or Superintendent. These actions were of such a nature that they had the potential to compromise the Board in violation of N.J.S.A. 18A:12-24.1(e).

DECISION

The Commission finds that the Complainant has proven by a preponderance of the relevant, credible evidence that Respondent Steven Rodas violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members as set forth in Paragraphs 4 and 5 of the

Complaint, and the Commission dismisses all other allegations that the Respondent violated N.J.S.A. 18A:12-24.1(e) of the Code.

PENALTY

The Commission recommends a penalty of reprimand of the Respondent, as it did in matters where similar violations of N.J.S.A. 18A:12-24.1(e) were found and a comparable violation occurred. In recommending the penalty, the Commission notes that a reprimand was the appropriate penalty when it found that a Board member violated N.J.S.A. 18A:12-24.1(e). The Commission finds that taking action beyond the scope of a Board member's authority is precisely the type of action which the Code of Ethics for School Board Members was intended to proscribe. (See: Melindo Persi v. Daniel Woska, Board of Education of the Twp. of Brick, Ocean County, 6/17/14, #260-14A, SEC 03-14, *supra*; G.M.B. v. Cynthia Zirkle, Cumberland Regional Board of Education, Cumberland County, C44-10 (September 27, 2011)(Modified and confirmed by Commissioner of Education Decision No. 113-12ASEC, decided March 29, 2012), where a Board member was found to have violated N.J.S.A. 18A:12-24.1(e) when she telephoned the Board office, spoke to the Business Administrator, and asked what could be done about changing a student's bus pass to the residence of the child's paternal grandfather, rather than the residence of the student's mother, without the knowledge or consent of the student's mother; and, I/M/O Randie Zimmerman, Rocky Hill Bd. of Ed., Somerset County, (C49-02) (July 22, 2003), Commissioner of Education Decision No. 497-03SEC, decided August 21, 2003), where a Board member investigated a complaint and drafted a letter that appeared to have the endorsement of the Board.)

Here, where the Respondent was found to have violated N.J.S.A. 18A:12-24.1(e) for exceeding his authority as a Board member, the Commission finds that the penalty of reprimand is appropriate.

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

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

Parties seeking to appeal the Commission's finding of violation *must* file an appeal, pursuant to the standards set forth at N.J.A.C. 6A:4, within **30 days** of the filing date of the

decision from which the appeal is taken. The filing date shall be three days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (13 days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: September 23, 2015

Resolution Adopting Decision – C58-14

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof, and the testimony of the parties from its hearing on July 28, 2015; and

Whereas, at its meeting on July 28, 2015, the Commission consented to the withdrawal of the claims alleged in Paragraphs 9 through 12; and

Whereas, at its meeting on July 28, 2015, the Commission reserved its decision on Respondent's Motion to Dismiss the Complaint; and

Whereas, at its meeting on July 28, 2015, the Commission directed the parties to file a brief in support of their competing positions regarding authority to issue a *Rice* notice; and

Whereas, the parties simultaneously submitted their respective briefs on August 6, 2015; and

Whereas, at its meeting on August 25, 2015, the Commission again reviewed all submissions of the parties and voted to deny Respondent's Motion to Dismiss the Complaint; and

Whereas, at its meeting on August 25, 2015 and September 22, 2015, the Commission found that the Complainant established that the Respondent violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members set for in Paragraphs 4 and 5 of the Complaint, but dismissed all remaining allegations that the Respondent violated N.J.S.A. 18A:12-24.1(e), as articulated in Paragraphs 3 and 6 through 8, and voted to recommend that the Commissioner of Education issue a penalty of Reprimand to the Respondent; and

Whereas, at its meeting on September 22, 2015, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

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

_____

Robert W. Bender, Chairperson

I hereby certify that the Resolution
was duly adopted by the School Ethics
Commission at its public meeting on
September 22, 2015.

_____

Joanne M. Restivo
Acting Executive Director
School Ethics Commission

23-17

R.W., ON BEHALF OF MINOR CHILD, J.W.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In May 2011, petitioner filed an appeal challenging her son's suspension from general education classes and his assignment to an alternative school. Petitioner failed to appear on the second scheduled day of hearing in the matter, on December 5, 2011. The Commissioner subsequently remanded the matter to the OAL after receiving petitioner's exceptions to the ALJ's dismissal of the petition for her failure to appear. On remand, the record of this matter and the advisement by the OAL of petitioner's failure to appear at a status conference scheduled for June 27, 2012 were reviewed, along with petitioner's hand-written explanation for her non-appearance – which included a statement that she had not heard from the court in four years, and could not remember why she had failed to attend the status conference in 2012. She stated, however, that she had been very ill at that time, and requested a new court date.

The Commissioner reviewed the matter on remand, and found that the failure to appear was processed on December 7, 2016 – more than four years after the status conference that petitioner missed. Given the length of time that has elapsed, and the petitioner's written explanation for her nonappearance, the Commissioner returned the matter to the OAL for further disposition pursuant to *N.J.A.C.* 1:1-3.3(b).

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

January 20, 2017

OAL DKT. NO. EDU 01189-12
(EDU 5274-11 ON REMAND)
AGENCY DKT. NO. 115-5/11

R.W., ON BEHALF OF MINOR CHILD, J.W.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the advisement by the Office of Administrative Law (OAL) – pursuant to *N.J.A.C.* 1:1-14.4 – of petitioner's failure to appear at a status conference scheduled for June 27, 2012 have been reviewed.

Petitioner filed a hand-written explanation, which has been thoroughly reviewed and considered. In her explanation, petitioner asserts that she has not heard from the court in four years. She indicated that she had been very ill, and was sure that if she did not appear, it was for an urgent reason as she would otherwise have called.

Upon review, it appears as though petitioner is correct. The failure to appear was processed on December 7, 2016 – more than four years after the status conference that petitioner is said to have missed. Given the lengthy time since the status conference at issue, as well as petitioner's written explanation for her nonappearance, this matter is being returned to the OAL for further disposition, pursuant to *N.J.A.C.* 1:1-3.3(b).

Accordingly, this matter is hereby remanded to the OAL for further disposition as indicated herein.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/20/17

Date of Mailing: 1/20/17

25-17

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

JS Case No. 4438

---x

Agency No. 2589/16

In the Matter of the Tenure Hearing between

SCHOOL DISTRICT OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,
Petitioner,

OPINION AND CONSENT AWARD

and

STEPHEN TOWNSEND,
Respondent,

---x

Before JOHN E. SANDS, Impartial Arbitrator

OPINION

On October 21, 2016 M. Kathleen Duncan, Director of the New Jersey Department of Education Bureau of Controversies and Disputes, appointed me to hear and decide the above tenure matter. In accordance with my authority under P.L. 2015, c. 109, on January 12, 2017 I conducted a hearing at the School District Offices in Pleasantville, NJ. Prior to that hearing, I reviewed the parties' following exhibits:

1	Petitioner's Arbitration Statement
2	Respondent's Arbitration Statement
3	Acknowledgment and certification of DOE Charges, September 27, 2016

4	Respondent's Answer to Tenure Charges
5	OFAC Report
6	Respondent's First Set of Interrogatories and Document Demands
7	Petitioner's Response to Petitioner Exhibit 6
8	Petitioner's First Set of Interrogatories
9	Petitioner's First Set of Interrogatories
10	Respondent's Answers to Petitioner's Interrogatories and Document Demands
11	Letter to Respondent dated May 12, 2016 Suspending employment
12	July 25, 2013 Letter to Respondent suspending employment
13	Signed Acknowledgment by Respondent of District Policies
14	NJSA 18A:6-7.1 Criminal Background Statute

At the hearing, the parties reached this proposed settlement of the issues of this matter pending Board approval and approval of the State Fiscal Monitor, Dr. Constance Bauer:

1. Respondent shall return to the District in the position of Principal on Special Assignment and he shall not serve as a Building Principal and/or Building Administrator.

2. Respondent shall retain all of his tenure rights and seniority with the District.

3. Respondent shall serve 150 days' unpaid suspension without salary and pension benefits and he shall reimburse the District for his share if any, of health benefits received. Pension benefits will not accrue during the term of suspension. Respondent shall be reinstated February 23, 2017.

4. Respondent's salary shall be frozen at the annual salary of $138,983 for a term of five years; on January 1, 2022, Respondent and the administration shall negotiate compensation moving forward.

5. Respondent shall not be permitted use of any school facilities for non-school related events during his employment with the District.

6. Respondent agrees to waive any and all claims against the District, and the parties will execute mutual general releases of all claims against each other arising prior to the date of this agreement.

7. Petitioner agrees to withdraw all tenure charges.

At the parties' request, I have reviewed the above exhibits and heard the parties' attorneys' opening arguments and considered whether, in my professional opinion, their proposed settlement represents an appropriate resolution of the issues of this matter taking into account the relevant law and the parties' exposures to loss. On the basis of that review and my experience as arbitrator and mediator of more than 4,000 labor and employment law disputes, I find the parties' proposed settlement to be an appropriate compromise of their positions.

By reason of the foregoing I issue the following

CONSENT AWARD

Subject to Board approval and approval of the State Fiscal Monitor, Dr. Constance Bauer, the following Settlement Agreement shall be placed in effect:

1. Respondent shall return to the District in the position of Principal on Special Assignment and he shall not serve as a Building Principal and/or Building Administrator.

2. Respondent shall retain all of his tenure rights and seniority with the District.

3. Respondent shall serve 150 days' unpaid suspension without salary and pension benefits and he shall reimburse the District for his share if any, of health benefits received. Pension benefits will not accrue during the term of suspension. Respondent shall be reinstated February 23, 2017.

4. Respondent's salary shall be frozen at the annual salary of $138,983 for a term of five years; on January 1, 2022, Respondent and the administration shall negotiate compensation moving forward.

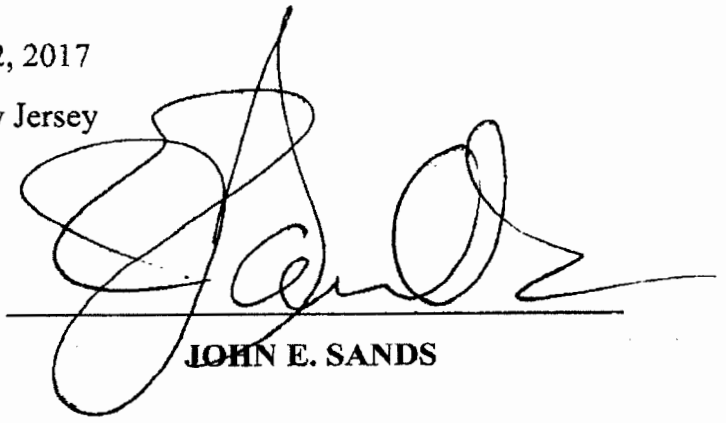
5. Respondent shall not be permitted use of any school facilities for non-school related events during his employment with the District.

6. Respondent agrees to waive any and all claims against the District, and the parties will execute mutual general releases of all claims against each other arising prior to the date of this agreement.

7. Petitioner agrees to withdraw all tenure charges.

Dated: January 12, 2017

Pleasantville, New Jersey



JOHN E. SANDS

ACKNOWLEDGMENT

STATE OF NEW JERSEY)

>ss.:

COUNTY OF ATLANTIC)

On January 12, 2017, JOHN E. SANDS, whom I know, came before me and acknowledged that he had executed the foregoing as and for his Opinion and Award in the above-captioned matter.

Temera I. Stafford

A Notary Public of New Jersey

My Commission expires September 25, 2020

TEMERA I. STAFFORD
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Sep 25, 2020

ACCEPTED AND AGREED TO:

STEPHEN TOWNSEND

DENNIS ANDERSON, SUPERINTENDENT

WAYNE J. OPPITO, ESQ.

ATTORNEY FOR NJ PRINCIPALS & SUPERVISORS ASSOCIATION

JAMES J. CARROLL, ESQ.

ATTORNEY FOR SCHOOL DISTRICT OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY

A.M., on behalf of minor child, G.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MINE HILL, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

In September 2016, *pro se* petitioner appealed the determination of the respondent Board that his child, G.M., is not entitled to a free public education in Mine Hill schools for the 2016-2017 school year. Petitioner contended that he resided in Mine Hill and has joint custody of G.M.; accordingly, his daughter should have been allowed to enroll in Mine Hill's preschool program in August 2016. The Board argued that G.M. is not legally domiciled within the school district, and filed a counterclaim for tuition.

The ALJ attempted to convene a telephone conference in this matter, but had difficultly contacting the petitioner. Subsequently, the ALJ's office was advised that the petitioner had moved and that G.M. would not be attending preschool in Mine Hill; the school district confirmed that G.M. is not presently enrolled. The ALJ concluded that it is appropriate to dismiss without prejudice any relief sought by respondent in its cross-claim. Accordingly, the ALJ deemed the petition withdrawn without prejudice, and the counterclaim dismissed without prejudice.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

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

Issued 1/23/17

OAL DKT. NO. EDU 15090-16
AGENCY DKT. NO. 234-9/16

A.M., on behalf of minor child, G.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MINE HILL, MORRIS COUNTY,	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Administrative Law Judge's (ALJ) recommended decision for the reasons expressed therein. Accordingly, the petition and the cross-claim are dismissed without prejudice.

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/23/17
Date of Mailing: 1/23/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 15090-16
AGENCY DKT. NO. 234-9/16

A.M. o/b/o G.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MINE HILL, MORRIS COUNTY
Respondent.

A.M. appearing pro se

Marc H. Zitomer, Esq., for respondent Mine Hill Board of Education (Schenck Price Smith & King, attorneys)

Record Closed: December 1, 2016 Decided: December 9, 2016

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

A.M. appeals the determination of the Board of Education of the Township of Mine Hill (District) that his daughter G.M. is not entitled to a free public education in the Board's schools because she was not domiciled in the district for the 2016-2017 school year. The Board has filed a counterclaim seeking A.M.'s payment of tuition for the number of days G.M. attended the District's schools. A.M. contends that he has joint shared custody of G.M. and that her placement in Mine Hill is appropriate and lawful.

The District refused to allow petitioner to register his four-year-old daughter at the Canfield Elementary School as a new preschool student in or about late August 2016. A.M. and his ex-wife live in different municipalities but A.M. alleges he has physical custody 50% of the time and joint legal custody, and thus maintains that he had every right to register his child in the Mine Hill District. A.M. filed his petition of appeal directly with the Commissioner of Education on September 6, 2016. The Board filed its answer and counterclaim on September 30, 2016. The matter was then transmitted to the Office of Administrative Law for determination as a contested case on October 5, 2016.

I attempted to convene a telephone case management conference on the matter but had some difficulty with the contact information. Our office was advised that A.M. had moved and that G.M. would not be attending preschool in the District. Nevertheless, to date petitioner has not memorialized this action in writing. I am satisfied that he was sincere in his decision to not pursue this appeal in light of the confirmation from the District that G.M. is not presently enrolled. Furthermore, in light of the fact that G.M. might not have attended much if any days of preschool in the District, and in light of the withdrawal of the underlying claim, I **CONCLUDE** that it is appropriate to dismiss without prejudice any relief sought by respondent in its cross-claim.

ORDER

Accordingly, it is **ORDERED** that the petition of A.M. on behalf of G.M. is hereby deemed withdrawn without prejudice should he seek to register his daughter. It is further **ORDERED** that the cross-claim of Mine Hill Board of Education for any tuition that might be due and other relief should it have been determined that A.M. did not properly reside in the District is also deemed dismissed without prejudice to re-filing.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER FOR THE DEPARTMENT OF EDUCATION**, which by law is

authorized to make a final decision in this matter. If the Board of Trustees does not adopt, modify or reject this decision forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

December 9, 2016
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

Mailed to Parties: DEC 12 2016

CHIEF ADMINISTRATIVE LAW JUDGE

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

None

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

None

For Respondent:

R-1 Letter from Marc H. Zitomer, dated December 8, 2016

27-17

OAL DKT. NO. EDU 13976-15
AGENCY DKT. NO. 230-8/15

KENNETH RADWILL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/23/17

Date of Mailing: 1/23/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 13976-15
AGENCY DKT. NO. 230-8/15

KENNETH RADWILL,
Petitioner,
v.
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL, BURLINGTON COUNTY,
Respondent.

Kenneth Radwill, petitioner, pro se

R. Taylor Ruilova, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: December 12, 2016 Decided: December 15, 2016

BEFORE **PATRICIA M. KERINS**, ALJ:

Petitioner Kenneth Radwill filed a Petition of Appeal with the Commissioner of Education requiring respondent Board of Education of the Lenape Regional High School, to correct his disciplinary record. The Department of Education transmitted this matter to the Office of Administrative Law (OAL), where it was filed on September 10, 2015.

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

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

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

Therefore, I **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

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

December 15, 2016 — Patricia M Kerins

DATE — **PATRICIA M. KERINS**, ALJ

Date Received at Agency: December 15, 2016 (emailed)

Date Mailed to Parties: 12/16/16

PMK/mel
Attachment

COMEGNO
LAW GROUP, P.C.

R. TAYLOR RUILOVA, ESQUIRE
MEMBER NJ AND PA BARS

521 PLEASANT VALLEY AVENUE
MOORESTOWN, NJ 08057
888.313.4332
856.234.4114
856.234.4262 FAX
COMEGNOLAW.COM

December 12, 2016

VIA EMAIL (Maria.Lugo@oal.nj.gov) & REGULAR MAIL

The Honorable Patricia M. Kerins, A.L.J.
Office of Administrative Law
P.O. Box 049
Trenton, New Jersey 08625-0049

RE: Kenneth Radwill v. Lenape Regional High School District Board of Education
OAL Dkt. No. EDU 13976-15

Dear Judge Kerins:

As Your Honor will recall, our firm represents Respondent, the Lenape Regional High School District Board of Education ("Board"), in the above-captioned matter.

We are pleased to enclose a fully executed Settlement Agreement and General Release (the "Agreement") which is dispositive of all issues in dispute in the above-referenced matter. As the resolution in the Agreement does not include any financial component, no further Board approval is necessary in order to effectuate same.

Consistent with the terms of the Agreement, we respectfully request that Your Honor memorialize the terms of the Agreement in an Order and close this matter.

We thank Your Honor for your courtesies and consideration. If we can be of any further assistance, please let us know.

Respectfully Submitted,

R. TAYLOR RUILOVA

RTR/
Enclosure
c: Carol L. Birnbohm, Ed.D., Superintendent (via email w/encl.)
Kenneth Radwill (via email w/encl.)

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057
(856) 234-4114
(856) 234-4262 Fax

Attorneys for Respondent, Lenape Regional
High School District Board of Education

BY: R. TAYLOR RUILOVA, ESQUIRE

KENNETH RADWILL, Petitioner, v. LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DOCKET NO: EDU-13976-15 **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release ("Agreement") is entered into by and between the Lenape Regional High School District Board of Education (the "Board"), located at 93 Willow Grove Road, Shamong, NJ 08088, and Kenneth Radwill (the "Petitioner") who resides at 23 Hunters Lane, Southampton, NJ 08088, (the Board and Petitioner collectively referred to as the "Parties"). This Agreement is being entered into by the Parties to resolve and settle all outstanding issues involved in the instant dispute as follows:

WHEREAS, the Petitioner is a former student of the Lenape Regional High School District (the "District") who graduated from Seneca High School in 2011; and

WHEREAS, in 2015, a dispute arose regarding certain of Petitioner's pupil records, in particular, the reference to a disciplinary incident from 2011;

WHEREAS, Petitioner ultimately commenced the instant litigation seeking a modification and/or removal of certain of his pupil records; and

WHEREAS, after engaging in good faith settlement discussions, the Parties, without alleging or admitting anything, are desirous of arriving at an amicable resolution; and

WHEREAS, in consideration of the mutual promises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, the Parties enter into this Agreement to outline their agreement, release claims, and express the full and complete terms of same.

NOW, THEREFORE, THE PARTIES HEREBY AGREE THAT:

1. The Board shall remove the word "Criminal" from the reference on Petitioner's disciplinary record in connection with a 2011 disciplinary incident. The disciplinary record will instead refer to the incident as a "Threat."

2. Petitioner understands, acknowledges and agrees that the remainder of his pupil records shall remain unchanged.

3. Within thirty (30) days of the full execution of this Agreement, the Board shall provide Petitioner with a complete copy of his pupil records.

4. In consideration of the above, Petitioner hereby fully and forever releases the Board, its administrators, agents, board members, directors, employees, officers, representatives, and/or servants (collectively, the "Releasees") from any and all claims which Petitioner has or could have asserted against the Releasees in connection with the subject matter of this litigation, whether known or unknown, which have accrued up to and including the date of the full execution of this Agreement, to the extent permitted by applicable law. However, nothing in the release set forth in this paragraph shall be construed as a release or waiver of any claims between the Parties seeking to enforce any term or provision of this Agreement.

5. The Parties consent to the memorialization of this Agreement in an Order and

Decision from the Office of Administrative Law.

6. Neither Party will be considered to be a "prevailing party" for any purpose.

7. Each Party shall be responsible for their own attorneys' fees and costs incurred in connection with this matter.

8. The Parties acknowledge that they have read and understand the terms of this Agreement, that they have had the opportunity to have the Agreement reviewed by counsel if they so choose, and that they are entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

9. This Agreement shall be interpreted, enforced, and governed under the laws of the State of New Jersey. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the Parties.

10. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof, and supersedes all prior written or oral and all contemporaneous oral agreements, understandings, and negotiations.

11. This Agreement may only be amended in writing by way of a document signed by all Parties.

IN WITNESS WHEREOF, the Parties hereto set their hands and seals as of the dates set forth below.

FOR THE LENAPE REGIONAL HIGH SCHOOL DISTRICT
BOARD OF EDUCATION:

BY: _____ DATED: 12/12/16
Carol L. Birnbohm, Ed.D., Superintendent

FOR PETITIONER

Kenneth Radwill _____ DATED: 9/24/16
Kenneth Radwill

28-17

OAL DKT. NO. EDU 17184-16
(EDU 6707-16 ON REMAND)
AGENCY DKT. NO. 103-4/16

A.D., on behalf of minor children, P.D. and A.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Settlement Agreement (Agreement), and the Initial Decision on Remand of the Office of Administrative Law (OAL), have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. On November 14, 2016, the Commissioner remanded this matter to OAL based upon a determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge did not include the requisite Board of Education approval.

Upon review of the revised record on remand, the Commissioner finds that the Agreement now contains the requisite Board approval. According to the Agreement, the settlement payment is due on a date that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

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

IT IS SO ORDERED

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/23/17

Date of Mailing: 1/23/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 17184-16
AGENCY DKT. NO. 103-4/16
(Remand EDU 06707-16)

A.D. ON BEHALF OF MINOR CHILDREN P.D. AND A.D.,
Petitioner,
v.
MORRIS SCHOOL DISTRICT BOARD OF EDUCATION, MORRIS COUNTY,
Respondent.

A.D., petitioner, pro se

Marie-Laurence Fabian, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: December 13, 2016 Decided: December 14, 2016

BEFORE **MICHAEL ANTONIEWICZ,** ALJ:

On or about April 7, 2016, petitioner A.D. filed a Petition of Appeal with the Commissioner of Education challenging the residency determination by respondent Morris School District Board of Education (the Board). The Department of Education

transmitted this matter to the Office of Administrative Law (OAL), where it was filed on May 4, 2016, for determination as a contested case under OAL Dkt. No. EDU 06707-16.[1] Subsequently, the parties reached an amicable resolution of the matter. Counsel for the Board submitted a Settlement Agreement and the undersigned issued an Initial Decision Settlement on September 23, 2016.

Afterward, the Commissioner observed that the Board attorney did not sign the Settlement Agreement and/or no resolution was supplied approving the Settlement Agreement. The matter was remanded to the OAL where it was filed on November 14, 2016, under OAL Dkt. No. EDU 17184-16. The undersigned held a telephone conference; thereafter, under letter dated December 12, 2016, counsel for the Board submitted the attached Settlement Agreement.

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

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

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

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

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

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

[1] A typographical error on the previous Initial Decision Settlement issued on September 23, 2016, was found regarding the Agency Dkt. No. that should have been 103-4/16 not 667-11/10.

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

December 14, 2016
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: 12-15-16

Date Mailed to Parties: DEC 15 2016

Laura Dudas
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

jb

SETTLEMENT AGREEMENT

2016 DEC 13 P 4:25

This settlement agreement ("Agreement") made
by and between

Morris School District Board of Education
(Hereinafter referred to as "Morris")

AND

A.D. o/b/o P.D. & A.D.
(Hereinafter referred to as "A.D.")

WITNESSETH:

WHEREAS, Morris is duly organized as a public school district under the laws of the State of New Jersey; and

WHEREAS, A.D. was found by Morris to have enrolled his sons in Morris School District Public Schools, despite not being domiciled in the Morris School District; and

WHEREAS, A.D. appealed that decision to the Commissioner of Education in a matter bearing Agency Reference Number 103-4/16 and OAL Docket Number EDU 06707-2016N; and

WHEREAS, a hearing was commenced before the Office of Administrative Law on August 29, 2016 during which A.D. provided documentation supporting domicile in the Morristown for the first time; and

WHEREAS, in order to avoid the time and expense of continuing the litigation, the parties agreed to enter into a settlement agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises hereinafter set forth, the parties desire to enter into the within Settlement Agreement (the "Agreement") as follows:

1. **Payment:** On or before September 15, 2016, A.D. shall pay the sum of three thousand dollars ($3,000.00) to Morris.

2. **Withdrawal and Release.** A.D. agrees to withdraw his claims against Morris and Morris releases its claims for tuition for the 2015-2016 school year. Morris acknowledges that A.D. has provided documentation supporting his sons' eligibility for enrollment in the Morris School District at this time. A.D. herein releases and gives up any and all civil and administrative claims and rights he may have against Morris for any damages or injuries, including any civil claim for compensatory damages, punitive damages, or any damages or injuries to A.D. arising out of the residency/domicile or education of the minor children A.D. and P.D. during the time period they were attending school in the Morris School District, whether known or unknown, that have taken place through the date of this Agreement.

3. **Non-Admission of Liability**. Nothing contained in this Agreement is intended, nor shall be construed: (i) to waive or release any future claim arising after the date this Agreement is signed by both parties; or (ii) to limit either party's right to enforce the terms of this Agreement. Each party acknowledges and agrees that this Agreement is a compromise of disputed claims and neither this Agreement, nor any consideration provided pursuant to this Agreement, shall be taken or construed to be an admission or concession by either party of any kind with respect to any fact, liability, or fault.

4. **Severability.** Should any provision of this Agreement be declared illegal or unenforceable by any court of competent jurisdiction and cannot be modified to be enforceable, such provision shall immediately become null and void, leaving the remainder of this Agreement in full force and effect.

5. **Authorization.** Each individual signing this Agreement warrants and represents that he or she has the full authority and is duly authorized and empowered to execute this Agreement on behalf of the party for which he or she signs.

6. **Jurisdiction.** This Agreement shall be governed by the laws of New Jersey, and the Superior Court of New Jersey, Morris County, shall have jurisdiction over, and be the proper venue for, any disputes arising out of this Agreement.

7. **Construction.** The parties have participated fully in the review of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. The language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any party.

8. **Successors.** This Agreement shall inure to the benefit of the parties hereto, and their respective officers, directors, employees, attorneys, heirs, executors, administrators, successors and assigns.

9. **Amendment.** This Agreement may only be amended by a writing signed by all of the parties to this Agreement.

10. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties and fully supersedes any and all prior contracts or agreements between the parties, and it likewise fully supersedes any and all other conflicting agreements or understandings between the parties.

Morris School District Board of Education

_____
A.D.
Dated: _____

_____
By: Mackey Pendergrast,
Superintendent

Dated:_____

_____
Anthony LoFranco,
Business Administrator/Board Secretary

Dated:_____

M.L. Fabian
Marie-Laurence Fabian, Board Attorney

Dated: 11/30/16

9. **Amendment.** This Agreement may only be amended by a writing signed by all of the parties to this Agreement.

10. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties and fully supersedes any and all prior contracts or agreements between the parties, and it likewise fully supersedes any and all other conflicting agreements or understandings between the parties.

Morris School District Board of Education

By: Mackey Pendergrast,
Superintendent

Dated: 12/1/16

Anthony LoFranco,
Business Administrator/Board Secretary

Dated: 12/1/16

Marie-Laurence Fabian, Board Attorney

Dated: 11/30/16

A.D.
Dated: _____

9. **Amendment.** This Agreement may only be amended by a writing signed by all of the parties to this Agreement.

10. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties and fully supersedes any and all prior contracts or agreements between the parties, and it likewise fully supersedes any and all other conflicting agreements or understandings between the parties.

A.D.
Date: 9-14-2016

Morris School District Board of Education

By: Mackey Pendergrast,
Superintendent

Dated: 9/1/2016

Anthony LoFranco,
Business Administrator/Board Secretary

Dated: 9/1/2016

29-17

OAL DKT. NO. EDU 12760-16
(EDU 05774-16 ON REMAND)
AGENCY DKT. NO. 61-2/16

J.T., ON BEHALF OF MINOR CHILDREN, J.T., A.T., AND B.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the President of the South Brunswick Board of Education signed the agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf – as required by *N.J.A.C.* 6A:3-1.13 under these circumstances – nor is the resolution attached to the settlement agreement itself. In the alternative, the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating the Board President to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

Additionally, the Commissioner notes that the settlement makes reference to a monthly payment intended to begin on August 15, 2016. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the settlement agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/23/17

Date of Mailing: 1/23/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12760-16
AGENCY DKT. NO. 61-2/16

J.T. on behalf of minor children, J.T.,
A.T. and B.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY

Respondent.

J.T., petitioner, pro se

Adam Herman, Esq., for respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: December 2, 2016 Decided: December 6, 2016

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

On April 15, 2016, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A.

52:14F1 to -13. The matter was scheduled for hearing on June 20, 2016 and during that time, the parties agreed to settle the matter. A signed copy of the Settlement Agreement and Release indicating the terms of settlement was forwarded to the undersigned on July 13, 2016 and is attached hereto.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

December 6, 2016

DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 12-8-16

Date Mailed to Parties: DEC 8 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

SETTLEMENT AGREEMENT AND RELEASE

J.T. o/b/o J.T., A.T. and B.T. v. South Brunswick Board of Education, Middlesex County,
Agency Docket No. 61-2/16
OAL Docket No.: EDU 05774-2016N

2016 DEC -2 P 5:55

This Settlement Agreement ("Agreement") is made this ____ day of June, 2016, by and between Petitioner J.T. ("J.T.") o/b/o J.T., A.T., and B.T. ("Children"), and Respondent/Cross-Petitioner South Brunswick Board of Education ("Board") (hereinafter collectively referred to as the "Parties").

WHEREAS, on or about February 26, 2016, J.T. filed a Pro Se Residency Appeal with the Commissioner of Education, which was docketed as 61-2/16 ("Petition"), challenging the Board's August 8, 2016 determination that J.T.'s Children did not reside in South Brunswick during the 2015-16 school year; and

WHEREAS, on or about April 12, 2016, the Board filed an Answer to J.T.'s Petition and also filed a Cross-Petition for tuition costs for J.T.'s Children; and

WHEREAS, the matter was transmitted to the Office of Administrative Law for a hearing before the Honorable Jeffrey Gerson, A.L.J. on June 20, 2016, which was docketed as EDU 05774-2016N; and

WHEREAS, the Parties intend to adopt, by way of compromise, without any admission of liability, all claims which were either raised or could have been raised in the Petition and Cross-Petition ; and

NOW THEREFORE, in consideration of the foregoing and of the mutual agreements contained herein, and intending to be legally bound, the Parties agree as follows:

1. This Agreement sets forth all the terms and conditions of the Parties' agreement.
2. J.T. agrees to pay the Board a total sum of thirteen thousand dollars ($13,000.00).

g. J.T. understands that his obligation to pay the full sum of thirteen thousand dollars ($13,000.00) in accordance with this Agreement shall remain in effect even if J.T. and/or his Children does not reside in South Brunswick.

3. J.T. has informed the Court that he is in the process of renting an apartment in South Brunswick, and that his Children will be residing with him in the South Brunswick apartment. As such, J.T. agrees to provide the Board with a copy of the fully executed lease agreement if and when he registers his Children for school in accordance with Paragraph 4.

4. J.T. understands that he is required to register his Children in the South Brunswick School District for the 2016-17 school year, provide sufficient proof of residency and comply with all Board Residency/Registration requirements and policies and student residency laws at all times.

5. In exchange for the promises set forth above, J.T. agrees to dismiss the instant Petition and the Board agrees to dismiss its Cross-Petition.

6. Additionally, J.T. agrees to and hereby releases and gives up any and all claims and rights which he may have against the Board (including any of its officers, employees, agents and representatives). This releases all claims of J.T. and his Children, including those of which J.T. is not aware and those not expressly mentioned in this Release. This Release applies to claims resulting from anything which has happened up until and through the date of execution of this Agreement by J.T.

7. The Parties agree that this Agreement, and all of its terms, are and will remain confidential to the maximum extent possible by law. J.T. is expressly forbidden from discussing this Agreement with any person, other than his accountants, tax advisers, and attorney ("permitted disclosures"), and any other individual or entity as necessary to

a. Said amount shall be paid by J.T. over the course of sixty-one (61) monthly installment payments.

b. All monthly payments by J.T. shall be in the form of a check or money order made payable to the "South Brunswick School District."

c. All monthly payments shall be sent by J.T. to:

South Brunswick School District
P.O. Box. 181
Monmouth Junction, New Jersey 08852
Attention: School Business Administrator

d. The first payment by J.T. shall be in the amount of one thousand dollars ($1,000.00), and is due to the Board on or before August 15, 2016.

e. The remaining balance of twelve thousand dollars ($12,000.00) shall be paid to the Board in sixty (60) monthly installments of two hundred dollars ($200.00) each, beginning in September 2016. Each of these monthly sixty (60) payments is due to the Board on or before the 5th of each month.

f. If the initial monthly payment is not received by the Board by August 25, 2016, or if any subsequent payment is not received by the Board by the 15th of the respective month, the Board shall send J.T. a letter via certified and regular mail informing J.T. of his default of this Agreement. If J.T.'s default is not cured within five (5) days of the date of the Board's letter, the Board shall apply to the Office of Administrative Law or New Jersey Superior Court for a default judgment in the amount of thirty thousand dollars ($30,000), minus the amount already paid by J.T., if any. If it becomes necessary for the Board to seek a default judgment, J.T. agrees that the Board shall be entitled to counsel fees and costs associated with that application.

implement the Agreement or to which he is legally obligated to respond ("legally-required disclosures").

8. This Agreement may not be modified, altered, changed, discharged, terminated or waived, except upon express written consent of the Parties.
9. This Agreement shall not serve as a precedent for any other matter.
10. The Parties acknowledge that they have entered into this Agreement voluntarily and hereby sign it without duress or coercion, and with the opportunity to consult counsel.
11. This Agreement shall be governed by the laws of the State of New Jersey.
12. The Parties agree that this Agreement may be signed in counterparts and that facsimile of signatures will have the same force and effect as original signatures.
13. The Agreement is subject to the formal approval of the Board

PETITIONER
GIROLAMO TOMASELLI (A/K/A JERRY TOMASELLI)

By: _____

Dated: 8/31/16

RESPONDENT/CROSS-PETITIONER
SOUTH BRUNSWICK PUBLIC SCHOOLS

Stephen F. Parker

By: _____

Dated: 8/31/16

RIKER DANZIG SCHERER HYLAND & PERRETTI LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
Attorneys for State-Operated School District of the City of Newark

In re	NEW JERSEY DEPT. OF EDUCATION AGENCY DKT. NO. 302-10/15
MICHAEL WILSON	
and the	**SETTLEMENT AGREEMENT**
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	

This Settlement Agreement and General Release ("Agreement") is made by and between the STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, with an address at 2 Cedar Street, Newark, New Jersey 07102, ("School District"), and MICHAEL WILSON ("Employee" or "Wilson") (collectively, the "Parties").

WHEREAS Employee is a tenured teaching staff member employed by the School District as a teacher;

WHEREAS the State District Superintendent of the School District ("Superintendent") certified tenure charges of inefficiency to the Commissioner of Education of New Jersey, captioned *In the Matter of Tenure Charge against Michael Wilson, State-operated School District of the City of Newark, Essex County* ("Tenure Charge"); and such charge was assigned Docket No. 302-10/15; and the Commissioner of Education referred the matter to Arbitrator Lewis R. Amis ("Arbitrator") for a hearing;

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

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. This Agreement shall be and is subject to final approval by the Arbitrator, and shall be effective only upon the School District's receipt of a copy of this Agreement executed by the Arbitrator to indicate his approval. The effective date of this Agreement

("Effective Date") shall be such date of the School District's receipt of this Agreement, approved by the Arbitrator, or the eighth day after the School District's receipt of this Agreement, executed by Employee, whichever is later, provided that Employee has not exercised his right to rescind this Agreement in accordance with paragraph 13 below. In the event of disapproval by the Arbitrator or any failure to act on such approval, this Agreement shall be void and of no effect, and both Parties shall have the right to pursue any and all matters relating to the other, including but not limited to the Tenure Charge.

2. Wilson hereby agrees to retire from his tenured position effective February 1, 2017. Attached as Exhibit A is a copy of Wilson's signed Letter of Retirement. Wilson's separation from employment will be deemed a voluntary retirement in good standing. Upon inquiry from any third parties, the District will only confirm Wilson's employment, position, title, salary and dates of employment.

3. Wilson also agrees to withdraw with prejudice any and all claims or suits that he may have previously filed against the District that are still pending in any and all courts and/or before any and all agencies, with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the District and Wilson. Should Wilson fail to submit letters of withdrawal for any such pending claims or suits, this Settlement Agreement will serve as Wilson's formal written notice of withdrawal of those pending claims or suits, except for workers' compensation claims.

4. In exchange, commencing on November 1, 2016, Wilson will be retroactively placed on administrative leave with pay until he retires. He will be issued back pay in an amount equivalent to the salary he would have received as an active employee from November 1, 2016, to the effective date of his retirement, February 1, 2017. The back pay that Wilson receives as a result of being retroactively placed on administrative leave with pay will be minus all standard salary and tax deductions. Other than the salary, back pay, and benefits that Wilson receives until the date of his retirement, as well as the value of any remaining accumulated sick days that he may cash out after retirement pursuant to

the terms of the applicable Collective Bargaining Agreement, Wilson will not receive any further monies from the District in exchange for this Settlement Agreement.

5. The District also agrees not to pursue any disciplinary action, including termination of Wilson's employment, so long as this Settlement Agreement remains in effect and is not voided by any court or administrative agency of competent jurisdiction. However, if the Settlement Agreement is voided, the District retains the right to pursue disciplinary action against Wilson, including termination from the District.

6. As of the date of his retirement, all of Wilson's employment rights, including but not limited to salary, insurance coverage, tenure and seniority, will permanently end.

7. Wilson agrees that he will not apply for reemployment with the District at any time. Specifically, Wilson will be considered to have retired permanently from his tenured position as a result of this Settlement Agreement. If Wilson does apply for reemployment with the District and is approved for employment in any capacity, the terms of this Settlement Agreement shall control and be grounds for immediate termination of Wilson's employment.

8. The School District agrees to dismissal of the Tenure Charge upon approval of this Agreement by the arbitrator.

9. This Settlement shall not constitute a precedent in any matters involving other employees.

10. Except as noted above, Wilson waives all claims of any nature against the District with regard to his employment with and/or his separation from the District, including fees, or other monetary relief, with the exception of workers' compensation claims.

11. By entering into this Settlement Agreement, and in exchange for good consideration as set forth in Paragraphs 4 and 5 above, the sufficiency of which is hereby acknowledged by the parties, Wilson releases and discharges the District, the State District Superintendent, its Advisory Board of Education and its Advisory Board members, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or

rights that he has or may have against the District regarding his employment with the District. This includes without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Wilson's employment with the District and separation from the District except for workers' compensation claims. It specifically includes, without limitation, all claims which Wilson may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract or collective bargaining/ contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on his employment by and the termination of his employment with the District, including, but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorney's fees, costs, and/or future wage loss, except for workers compensation claims. Wilson

agrees to save, hold harmless and indemnify the District for any legal costs and attorneys' fees associated with the enforcement of the terms of this Settlement Agreement should enforcement become necessary.

12. Notwithstanding Paragraph 11 of this Settlement Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 11, Wilson agrees not to seek or accept any resulting relief whatsoever.

13. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Wilson of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Settlement Agreement. Accordingly, by executing this Settlement Agreement, Wilson acknowledges that he: (i) fully understands the terms and conditions of this Settlement Agreement; (ii) has consulted with an attorney to review the Settlement Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Settlement Agreement; and (v) has seven (7) days from the date of the execution of this Settlement Agreement to revoke it. Wilson understands that he may rescind this Settlement Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the seven-day period.

14. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

15. This Settlement Agreement constitutes the full agreement between the parties, and shall be construed and enforced in accordance with New Jersey law.

16. If any provision or portion of a provision of this Settlement Agreement is held by a court of competent jurisdiction, or determined under applicable federal or state law to be

invalid, void, or unenforceable, the remaining provisions or remaining portions of a provision will continue and remain in full force and effect.

17. Pursuant to N.J.A.C. 6A:3-5.6, the Parties acknowledge and represent that:

a. Documentation of the tenure charge of inefficiency has been presented in the Statement of Evidence accompanying the Notice of Tenure Charge.

b. Without waiving any claims or defenses, the Parties have agreed to settle this matter in order to avoid the cost and expense of further legal action.

c. Both the charged and charging parties consent to the settlement set forth herein.

d. Employee enters into this agreement with a full understanding of his rights.

e. Because it allows the School District to avoid the cost, expense and uncertainty of further legal action, the proposed settlement is in the public interest.

f. Employee has been advised that the Commissioner has a duty to refer some tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

Dated: 1/17/17

MICHAEL WILSON

Dated: 1/17/17

NICHOLAS POBEREZHSKY, ESQ.
Attorney for Michael Wilson

Dated: 1/19/17

CHRISTOPHER CERF
State District Superintendent

Dated: 1/19/17

TERESA L. MOORE, ESQ.
Attorney for State-operated School District
of the City of Newark

CERTIFICATION

I, MICHAEL WILSON, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 1/17/17

MICHAEL WILSON

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b)

Date: 1/19/17

TERESA L. MOORE, ESQ.

Riker Danzig Scherer Hyland & Perretti LLP
Attorneys for State-operated School District
of the City of Newark

APPROVED:

Dated: January 20, 2017

LEWIS R. AMIS, Arbitrator

EXHIBIT A

Christopher Cerf
State District Superintendent
Newark Public Schools
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102

RE: MICHAEL WILSON
NOTICE OF RETIREMENT

Dear Superintendent Cerf:

I hereby notify the State-operated School District of the City of Newark ("School District") of my intention to retire from employment with the School District, effective on February 1, 2017.

Dated: 1/17/17

MICHAEL WILSON

32-17

TRACEY PITTS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – formerly employed as a tenured teacher by the respondent school district – alleged that her due process and tenure rights were violated when the Board unlawfully terminated her employment. The Board contended that petitioner had voluntarily left its employment as a result of an agreement between the two parties; the petitioner asserted that she had never entered into the agreement with the Board, and argued that tenure charges would need to be filed in order to remove her from her tenured position. The matter was litigated in Superior Court, where the Board sought an order enforcing the terms of a settlement agreement it claimed to have entered into with petitioner; under the terms of the settlement, the Board contended that petitioner had agreed to resign, while the Board agreed not to pursue tenure charges against petitioner. The Superior Court Judge (SCJ) ruled that the parties had entered into a binding agreement, under the terms of which the petitioner had agreed to resign effective October 31, 2015, and the Board had agreed not to pursue tenure charges against her.

The ALJ found, *inter alia,* that: the Commissioner does not consider cases in which the issue involves contractual disputes, as these claims do not arise under the school laws; the SCJ determined that a binding agreement had been consummated in this case; the petitioner's claims herein arose from a provision of the contract between the parties, *i.e.*, the settlement agreement, which details a procedure by which petitioner could revoke her acceptance of the agreement; petitioner's contention that she effectively invoked her right under the settlement to revoke her acceptance through written communications – and therefore remains a tenured employee who can only be removed through tenure charges – is without merit; the Order of the Superior Court in this matter effectively ends the controversy, as the SCJ determined that the settlement – under which petitioner agreed to resign her position – was binding; and therefore no violation of petitioner's tenure rights occurred. Accordingly, the ALJ concluded that the petition must be dismissed.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision, with modification. The Commissioner concurred with the ALJ that the petitioner's claims in this matter arose from a provision in the contractual agreement between the parties, and accordingly can only be properly raised before the Commissioner if the petitioner properly revoked her acceptance of the settlement agreement. As there remains a dispute between the parties as to whether petitioner revoked her acceptance, the Commissioner cannot conclude that petitioner has tenure rights that were violated by the Board. Accordingly, the petition was dismissed without prejudice.

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

January 30, 2017

OAL DKT. NO. EDU 23-16
AGENCY DKT. NO. 375-12/15

TRACEY PITTS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and respondent's reply thereto – submitted in accordance with *N.J.A.C.* 1:1-18.4 – were also considered by the Commissioner. Upon a comprehensive review of the record in this matter, the Commissioner adopts the Administrative Law Judge's (ALJ) decision, as modified herein.

The ALJ found that petitioner's claims in this matter arose from a provision[1] in an agreement between the parties (Agreement), and noted that the Commissioner does not consider cases in which the issues involve contractual disputes.[2] The ALJ explained, whether there was revocation of petitioner's acceptance of the Agreement under the subject provision involved

[1] The relevant provision – Section 6(e) – provides in pertinent part:
[Pitts] has been advised that during the seven (7) day period following her execution of the Settlement Agreement and the Release, she may revoke her acceptance of this Agreement by delivering written notice through her legal counsel . . . and the Settlement Agreement and the Release shall not become effective or enforceable until after the revocation period has expired.

[2] Presently, there is an outstanding contractual dispute as to whether petitioner revoked the Agreement. Petitioner, who was scheduled to sign the Agreement on October 23, 2015 but failed to show up at her attorney's office, has maintained that on October 26, 2015, and then again on October 29, 2015, petitioner's counsel advised the Board Attorney that Pitts no longer wished to sign the Agreement or resign from her position in the District. Thereafter, following the Superior Court Judge's July 22, 2016 ruling – finding that the parties entered into an enforceable agreement – Pitts sent a letter to the Board on July 28, 2016, stating that she was revoking her acceptance of the Agreement pursuant to Section 6(e).

interpretation of the terms of the Agreement, which is beyond the purview of the Commissioner. The ALJ further found that the Superior Court Judge's (SCJ) granting of the Board's motion to enforce the Agreement meant that either the SCJ did not find effective revocation of the Agreement or that the revocation period had elapsed. The ALJ explained that petitioner's disagreement with the SCJ's decision should have been appealed to the Appellate Division as there is no remedy available through the Commissioner. The ALJ concluded that: petitioner agreed to resign from her position pursuant to the Agreement, which became effective on October 31, 2015; respondent did not violate petitioner's tenure rights; and the SCJ's decision effectively ended the controversy.

The exceptions substantially reiterate the substance of petitioner's submissions at the OAL, recasting the arguments therein to support her contention that the ALJ erroneously concluded that the Board did not violate Pitts' tenure rights. Specifically, petitioner maintains that the Board wrongfully terminated Pitts in violation of her tenure rights. Petitioner further argues that the ALJ improperly inferred that her revocation of the Agreement was not effective or that the revocation period had expired based on the fact that the SCJ ruled in favor of the Board to enforce the Agreement. Petitioner notes that the SCJ stated during oral arguments that the parties retained their rights under the Agreement. In reply, respondent also reiterated the positions advanced in its submissions at the OAL. Respondent contends that Pitts was not terminated; instead, she resigned pursuant to the Agreement. Respondent further submits that, contrary to petitioner's assertion that she retained all her rights under the Agreement – including Pitts' right to revoke – the SCJ rejected those arguments and ruled in favor of the Board.

As a preliminary matter, the Commissioner finds that petitioner's claim – that the Board violated her tenure rights – can be properly raised only if petitioner effectively revoked

her acceptance of the Agreement.[3] The dispute between the parties as to whether Pitts revoked her acceptance of the Agreement remains unresolved. The contention over whether there was revocation of petitioner's acceptance does not arise under the school laws. Such dispute clearly implicates contract laws; therefore, the appropriate venue for adjudication of this issue is the Superior Court of New Jersey. In other words, whether Pitts revoked her acceptance of the Agreement will determine if she can bring a claim pursuant to *N.J.S.A.* 18A:6-10 *et seq.*, and the SCJ has proper jurisdiction to resolve the discord between the parties relating to petitioner's revocation of acceptance.

Petitioner's contention that the ALJ improperly inferred that Pitts' revocation was ineffective, does require discussion. Petitioner argues that her right to revoke the Agreement was not extinguished by the SCJ's ruling because the enforcement of the Agreement meant she had the right to revoke pursuant to Section 6(e). The Board contends that the SCJ rejected petitioner's repeated arguments that Pitts "could or had revoked" the Agreement, and ruled in favor of the Board. In the Initial Decision, the ALJ concluded that the SCJ's ruling in favor of the Board suggests that Pitts did not or could not revoke her acceptance of the Agreement. A review of the limited record of the Superior Court matter,[4] however, indicates that the issue of revocation was not explicitly addressed by the SCJ. In fact, when petitioner raised the issue of revocation in her arguments during the hearings and included it as part of her motion for reconsideration, the SCJ did not address revocation.

During oral arguments on July 22, 2016, the SCJ stated in relevant part:

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[3] If petitioner effectively revoked the Agreement, it would mean that Pitts did not resign from her teaching position in the District.

[4] The parties have submitted copies of relevant pleadings and correspondence, as well as excerpts from transcripts of the hearings on January 8, 2016 and July 22, 2016.

> [T]he contract as it was drafted on October 23rd, 2015 is the embodiment of that entire agreement . . . That written agreement, that written agreement is the agreement, so you know, even though she didn't sign it, if you're asking me well, what did you just rule on, what are my rights, they're all contained in that agreement that she did not sign because [there was a] meeting of the minds . . .
>
> Transcript of Motion Hearing, July 22, 2016, pg. 17-18.

When the Board Attorney sought clarification, inquiring whether the ruling on the Agreement included all the provisions, the SCJ responded, "[a]ll the provisions in that agreement." *See* Transcript of Motion Hearing, July 22, 2016, pg. 18. It is evident from the transcript that the SCJ simply ruled on whether there was a binding agreement between the parties. The SCJ then entered an order enforcing the Agreement. Implicit in such a ruling is the interpretation reached by the ALJ: that the Agreement was not revoked by Pitts. However, the SCJ clarified during the hearing that the rights of the parties were as they appear in all the provisions of the written Agreement. It would, therefore, follow that petitioner had a right to revoke her acceptance of the Agreement. Notwithstanding, the SCJ did not explicitly address whether petitioner had (on October 26, 2015) or could have (on July 28, 2016) revoked her acceptance of the Agreement; nor did the SCJ hold that petitioner's right to revoke was no longer valid. As such, without explicit finding of the Superior Court of New Jersey that petitioner's right to revoke the Agreement had extinguished or that her alleged revocation was insufficient, it would be improper for the Commissioner to conclude such. Similarly, and as discussed above, whether petitioner revoked her acceptance of the Agreement is an issue to be determined by the Superior Court of New Jersey.[5]

[5] The SCJ's decision is presently on appeal. Although petitioner noted in her December 14, 2016 letter to the ALJ that the issue of revocation cannot be addressed on appeal because it was not argued in any of the moving papers or during oral argument, the Commissioner's review of the transcripts from January 8, 2016 and July 22, 2016, and petitioner's motion for reconsideration indicate that the issue of revocation was raised but not addressed by the SCJ.

Since petitioner's right to bring this action would only arise if there was proper revocation of the Agreement – and there is a dispute as to whether petitioner revoked her acceptance of the Agreement – the Commissioner cannot determine whether Pitts effectively revoked her acceptance of the Agreement. For this reason, the Commissioner cannot conclude that petitioner has tenure rights in the District that were violated by the Board. Accordingly, the Initial Decision of the OAL – as modified – is adopted as the final decision in this matter, and the petition is hereby dismissed without prejudice.

IT IS SO ORDERED.[6]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/30/17

Date of Mailing: 1/31/17

[6] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 23-16
AGENCY DKT. NO. 375-12/15

TRACEY PITTS,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,

Respondent.

Morrison Kent Fairbairn, Esq., for petitioner (Michael A. Armstrong and Associates, attorneys)

Joseph G. Antinori, Esq., for respondent (Brown and Connery, attorneys)

Record Closed: November 17, 2016 Decided: December 16, 2016

BEFORE **JEFF S. MASIN,** ALJ t/a:

Tracey Pitts was employed by the Camden City Board of Education as a tenured teacher. On December 29, 2015, she filed a Notice of Motion for Emergent Relief with the Commissioner of Education, seeking a determination that the Board had unlawfully terminated her employment without affording her the rights that she was entitled to as a tenured employee. In essence, the Board, which was desirous of separating Ms. Pitts from the District, considered that she had voluntarily left its employment as a result of an agreement between the Board and Pitts, while Ms. Pitts asserted that she had never

entered into any such agreement and that the Board could only attempt to remove her by filing tenure charges. Emergent relief was denied by Order issued on January 22, 2015, by Honorable Robert Bingham II, ALJ. Thereafter, the parties pursued litigation in the Superior Court, in which the Board of Education sought an order enforcing the terms of what it believed to be a binding settlement agreement, under the terms of which Ms. Pitts had agreed to resign effective October 31, 2015, and the Board had agreed not pursue tenure charges against her. In response to the Board's action, Ms. Pitts moved, and the Board cross-moved, for summary decision. At the conclusion of oral argument, held on July 22, 2016, Honorable Anthony M. Pugliese, J.S.C., ruled that the parties had entered into a binding agreement, the terms of which were embodied in a writing submitted to counsel for Ms. Pitts on October 23, 2015. Although Pitts had never executed this agreement, Judge Pugliese nevertheless found that the

> two attorneys representing these entities had a meeting of the minds. They were authorized to represent the entities and they did so, and the deal was embodied fully in the document that was revised by Mr. Antinori and sent back to Ms. Johnson-Stokes in advance of Ms. Johnson-Stokes meeting with Ms. Pitts that was scheduled for sometime on October 23rd.

Judge Pugliese's decision was embodied in two Orders, both issued on July 22, 2016. One Order denied Pitts' summary decision motion and the other granted the Board's cross-motion. On the form Order submitted by the Board, the Judge wrote the following text: "Further Ordered that the terms of the settlement are contained in the attached agreement."

Following the issuance of these Orders, Ms. Pitts sought reconsideration of the judge's ruling, which was denied by Judge Pugliese in September 2016. His Order simply states that the denial is based upon reasons stated on the record, which apparently was a reference to the reasons he stated on July 22, as noted above.

Despite the outcome of the Superior Court proceedings, which resulted in the determination that Pitts had indeed entered into a binding settlement agreement with the Board under which she was to resign her tenured position, Ms. Pitts continues to argue in this administrative proceeding that the Board has violated her tenure rights.

Upon Judge Bingham's appointment to the Superior Court, the case was transferred to this judge, serving on recall.

Ms. Pitt's claim arises from a provision of the contract between the parties, for of course the settlement agreement is just that, a contractual arrangement. The provision contained on page 3 of the written "Settlement Agreement and Release," at "6," refers to the "Older Workers Protection Act" and the "Age Discrimination in Employment Act," waives all claims under each and releases the Board from such claims and the states

> (e) She has been advised that during the seven (7) day period following her execution of the Settlement Agreement and the Release, she may revoke her acceptance of this Agreement and the Release, she may revoke her acceptance of this Agreement by delivering written notice through her legal counsel for Company (as identified below), and that the Settlement Agreement and the Release shall not become effective or enforceable until after the revocation period has expired.:

Pitts contends that through written communications sent prior to the expiration of the seven days following the October 23, 2015, date on which Judge Pugliese determined that a binding agreement had been consummated, and/or through a letter sent within seven days of the judge's July 2016 Order deciding that a binding contract had been entered into and was to be enforced, she effectively invoked her right under the agreement to revoke her acceptance of that agreement. Having done so, she did not agree to resign, and remained a tenured employee. As such, if the Board still desires to separate her from her tenured status, it must file tenure charges with the Commissioner. In the meantime, she must be returned to the Board's payroll.

In response, the Board argues that Judge Pugliese's Order of July 22 determined that the Agreement was binding, and that his Order granting the Board's request to enforce the settlement precludes any need to take any further action vis a vis Ms. Pitts, who has resigned her position as per the Settlement Agreement and Release.

I have considered the positions of the parties, as expressed in their briefs, attached documents, partial transcript of the Superior Court discussion and oral arguments, and have examined the briefs filed in Superior Court in order to assure that I

had sufficient understanding of what was before Judge Pugliese. In regards to these latter documents, in light of the legal conclusion reached herein, they are deemed not to be of significance to the outcome.

It should first be noted that the Commissioner of Education does not consider cases in which the issue involves contractual disputes. These claims do not arise under the school laws, but under principles of common or statutory law. Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 424-25 (App. Div. 2002). Whether there was an effective revocation of acceptance of the Agreement under the provision previously quoted would appear to involve issues arising under the specific contract provisions and involving possible interpretation of contract terms, and, as such, is not a proper subject for the Commissioner to consider. However, more fundamentally, a simple reading of the very provision notes that it states that the agreements embodied in the written terms "shall not become effective or enforceable until after the revocation period has expired" (bolding not in the original). Thus, in light of the fact that Judge Pugliese granted the Board's motion to enforce the terms of the settlement that he found had been entered into, it must perforce be the case that he did not see any basis for refusing to do so due to an effective revocation of acceptance by Pitts. He had to have concluded that the revocation period had passed without effective action to revoke, which had it occurred would have precluded enforcement under the very provision itself. If Ms. Pitts believed that the judge's decision to enforce the settlement was incorrect, either because there was no binding agreement or because she had properly revoked her acceptance of the agreement in a timely fashion and thereby precluded enforcement, and in light of the judge's refusal to reconsider and overturn his July 22, Order, she should have appealed his ruling to the Appellate Division. But there is no recourse to the Commissioner in this case. I **CONCLUDE** that as a matter of law the Superior Court ruling effectively ends the controversy. Ms. Pitts agreed to resign her position, and her resignation must be deemed to have been effective, as the Settlement Agreement states, on October 31, 2015. Thus, I **CONCLUDE** that there has been no violation of her tenure rights by the Board. Her petition must therefore be **DISMISSED**.

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

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

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

December 16, 2016
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency: 12/16/16

Date Mailed to Parties: 12/16/16

mph

EXHIBITS:

Briefs and attachments on Motion for Summary Decision:

For petitioner Tracie Pitts:

March 8, 2016 and August 11, 2016

For respondent Board of Education:

April 12, 2016 and August 10, 2016

Additional exhibits:

Partial transcript of motion hearing, July 22, 2016, Superior Court, Law Division

33-17

OAL DKT. NO. EDU 18223-16
AGENCY DKT. NO. 304-12/16

M.V., on behalf of minor child, F.H.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

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

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/30/17
Date of Mailing: 1/31/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 18223-16
AGENCY DKT. NO. 304-12/16

M.V. ON BEHALF OF MINOR CHILD, F.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,
Respondent.

Pasquale Marago, Esq., for petitioner (Law Offices of Pasquale Marago, attorney)

David Rubin, Esq., for respondent

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

Petitioner, M.V. on behalf of minor child, F.H., a high school senior, brings this emergent relief application to the Commissioner of Education. It seeks an order returning F.H. to respondent's school without the requirement of a psychological psychiatric assessment. It also seeks the clearing of F.H.'s school records, that F.H. be provided with temporary home instruction, and that F.H. be transferred to the Hillsborough School District at the expense of the Manville Board of Education. Petitioner argues that on September 26, 2016, respondent over-reacted to the discovery

of gun control and school incident materials found on a flash drive owned by petitioner. Respondent maintains the school took no action. M.V. withdrew F.H. from school.

On December 2, 2016, petitioner made this application for emergent relief to the New Jersey State Commissioner of Education. On December 5, 2016, the New Jersey State Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL), pursuant to N.J.A.C. 1:1-8.2. The OAL conducted oral argument on the application on December 14, 2016.

FACTUAL DISCUSSION

A teacher found a flash drive after school hours in a classroom, which she turned into the main office. A staff person in the main office reviewed the flash drive. It revealed satirical cartoon materials entitled Gun Control for Dummies. It depicts alleged absurdities of gun control bans, specifically, various nationwide school incidents involving school attacks, with the perpetrators considering that the locations of the incidents had gun bans, providing the perpetrators with a degree of security that, "No one here can shoot back." The other cartoons had similar messages. The drive is no longer in the possession or control of respondent. The staff person turned the material over to Ilana Kurtin, one of the school's guidance counselors. The staff at the main office or Ms. Kurtin, discovered that the flash drive belonged to F.H. She had previous experience with F.H. She certified she knew him to be a loner, occasionally wore a Soviet trench coat and hat, and had a fascination with war and violent video games. She related an incident from the previous year where F.H. critically commented on the staff's inability to perform their jobs. Ms. Kurtin perceived the material as being a "red flag", and sought out Audrey Press of special services. In the absence of Ms. Press, she contacted Anne Facendo, the Superintendent of Schools. Ms. Facendo contacted the Manville Police. The police requested permission to contact petitioner to assess the circumstances. Upon meeting at F.H.'s residence, the police reported that F.H. maintained that the materials were in connection with a high school project. The school attempted to confirm this claim. The teacher reviewed the submission but represented that F.H.'s submission referred to a different election issue, immigration. Respondent again contacted the police to have F.H. contact Psychiatric Emergency Screening

Services (PESS) of Somerset County that evening to prevent F.H. from missing school the following day. A telephone call instituted by the police officer ensued between Dr. Brunn, the High School Principal and M.V. M.V. advised the police officer she refused the request to attend the psychiatric testing due to the time requirements.

M.V. advised the police officer that she would withdraw F.H. from the school. F.H. withdrew from the school. Respondent claims there is no record on F.H.'s school record regarding this incident.

STATEMENT OF FACTS

After consideration of the supporting petition and opposition from the respondent, for purposes of this emergent application, I **FIND** as **FACT**:

1. Petitioner, F.H., a high school senior, either accidentally or intentionally, left a flash drive at his high school.

2. The flash drive contained materials that aroused concern among some of the staff at the high school over the safety of the student body, because of the nature of the materials contained on the flash drive and experiences with F.H.

3. The high school initially investigated the matter by contacting the police.

4. The investigation resulted in a belief by some staff at the school that petitioner's response did not contain truthful statements.

5. The high school requested petitioner, attend a psychiatric assessment, prior to returning to the high school.

6. M.V., petitioner's mother, rejected the request.

7. M.V. advised the police that she would withdraw her son from the school.

8. F.H. did not participate in a psychiatric assessment.

9. M.V. withdrew F.H. from the school the following day.

10. As F.H. withdrew, the school took no disciplinary action against F.H.

LEGAL DISCUSSION

Petitioner must meet the requirements for emergent relief set forth in N.J.A.C. 6A:3-1.6(b).

N.J.A.C. 6A:3-1.6 sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b).]

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in his favor. Petitioner's counsel argued that respondent constructively suspended or dismissed F.H. from high school by improperly requesting he attend a psychiatric assessment prior to readmission to the school. M.V. acknowledges that she withdrew F.H. from the school the following day. Counsel argues M.V.'s high school

education resulted in her failure to understand that the school would provide other education to F.H., just not at the present high school.

After the withdrawal, the school took no further action. Had M.V. not withdrawn F.H., the school would have been required to provide F.H. with various due process rights. The withdrawal prevented providing those due process rights.

There are various factual disputes, over statement made, actions taken, motivations, or omissions by the parties. The determination of these factual disputes are not relevant for the within emergent application. They may be relevant in determining the validity of respondent's request that F.H. submit to a psychiatric evaluation. They cannot be determined in the absence of a plenary hearing.

The respondent argues that the petitioner cannot demonstrate any irreparable harm from the respondent's action, as petitioner's mother withdrew him from the school. Accordingly, it seeks the dismissal of the application for emergent relief. This tribunal will not accept this argument. F.H. is suffering irreparable harm by not completing his senior year and graduating with the rest of his class. That harm came from the withdrawal. It is not to say that the withdrawal resulted solely from M.V.'s action. It likely resulted from the action of the high school. A plenary hearing is required to determine the justification for the school's action.

The Crowe v. DeGioia test requires an analysis of whether the legal rights are settled. Petitioner does not cite any precedent, nor has this tribunal found any that addresses a situation where a petitioner voluntarily withdrew a student from a school district and then sought not re-enrollment, but home schooling or placement outside of the district. Accordingly, petitioner cannot show that he will prevail on the merits. Similarly, the petitioner cannot show he will prevail on the merits.

The final prong of the Crowe v. DeGioia test is a balancing of the equities and the interests of the parties. The balancing of F.H.'s freedom of speech against the high school's obligation to protect the safety of all students is an area that requires a close analysis of all the credible factual testimony available to the tribunal. Petitioner has

placed forth a factual certification suggesting the high school's actions may be motivated by pre-judgments inconsistent with the sole safety of the student body.

In regard to the standard for emergent relief, petitioner has the burden of proof to show the irreparable harm, the settled legal right, the likelihood of success and the balancing of the harm all rests in petitioner's favor. Petitioner has shown that he is presently suffering irreparable harm. Petitioner has not demonstrated the settled legal right, the likelihood of success and the balance of equities rests in his favor.

CONCLUSION

After hearing the arguments of petitioner and respondent and considering the documents submitted, I **CONCLUDE** that petitioner is not entitled to emergent relief because the proofs submitted fail to establish the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Specifically, there is no showing a settled legal right, the likelihood to prevail on the merits, or that the balance of harm favors the petitioner. A factual hearing is necessary to determine the justification for the high school's action to request F.H. to submit to a psychiatric assessment.

For the foregoing reasons, petitioner's request for emergent relief is **DENIED**.

ORDER

It is **ORDERED** that petitioner's request for emergent relief is **DENIED**.

It is **ORDERED** that the matter proceed to hearing. A telephone prehearing will be scheduled and the parties will be sent notices.

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

December 15, 2016
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: December 15, 2016

Date Mailed to Parties: December 15, 2016

lam

APPENDIX

LIST OF EXHIBITS

For Petitioner:

P-1 Entire transmittal documents

For Respondent:

R-1 Entire package in opposition to application, received post-transmittal of file

AGENCY DKT. NO. 92-4/15

J.S., ON BEHALF OF MINOR CHILD, A.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY,	:	ORDER
RESPONDENT.	:	

On April 5, 2016, a final agency decision was rendered in this matter, wherein the Commissioner found J.S. liable for tuition in the amount of Eighteen Thousand Seven Hundred Six Dollars and Forty Seven Cents ($18,706.47), representing tuition for a period of ineligible attendance by her son, A.S., in the Board's school district between November 3, 2014 and February 29, 2016. The Board subsequently notified the Commissioner that J.S. had failed to comply with the decision and it requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. In response to the Board's request, J.S. asserts that she was never given the opportunity to appeal the Commissioner's decision. She further indicates that the Commissioner's decision was unfair and her son should have the right to a free education like any other citizen. The Commissioner notes that J.S. did not file exceptions to the Initial Decision, and the Commissioner's April 5, 2016 final agency decision clearly indicated that the decision was appealable to the Appellate Division of the Superior Court. As such, J.S. has offered no reasons that have not been fully and fairly adjudicated as to why the judgment against her should not be so docketed.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Jadwiga Shahat is now subject to entry of a judgment by the court in the amount of $18,706.47, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/31/17

Date of Mailing: 2/01/17

35-17

OAL DKT. NO. EDU 13913-16
(EDU 04043-16 ON REMAND)
AGENCY DKT. NO. 50-2/16

T.M., ON BEHALF OF MINOR CHILD, T.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' revised settlement agreement, and the Initial Decision on Remand of the Office of Administrative Law (OAL), have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. On September 12, 2016, the Commissioner remanded this matter to OAL because the previous agreement recommended for adoption by the Administrative Law Judge contained a provision that was inconsistent with the *N.J.A.C.* 6A:32-7.8.

Upon review of the revised agreement and the record on remand, the Commissioner finds that the deficiency identified in the prior agreement has been corrected. Accordingly, the settlement is hereby approved and the case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/01/17
Date of Mailing: 2/01/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 13913-16
AGENCY DKT. NO. 50-2/16

ON REMAND
OAL DKT. NO. EDU 4043-16

T.M. ON BEHALF OF MINOR CHILD T.M.,
Petitioners,
v.
CITY OF HACKENSACK
BOARD OF EDUCATION, BERGEN COUNTY,
Respondent.

Gale B. Weinberg, Esq. for petitioners (Weinberg and Cooper, attorneys)

Richard E. Salkin, Esq. for respondent (Law Office of Richard E. Salkin, attorney)

Record Closed: December 19, 2016 Decided: December 19, 2016

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 12, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

December 19, 2016
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: December 21, 2016

Mailed to Parties: December 21, 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

T.M., on behalf of minor child, T.M. –vs- City of Hackensack BOE, Bergen County

AOL Docket No. : EDU 04043-2016N Agency Ref. No. 50-216

STIPULATION OF SETTLEMENT

The parties hereto hereby agreed as follows:

1. The two-day suspension imposed upon minor child, T.M., on May 19, 2015, by the Respondent shall be expunged from his student records on or about the last day of school during the 2016-2017 school year pursuant to N.J.A.C. 6A:32-7.7 **provided** that, during the 2016-2017 school year, the minor child, T.M., shall not initiate against or cause intentional physical harm to a student or staff member (excluded from this category is a fight where in the minor child, T.M., and the other participant(s) have engaged in mutual combat where it is impossible to conclude who was the aggressor or T.M. reasonable engaged in self-defense).

T.M., on behalf of the minor
Child, T.M.
Dated: December 1, 2016

Richard E. Salkin, Esq.
Attorney for the City of Hackensack
BOE. Bergen County
Dated: December , 2016

Weinberg & Cooper, LLC
Attorneys for T.M., on
behalf of the minor child, T.M.

By: _____
Gale B. Weinberg, Esq.

RICHARD E. SALKIN
ATTORNEY AT LAW
50 MAIN STREET
HACKENSACK, N.J. 07601

MEMBER OF THE BAR-N.J. & N.Y.

(201) 342-3626
FAX (201) 342-9457

December 9th, 2016

Honorable Danielle Pasquale, ALJ
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07107

RE: T.M. o/b/o child
T.M. -vs- Hackensack Board of Education
OAL Docket No.: EDU - 13913 - 2016 N
Agency Ret. No.: 50 - 2/16

Dear Judge Pasquale:

Pursuant to the representation made to you by counsel during the 11/28/16 Management Conference, enclosed please find three (3) executed "Stipulation of Settlement".

Please file same and return a copy to both Ms. Weinberg and the undersigned in the enclosed courting envelopes.

Very truly yours,

Richard E. Salkin, Esq.

RES/smf

cc: Gail B. Weinberg, Esq.
Via Fax To: (201) 487-7006

OAL DKT. NO. EDU 17845-16
(EDU 07541-16 ON REMAND)
AGENCY DKT. NO. 117-4/16

A.G., on behalf of minor child, M.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, AND THOMAS FICARRA, SUPERINTENDENT,	:	DECISION
RESPONDENT.	:	

The record, proposed settlement agreement, and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's November 22, 2016 determination that the prior Agreement submitted did not comply with *N.J.A.C.* 6A:3-1.13, as it was neither signed by the Board's attorney nor contained a copy of the Board's resolution approving the settlement. Since the Agreement now bears the signature of the Board Attorney, the Commissioner can approve the within settlement in its present form.

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

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/02/17
Date of Mailing: 2/02/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 17845-16 (On Remand EDU 07541-16)

AGENCY DKT. NO. 117-4/16

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

Petitioner,

v.

BOARD OF EDUCATION OF HAMILTON, MERCER COUNTY AND THOMAS FICARRA, SUPERINTENDENT,

Respondents.

A.G., petitioner, pro se

Patrick F. Carrigg, Esq., for respondents (Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey, attorney)

Record Closed: December 16 2016 Decided: December 21, 2016

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

This matter was remanded to the Office of Administrative Law on November 28, 2016, 2016, for determination as a contested case, pursuant to N.J.A.C. 1:1-8.2, N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13

The parties have agreed to a settlement and have executed a Settlement Agreement and General Release of Claims, which is attached hereto as J-1.

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

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

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

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

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

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

December 21, 2016
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 12/23/16

Date Mailed to Parties: 12/23/16

/lam

LIST OF EXHIBITS

J-1 Settlement Agreement and General Release of Claims

J-1
12/21/16

SETTLEMENT AGREEMENT AND GENERAL RELEASE OF CLAIMS

The SETTLEMENT AGREEMENT ANDGENERAL RELEASE OF CLAIMS **("Agreement")** is being entered into among and between **A.G. o/b/o M.G.** (or **"Releasor")** and HAMILTON TOWNSHIP BOARD OF EDUCATION **("HAMILTON")** shall be referred to as **"Releasee." A.G. o/b/o M.G.** and HAMILTON shall be collectively referred to herein as the **"Parties."**

WHEREAS, Releasor is the parent of a 7th grade student, M.G., enrolled in Crockett Middle School;

WHEREAS, Releasor filed an appeal of the Board's Decision dated January 28, 2016 affirming a finding of a violation of the HIB Policy to the Commissioner of Education Docket No.: 117-4/16 (the **"Action");**

WHEREAS, the Parties wish to resolve Releasor's appeal and any and all claims and\or causes of action that Releasor had or may have had, including without limitation those pied in the Action; and

WHEREAS, the meaning, effect and terms of the Agreement have been fully explained to Releasor, who understands that the Agreement settles, bars, and waives any and all claims that she could possibly have against Releasees as of the date of the Agreement.

NOW, THEREFORE, in consideration of the mutual promises, covenants, agreements and representations contained herein, and intending to be legally bound hereby, the Parties agree as follows:

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2016 DEC 16 P 4:18
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

1. No Admission of Wrongdoing. **Releasor** acknowledges and agrees that the consideration by Releasees to her as described below, her acceptance of such consideration, and the Parties' execution of the Agreement and making promises and representations as set forth herein, are the result of compromise, and that the Agreement shall never be considered at any time or for any purpose as an admission by Releasees of any liability, wrongdoing or unlawful conduct of any kind with respect to **Releasor** or any other person. Indeed, Releasees expressly deny that they violated any contract, rule, law or regulation related to the underlying matter.

2. Consideration. In consideration for **Releasor** signing the Agreement, not revoking it, and fully complying with the terms, conditions and promises made herein, Releasee agrees that the HIB decision and the investigatory documents related thereto shall not become part of M.G.'s permanent student record, shall not be passed from his current school to his next school whether in or outside the Hamilton Township School District, Mercer County, and that said records shall only be maintained consistent with Hamilton's obligations under any law or applicable statute for the retention of records. The records shall not be produced to any requesting individual or entity other than M.G.'s parents or guardians or as req uired by any statute or law. All physical and electronic copies of the HIB decision and investigatory documents will be destroyed upon M.G.'s leaving of Crockett Middle School by way of transfer out of the school, transfer out of the Hamilton Township School District, or promotion to high school. Notice of destruction shall be given to the parents of M.G. by way of certified mail.

3. General Release of Claims. In consideration for Releasees promises and representations made herein, Releasor, individually and on behalf of her heirs, representatives, immediate family members (including but not limited to her spouse and children), agents, successors and assigns, hereby releases Releasees, their parents, board members, subsidiaries, shareholders, directors, officers, employees, agents, attorneys, insurers, affiliates, predecessors, successors, assigns, heirs, and all persons acting by, through, under or in concert with any of them (collectively, the **"Released Parties"),** release from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses, and from any claims of any nature whatsoever, known or unknown, which Releasor now has, claims to have, owns, holds or which Releasors at any time heretofore had, held, or claimed to have based on events occurring through the date of execution of the Agreement, to the fullest extent allowed by law. The release includes, without limitation, claims arising under 42 U.S.C. *§* 1981, Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family Medical Leave Act, the National Labor Relations Act, the Employee Retirement Income Security Act (save for claims related to vested benefits, which are exempted from the release), the Equal Pay Act, the New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Act, as well as any other federal, state, local, or municipal statute, ordinance or regulation that prohibits improper discrimination, harassment or retaliation in the workplace or otherwise relates to or regulates employment relationships. In addition, the release extends to and covers claims for tortious conduct or breach of express or implied

contract, including wrongful discharge, breach of covenant of good faith and fair dealing, intentional or negligent infliction of emotional distress, breach of contract or implied contract, negligence, misrepresentation, fraud, detrimental reliance, promissory estoppel, defamation, invasion of

privacy, breach of laws governing safety in the workplace, loss of consortium, or any claims under federal, state, and local statutory and common law.

4. Inquiry. Hamilton agrees, through its Administration, to respond to inquiries for M.G.'s HIB file by providing all such information as it may be legally required to provide to any governmental agencies or pursuant to Court Order. Otherwise, Hamilton shall not produce said documents to any individual or entity and shall classify same as a confidential student record. Hamilton shall not produce said file to any other school within or outside the Hamilton Township School District, Mercer County, prior to, at the time of, or after M.G. leaves Crockett Middle School.

5. Confidentiality. The Parties mutually agree that the existence of the Agreement, and the terms hereof, are to be held confidential, and agree not to disclose it to anyone except for their attorneys, members of their immediate family, and any person required by law or order of court to receive such information. To the extent the Parties reference the Agreement in discussions with persons not permitted to receive information about the Agreement, they shall inform such persons that the claims "have been discontinued" or "have been closed ." Hamilton shall not disseminate or produce copies of the Agreement except pursuant to Court Order or a lawful request under the Open Public Records Act.

6. Non-Disparagement. The parties agree not to make, publicly or privately, through any media or medium (including, without limitation, comments on social networking sites), any disparaging or derogatory remarks or otherwise make statements that could injure the business or reputation of any of the Released Parties.

7. Additional Covenants and Acknowledgments. Releasor further understands and agrees that:

(a) By signing the Agreement she is voluntarily making a full and final compromise and settlement of any and all claims, disputed or otherwise, arising out the Action, and that the Agreement will preclude any further or additional claims arising out of the Action;

(b) She has the right to consult any attorney prior to signing the Agreement and has been encouraged to do so by Releasees;

(c) The Agreement is contractual, is not a mere recital, shall be given full force and effect, and shall be binding upon her, her heirs, executors, successors, administrators and assigns.

8. Disputes. The validity, performance, construction, and effect of the Agreement shall be governed by the substantive laws of the United States and the State

of New Jersey. The New Jersey Superior Court shall retain jurisdiction to implement and enforce the Agreement and its terms.

9. Severability. The invalidity or unenforceability of any provision of the Agreement, whether in whole or in part, shall not in any way affect the validity or enforceability of any other provision contained herein.

10. Counterparts; Exchange by Electronic Means. The Agreement may be executed in counterparts, which shall be taken together as the entire agreement of the Parties hereto. The Agreement may also be exchanged by the Parties via electronic mail for the purposes of securing signatures and will be fully enforceable as an original document.

RELEASOR ACKNOWLEDGES THAT SHE HAS READ THIS AGREEMENT, UNDERSTANDS IT AND IS ENTERING INTO IT KNOWINGLY AND VOLUNTARILY AND NOT AS A RESULT OF ANY PRESSURE, COERCION OR DURESS.

RELEASOR AGREES THAT SHE HAS HAD A REASONABLE AND SUFFICIENT TIME AND OPPORTUNITY TO CONSULT WITH COUNSEL, AND THAT SHE HAS FULLY DISCUSSED AND REVIEWED THE TERMS CONTAINED IN THE AGREEMENT WITH COUNSEL PRIOR TO EXECUTING IT, OR FREELY CHOSEN NOT TO DO SO.

RELEASOR FURTHER UNDERSTANDS, ACKNOWLEDGES AND AGREES THAT THE AGREEMENT CONTAINS A GENERAL RELEASE OF CLAIMS AS TO ALL RELEASED PARTIES, AND THAT THE AGREEMENT SETTLES, BARS, AND WAIVES ANY AND ALL CLAIMS THAT SHE HAS OR COULD POSSIBLY HAVE AGAINST THE RELEASED PARTIES THROUGH THE DATE OF THE AGREEMENT.

11. Settlement of Contested Case Pursuant to N.J.A.C. 6A:3–1.13(d). By signature of the Board Attorney, the Board hereby represents that it consented to settlement of this matter by vote of a majority of a quorum during the public session of a properly held meeting of the Board.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties agree to the terms of the Agreement.

RELEASOR

Dated: 12/14/16

HAMILTON TOWNSHIP BOARD OF EDUCATION

Patrick F. Carrigg, Esq.
Board Attorney

37-17

37-17R

OAL DKT. NO. EDU 11405-16
(EDU 12005-14 ON REMAND)
AGENCY DKT. NO. 223-8/14

SERGIO CALAFIORE,

PETITIONER,

V.

UNION COUNTY EDUCATIONAL SERVICES COMMISSION, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

Upon review, the Commissioner observes that a member of the Board of Directors of the Union County Educational Services Commission signed the agreement on behalf of the Board. The file does not contain a copy of the Board's resolution approving the settlement and designating a Board member to sign the agreement on its behalf – as required by *N.J.A.C.* 6A:3-1.13 under these circumstances – nor is the resolution attached to the settlement agreement itself. In the alternative, the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating a Board member to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the settlement agreement consistent with the concerns set forth above. If the parties

are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/01/17

Date of Mailing: 2/01/17

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11405-16

AGENCY DKT. NO. 223-8/14

ON REMAND

OAL DKT. NO. EDU 12005-14

SERGIO CALAFIORE,

Petitioner,

v.

UNION COUNTY EDUCATIONAL SERVICES COMMISSION, UNION COUNTY,

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

Bradley D. Tishman, Esq. for respondent (Cleary, Giacobbe, Alfieri, Jacobs, attorneys)

Record Closed: December 19, 2016 Decided: December 19, 2016

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 28, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

December 19, 2016
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: December 21, 2016

Mailed to Parties: December 21, 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

CLEARY | GIACOBBE | ALFIERI | JACOBS LLC

BRADLEY D. TISHMAN, Associate
btishman@cgajlaw.com

Reply to: Oakland Office

December 14, 2016

Via Facsimile [(973) 648-6124] and
First Class Mail
Hon. Danielle Pasquale, ALJ
State of New Jersey
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Calafiore v. Union County Ed. Serv. Comm.
OAL Docket No. EDU 11405-2016N
Agency Ref. No. 223-8/14

Dear Judge Pasquale:

As you know, our firm represents the Respondent Union County Educational Services Commission ("Commission") in the above matter. During our telephone conference held on November 16, 2016, it was agreed that the Commission would file its Motion to Dismiss by today. The parties have amicably settled this case following the telephone conference. Pursuant to this tribunal's November 21, 2016 prehearing order, we enclose a copy of the settlement agreement for your Honor's file. Based upon the terms of the agreement and discussions with Petitioner's counsel (Nicholas Poberezhsky, Esq.), it is our understanding that Petitioner will be promptly withdrawing his pending Amended Petition.

Thank you for your attention to this matter.

Respectfully Submitted,

Bradley D. Tishman

Bradley D. Tishman

Enclosure

Cc: Nicholas Poberezhsky, Esq. [Via E-mail (NPoberezhsky@carusosmith.com)]
Terry Foppert, Superintendent [Via E-mail (TFoppert@ucesc.org)]

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 7th day of December 2016, between the Union County Educational Services Commission (hereinafter referred to as the "Commission") and Sergio Calafiore (hereinafter referred to as "Calafiore").

WHEREAS, Calafiore was employed as a Teacher of Food Services by the Commission prior to the abolishment of his position effective July 1, 2014; and

WHEREAS, Calafiore filed a retirement application with the Division of Pensions and Benefits that became effective on November 1, 2014; and

WHEREAS, on August 13, 2014, Calafiore filed a Petition with the Commissioner of Education to challenge the Commission's reduction in force and abolishment of his position [OAL Docket No. EDU 12005-14, Agency Ref. No. 223-8/14]; and

WHEREAS, on April 15, 2015, Calafiore moved to amend his Petition to include a seniority rights claim; and

WHEREAS, on June 16, 2016, the Hon. Irene Jones, ALJ granted the Commission's Motion for Summary Decision upholding the Commission's decision to abolish Calafiore's position, and denied Calafiore's motion to amend his Petition to include a seniority rights claim; and

WHEREAS, on July 28, 2016, the Commissioner of Education affirmed Judge Jones's decision regarding the Commission's abolishment of Calafiore's position, but reversed Judge Jones's determination on Calafiore's motion to amend his Petition, and remanded Calafiore's claim to the Office of Administrative Law for a determination as to whether Calafiore is entitled

to a position with the Commission by virtue of his seniority rights; and

WHEREAS, on remand the matter was assigned to the Hon. Danielle Pasquale, ALJ [OAL Docket No. EDU 11405-16, Agency Ref No. 223-8/14]; and

WHEREAS, on September 16, 2016, Calafiore resubmitted his Amended Petition for Relief; and

WHEREAS, on November 8, 2016, Calafiore filed his Second Amended Petition; and

WHEREAS, the Commission disputes Calafiore's claim of entitlement to a position with the Commission by virtue of his alleged seniority rights; and

WHEREAS, the parties are desirous to amicably resolve the matter without further litigation.

NOW, THEREFORE, in consideration for the premises and conditions set forth herein, the Commission and Calafiore agree as follows:

1. **TERMS.**

A. Calafiore will immediately dismiss with prejudice the Second Amended Petition currently pending against the Commission [OAL Docket No. EDU 11405-16, Agency Ref No. 223-8/14]. Calafiore further agrees not to file a new claim, in any forum, regarding any of the allegations raised in his original and/or amended petitions against any individuals or entities affiliated with the Commission, as further detailed in the "Complete Release" section below.

B. Calafiore will receive the total sum of $3,750.00, inclusive of attorneys' fees in settlement of this matter. The Commission's payment to Calafiore will be subject to applicable tax withholdings, and the Commission will issue a W-2 form to Calafiore for this payment.

C. The parties agree that they are only responsible for their respective attorneys' fees

incurred to date. Calafiore agrees that if he should file a claim in a court of competent jurisdiction and/or administrative action relating to the terms set forth in this Agreement (with the exception of any action necessary to enforce the terms of this Agreement), the Commission may seek reasonable attorneys' fees incurred in defending against said litigation, as further provided for in subsection 2b below.

D. The Commission agrees to provide Calafiore with a neutral letter of reference by providing his title and dates of service only.

E. The terms of this Agreement are subject to formal acceptance and ratification by the Commission.

2. COMPLETE RELEASE.

a. In consideration of the settlement hereinabove, Calafiore, his heirs, assigns and agents hereby agree to release, waive and discharge the Commission, its affiliated departments, and its officers, trustees, agents, employees, former employees, current and former elected officials, current and former attorneys, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, or action or writ of any kind, nature, character or description that Calafiore had, now has, or may in the future have against the Releasees on account of or arising out of the Petition or any matter that, has happened, developed or occurred prior to the date of this Agreement. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, claim for damages of any kind, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law),

rule, regulation, executive order or guideline, and any and all claims for attorney's fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (LAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, gender identity or expression, familial status, disability or nationality, or liability for service, in the Armed Forces of the United States.

ii. Any federal claim, cause of action demand or complaint arising out of or under the Federal Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex, or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA), which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child; spouse or parent who has a serious health condition and any claim, cause

of action, demand or complaint arising out of under the New Jersey Family Leave Act (NJFLA).

vi. Any claim, cause of action demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

ix. Any claim, cause of action, demand or complaint arising out of or under the Federal Fair Labor Standards Act (FLSA) or the New Jersey Equal Pay Act.

x. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA).

b. Calafiore specifically acknowledges he has not filed and shall not hereafter file any claim, charge or complaint of any nature against Releasees with the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local court or agency against the Commission or the Releasees for any events preceding the ratification of this Agreement. If Calafiore violates this Complete Release by filing any claim, charge or complaint as prohibited by this Agreement, Calafiore agrees to pay all costs

and expenses of defending against the suit incurred by the Commission and/or the Releasees, including reasonable attorneys' fees.

3. **CONSULTATION WITH ATTORNEY.**

Calafiore has consulted with his legal counsel with respect to this Agreement, and has reviewed with his attorney all of the terms and conditions of this Agreement prior to executing this Agreement.

4. **COMPLETE AGREEMENT.**

This Agreement contains the entire agreement between Calafiore and the Commission with respect to the subject matter and supersedes all prior agreements, understandings and/or dealings whether written or otherwise with respect to the same subject matter. There is no agreement on the part of the Commission to do anything other than what is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

5. **MODIFICATION.**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

6. **SEVERABILITY.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

7. ATTESTATION.

Calafiore represents and warrants that he has carefully read each and every provision of this Agreement and that he fully understands all of the terms and conditions contained in each provision of this Agreement. Calafiore represents and warrants that he enters into this Agreement voluntarily, of his own free will, without any pressure or coercion from any person or entity including, but not limited to, the Commission and the Releasees.

8. NON-ADMISSION OF LIABILITY.

This Agreement is executed and all consideration is given in final settlement of disputed claims and shall not be construed as an admission of any allegation or of liability by the Commission, and any such liability is expressly denied.

9. FUTURE EMPLOYMENT.

Calafiore acknowledges that his relationship with the Commission has been permanently and irrevocably severed. Calafiore agrees that he will not at any time hereafter apply for employment or reemployment with the Commission, nor shall he accept any employment with the Commission.

10. NON-PRECEDENTIAL.

It is understood between and among all parties hereto that the terms of this settlement shall not have any precedential effect or constitute binding practice by the Commission.

11. REVOCATION.

Calafiore may revoke this Agreement within seven days after the date this Agreement is signed by Calafiore. This revocation must take the form of written notice by Calafiore that he intends to revoke the Agreement. The revocation must be provided directly to the

Commission. This seven day revocation period may not be waived by Calafiore.

12. REASONABLE PERIOD OF TIME.

Calafiore agrees that he has been given a reasonable period of time of at least 21 days within which to review and consider this Agreement prior to executing this Agreement, but that Calafiore may waive this 21 day period by signing in the space provided at the end of this Agreement.

IN WITNESS WHEREOF, and intending to be legally bound hereby, I, Sergio Calafiore, execute the foregoing Agreement this 7th day of December, 2016.

Sergio Calafiore
SERGIO CALAFIORE

Sworn and subscribed to before me
this 7th day of December 2016.

Notary Public of the
State of New Jersey

CLARE T. PELLEGRINI
A Notary Public of New Jersey
My Commission Expires November 10, 2020

UNION COUNTY EDUCATIONAL
SERVICES COMMISSION

Date: 12/07/16

By: Helen E Grant

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the twenty-one (21) day period referred to in the 12th recital on page 8 of this Agreement.

Date: 12/07/16

SERGIO CALAFIORE

38-17

OAL DKT. NO. EDU 19266-16
AGENCY DKT. NO. 319-12/16

SHANE BERGER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
GLADYS RIVERA AND BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

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

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief, is adopted for the reasons expressed therein. This case shall proceed at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/01/17

Date of Mailing: 2/01/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENCY RELIEF

OAL DKT. NO. EDU 19266-16

AGENCY DKT. NO. 319-12/16

SHANE BERGER,

Petitioner,

v.

GLADYS RIVERA AND BOARD OF EDUCATION OF BLOOMFIELD, ESSEX COUNTY,

Respondents.

Ciro Spina, III, Esq., for petitioner (Law Office of Jef Henninger, LLC, attorneys)

James A. Key, Jr., Esq., for respondent Gladys E. Rivera (Key Law Firm, attorneys)

Jonathan M. Busch, Esq., for respondent Board of Education of Bloomfield (Busch Law Group, LLC, attorneys)

Record Closed: January 5, 2017 Decided: January 6, 2017

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Shane Berger (Berger), a resident and taxpayer of Bloomfield, New Jersey, has filed an application for emergency relief, seeking an order as follows: (1) voiding the candidacy of Gladys E. Rivera (Rivera) for a seat on the Bloomfield Board of Education (the Board); and (2) enjoining respondent Rivera from continuing to occupy a seat on the Board and/or removing her from her elected position.

No responsive briefs or certifications were filed by any respondent in this matter prior to oral argument, and until that time, petitioner was appearing pro se. On the date of oral argument, petitioner appeared with counsel, as did respondent Rivera. Board counsel also appeared, but indicated the Board took no position in this matter.

Oral argument on Berger's application was heard on January 5, 2017.

A brief and certification were filed by petitioner, in which he alleged that on November 8, 2016, an election had been held for 3 seats with three year terms, and 1 seat with a one year term, on the Board. Rivera was elected to one of the three year seats. Petitioner placed fourth, and thus was unsuccessful in his effort secure a seat on the Board. Thereafter, the landlord's son from the three family home in Bloomfield where Rivera purportedly resides provided information indicating that Rivera moved into the building in April of 2016, and was not a tenant but was living with her boyfriend.

LEGAL DISCUSSION AND CONCLUSIONS

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation states in part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. Degioia, 90 N.J. 126 (1982):

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying the petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of success on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b).]

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in his favor.

Believing that Rivera had not been a resident of Bloomfield for one year immediately preceding the election as is required by N.J.S.A. 18A:12-1, petitioner retained the services of private investigators to conduct a search on Rivera. Both investigators reported separately that Rivera did not reside at the Bloomfield address. A change of address had reportedly been filed by Rivera with the NJ Motor Vehicle Commission in March 2016. The Spartan Detective Agency, Inc. provided a lengthy and detailed report (Spartan report) that purported to reveal Rivera resided in Elizabeth, NJ. The conclusion reached by the investigator was based upon voter registration searches, motor vehicle searches and cell phone registrations, as more fully detailed in a twenty-five page report he provided to petitioner. Included in that report is information indicating that Rivera was registered to vote in Elizabeth, and therefore she also did not meet the additional requirement of N.J.S.A. 18A:12-1 of being registered to vote in the district. Upon receipt of this information, petitioner filed his emergent relief application seeking a determination that Rivera's candidacy was void and that her election not be certified and/or she be removed from her position.

As the petition was unopposed until the commencement of oral argument, and the material facts undisputed, it appeared that there existed a likelihood of success on the merits of the underlying claim. At oral argument, however, that was called into

question by representations made by counsel for Rivera that the Spartan report sets forth a date of birth, social security number and name that do not belong to Rivera.

With regard to the remaining criteria for determining whether emergency relief is appropriate, the first standard stated in Crowe, provides that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra 90 N.J. at 132. The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980).

In the instant matter, I am not persuaded by the assertions of petitioner, as set forth in the supporting brief, that if Rivera is permitted to remain in her Board seat pending a full hearing of this matter, irreparable harm will occur. In addition, consideration of respondents' assertions, albeit not until oral argument, constrain me from concluding that the legal right underlying petitioner's claim is wholly settled, based on the limited record before me.

Based on the foregoing, I **CONCLUDE** that petitioner has failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting a stay or emergency relief. Accordingly, I **ORDER** that petitioner's application for such relief be and hereby is **DENIED**.

I **FURTHER ORDER** that this matter is scheduled for plenary hearing on February 7, 2017 at 9:00 AM.

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

January 6, 2017
DATE

LESLIE Z. CELENTANO, ALJ

dr

39-17

WEST CAPE MAY BOARD OF EDUCATION AND SPRINGFIELD BOARD OF EDUCATION,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY DEPARTMENT OF EDUCATION	:	
RESPONDENT.	:	

SYNOPSIS

The petitioning Boards challenged the respondent Department's imposition of a five percent cap on the number of new School Choice enrollments allowed in their school districts for the 2014-2015 school year. Petitioners alleged, *inter alia*, that the five percent limitation – above each program's 2013-2014 enrollment – was arbitrary, capricious and unreasonable, and was a rule change that should have gone through the required rulemaking procedures under the Administrative Procedure Act (APA). The Department filed a motion for summary decision, arguing that jurisdiction to review an agency decision belongs to the Appellate Division; that petitioners' requested relief is barred by the Fiscal Year 2015 Appropriations Act; and that the Department's decision was reasonable and does not amount to a rule change. Petitioners filed a cross-motion contending that they were not challenging the Commissioner's decision to impose a cap on enrollments across the entire School Choice Program, but rather that the Department breached the contracts with petitioners – i.e., their applications for the program, which allowed for more enrollments – when it imposed the five percent cap for 2014-2015; further, petitioners claimed that the Department is not entitled to summary decision in this matter because it did not comply with petitioners' discovery requests.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; the School Choice Program explicitly grants the right to appeal the Commissioner's decision in two instances, neither of which apply here; the Commissioner has jurisdiction over controversies and disputes arising under the school laws, but jurisdiction over contractual claims lies with the Superior Court; the Commissioner made a final agency decision when the five percent cap was imposed; final agency decisions are appropriately challenged in the Appellate Division; the Commissioner relies on the State Appropriations Act to fund the School Choice Program; the Commissioner acted within legislative authority by imposing the enrollment cap to keep the program funded when its projected cost for the 2014-2015 school year exceeded the budget afforded by the 2015 Appropriations Act; the imposition of the five percent cap was an exercise of the Commissioner's statutory authority, and cannot be considered to be rulemaking; and the Commissioner has already issued an interlocutory order on discovery. Accordingly, the ALJ granted the Department's motion for summary decision, and denied the cross-motions of the petitioners.

Upon review of the record and the Initial Decision of the OAL, the Commissioner adopted the ALJ's recommended decision as the final decision in this matter, for the reasons expressed therein. Accordingly, the petition was dismissed with prejudice.

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

OAL DKT. NO. EDU 04191-14
AGENCY DKT. NO. 49-3/14

WEST CAPE MAY BOARD OF EDUCATION AND SPRINGFIELD BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
NEW JERSEY DEPARTMENT OF EDUCATION	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Administrative Law Judge's recommended decision for the reasons expressed therein. Accordingly, the petition is dismissed with prejudice.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/02/17
Date of Mailing: 2/02/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 04191-14
AGENCY DKT. NO. 49-3/14

WEST CAPE MAY BOARD OF EDUCATION AND SPRINGFIELD BOARD OF EDUCATION,
Petitioners,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

Kerri A. Wright, Esq., Esq., for petitioners (Porzio, Bromberg and Newman, P.C., attorneys)

Angela L. Velez, Deputy Attorney General, for respondent (Christopher Porrino, Attorney General of New Jersey, attorney)

Record Closed: October 17, 2016 Decided: December 1, 2016

BEFORE **JEFFREY R. WILSON**, ALJ:

STATEMENT OF THE CASE

The petitioners, West Cape May Board of Education (West Cape May) and Springfield Board of Education (Springfield), challenge the implementation of the five percent cap on new School Choice enrollments in the petitioners' districts by the respondent, New Jersey Department of Education (NJDOE).

PROCEDURAL HISTORY

On March 4, 2014, the petitioners, West Cape May and Springfield, filed a Verified Petition of Appeal with the Commissioner of Education, challenging NJDOE's implementation of a five percent cap on New School Choice enrollments on the petitioners' districts. The matter was transmitted to the Office of Administrative Law (OAL) on April 8, 2014, to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On September 8, 2014, the NJDOE filed a motion for summary decision; on February 3, 2016, the petitioners, West Cape May and Springfield filed a cross-motion for summary decision.

ISSUES

Whether the NJDOE breached its contracts with petitioners' when it imposed a five percent cap on student enrollment in the School Choice Program.

1. Whether the decision to impose the five percent enrollment cap was arbitrary, capricious, or unreasonable.

2. Whether the five percent enrollment cap is a rule that was required to go through rulemaking procedures under the Administrative Procedure Act (APA).

3. Whether discovery disputes prevent the Court from granting the NJDOE's Motion for Summary Decision.

FINDINGS OF FACT

This matter arises out of the NJDOE decision to place a five percent cap on new student enrollments in the School Choice Program in petitioners' districts. Petitioners' Brief in Support of Cross-Motion for Summary Decision, 3.

Petitioner Springfield was admitted into the School Choice Program on April 13, 2011. Id. at 4. The NJDOE permitted Springfield to enroll twenty ninth-grade students for the 2011-2012 school year, with twenty new ninth-grade students to enroll each year thereafter. Id. Thus, by the 2014-2015 school year, Springfield could have enrolled up to eighty students under the School Choice Program. Id.

Petitioner West Cape May was admitted into the School Choice Program on May 24, 2011. Id. The NJDOE permitted West Cape May to enroll sixteen students at various grade levels for the 2011-2012 school year, with sixteen new students to enroll at various grade levels each school year thereafter. Id. Therefore, West Cape May could have enrolled up to sixty-four students under the School Choice program by the 2014-2015 school year. Id.

The NJDOE directed the petitioners to sign and return the forms that set forth petitioners' obligations under the School Choice Program. Id. Petitioners complied with the instructions. Id.

Petitioners and the NJDOE honored these obligations until October 3, 2013. Id. In the fall of 2013, the Office of Interdistrict School Choice (Choice Office) at the NJDOE learned that the budget for the School Choice Program for the 2014-2015 school year (fiscal year 2015) was likely to be an amount less than the projected cost of the program if eligible districts increased enrollment by the same rate as in previous years. Respondent's Brief in Support of Motion for Summary Decision, 8. The NJDOE determined that it could ensure that school districts received school choice aid for each student enrolled in the program if it limited the enrollment of choice students in each school choice district to a five percent growth "target enrollment" amount. Id. at 9. On

October 3, 2013, the Director of the Choice Office emailed all school choice administrators informing them that choice student enrollment for the 2014-2015 school year would be limited to five percent above each program's 2013-2014 enrollment. Id.

Because of the five percent cap on enrollment, Springfield faces an anticipated loss of $625,770 annually and West Cape May has been deprived of $640,000 with an additional loss of $414,687 expected annually. Petitioners' Brief in Support of Cross-Motion for Summary Decision, 5.

On March 4, 2014, petitioners filed a Petition of Appeal with the Commissioner of Education (the Commissioner) challenging the NJDOE's implementation of target enrollments. Respondent's Brief in Support of Motion for Summary Decision, 10. The NJDOE filed an answer and the matter was transmitted to the Law OAL as a contested case. Id.

On July 1, 2015, the State Appropriations Act for Fiscal Year 2015 became effective. This Appropriations Act allocated $49,246,000 for the Choice Program, up from $49,065,000 the previous year. Respondent's Brief in Opposition to Petitioners' Cross-Motion for Summary Decision, 6. However, if the NJDOE had not imposed the enrollment cap, the NJDOE estimated that the cost of the School Choice Program for the 2014-2015 year would have been $67,942,464. Id. at 7.

The NJDOE filed a Motion for Summary Decision claiming that jurisdiction to review an agency decision belongs to the Appellate Division, that petitioners' requested relief is barred by the Fiscal Year 2015 Appropriations Act, and that the NJDOE's decision was reasonable and does not amount to a rule. Id. at 1. Petitioners filed a Cross-Motion for Summary Decision claiming that the NJDOE breached its contracts with petitioners' when it limited enrollments under the School Choice Program. Petitioners' Brief in Support of Cross-Motion for Summary Decision, 2. Petitioners also claim that this limitation on enrollment is an unlawful promulgation of an agency rule. Id. Petitioners also claim that the NJDOE is not eligible for a grant of Summary Decision because it has not complied with petitioners' discovery requests. Petitioners' Brief in Opposition to Respondent's Motion for Summary Decision, 7.

LEGAL ANALYSIS

Summary Decision Standard

Under N.J.A.C. 1:1-12.5(b) a "motion for summary decision shall be served with briefs and with or without supporting affidavits." N.J.A.C. 1:1-12.5(b). A summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Id.

A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-529 (1995). The Supreme Court of New Jersey has adopted a standard that requires judges to "engage in an analytical process to decide whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533.

"When a motion for summary decision is made, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding . . . ." N.J.A.C. 1:1-12.5(b). A court should deny a motion for summary decision when the party opposing the motion has produced evidence that creates a genuine issue as to any material fact challenged. Brill, supra, 142 N.J. at 528-529. When making a summary decision, the "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 540.

Whether the Office of Administrative Law has jurisdiction over this matter.

NJDOE argues that the decision to impose the five percent cap on enrollment was an agency decision and, as such, review is within the exclusive jurisdiction of the Appellate Division of the Superior Court. Respondent Brief in Support of Motion for Summary Decision, 12. Petitioners claim that they are not challenging the Commissioner's decision to impose a cap on enrollments across the entire School Choice Program, but that they are challenging the imposition of the five percent cap on their enrollments in light of the petitioners' applications, which allowed for more enrollments. Petitioners' Brief in Opposition to Motion for Summary Decision, 6. Petitioners claim this constitutes a dispute arising under school laws. Id.

> Except as otherwise provided by R. 2:2-1(a)(3) (final judgments appealable directly to the Supreme Court), . . . appeals may be taken to the Appellate Division as of right . . .
>
> (2) to review final decisions or actions of any state administrative agency or officer, . . . except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise;
>
> [N.J. Court Rules, R. 2:2-3(a).]

The Commissioner has the authority to "establish an interdistrict public school choice program which shall provide for the creation of choice districts." N.J.S.A. 18A:36B-16. The State Appropriations Act for Fiscal Year 2015 specifically provided that "approved enrollment shall not exceed the district's maximum funded choice student enrollment as determined by the Commissioner of Education." L. 2014, c. 14, § 34.

The School Choice Program explicitly grants the right to appeal the Commissioner's decision in two instances, neither of which applies here. N.J.A.C. 6A:12-6.1. An appeal of any determination by the Commissioner not to grant an application for participation in the choice program may be filed by an eligible choice

district applicant) N.J.A.C. 6A:12-6.2. (An appeal of any denial of a choice student applicant for enrollment in a choice district may be filed by the parent or legal guardian with the Commissioner).

"In general, in cases involving only legal questions, the doctrine of exhaustion of remedies does not apply." Abbott v. Burke, 100 N.J. 269, 298 (1985). "A limited exception to this rule may be appropriate where the court perceives the agency to be in a special position to interpret its enabling legislation, but where the agency cannot definitively or conclusively resolve the issues, and further, cannot provide any relief for plaintiffs, any delay in confronting the merits will work an injustice." Id.

The Commissioner has jurisdiction over "all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner." N.J.S.A. 18A:6-9. But jurisdiction over breach of contract claims resides in the trial court. N.J.S.A. 59:13-4; D.J. Miller & Associates, Inc. v. State, Dept. of Treasury, Div. of Purchase and Property, 356 N.J. Super. 187, 192 (App.Div. 2002). Generally, contractual disputes are not within the Commissioner of Education's jurisdiction, because an interpretation of contractual language, rather than school law is necessary to determine the outcome of a claim and the expertise of the agency is not needed. Picogna v. Bd. of Educ. of Cherry Hill Twp., 249 N.J. Super. 332, 335 (App. Div. 1991); Silver Fox Learning Ctr. V. Dist. of the City of Paterson, EDU 1014-03, Initial Decision, (June 27, 2003), adopted, Comm'r, (November 6, 2003) <http://njlaw.rutgers.edu/collections/oal/>.

Here, the decision to impose a five percent cap on enrollment was made by the Commissioner, who is an Officer of the Department of Education, a state administrative agency. Thus, this is a final decision by the agency that must be appealed directly to the Appellate Division.

Petitioners argue that the five percent cap resulted in a breach of contract between the NJDOE and the petitioners. However, the Commissioner does not have jurisdiction over contract disputes. These claims must be heard in the appropriate New Jersey trial court. Because this forum is not empowered to grant the petitioner a

remedy for breach of contract, the NJDOE's Motion for Summary Decision should be granted on these issues.

The Commissioner of Education made a final agency decision when the five percent cap was imposed for the 2014-2015 school year. A final decision by an administrative agency should be appropriately challenged in the Appellate Division. However, if the Commissioner's decision is not a final agency decision, then the Office of Administrative Law does have jurisdiction to decide whether the Commissioner acted arbitrarily, capriciously, or unreasonably by imposing a five percent cap on enrollment in the School Choice Program for the 2014-2015 school year.

Whether the five percent cap on enrollment in the School Choice Program for the 2014-15 school year was arbitrary, capricious, or unreasonable.

"An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." In re Herrmann, 192 N.J. 19, 27-28 (2007) To determine whether the decision was arbitrary, capricious, or unreasonable, the court looks at:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
> [Id; quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995).]

When ruling on the appropriateness of an agency's decision, courts grant deference to agency expertise on technical matters "where such expertise is a pertinent factor." Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 588 (2001). "When resolution of a legal question turns on factual issues within the special province of an administrative agency, those mixed questions of law and fact are to be resolved based on the agency's fact finding." Id.

In 2010, the New Jersey Legislature enacted the Interdistrict Public School Choice Program Act ("Choice Act"). N.J.S.A. 18A:36B-14. The Legislature granted the Commissioner the authority to "establish an interdistrict public school choice program which shall provide for the creation of choice districts." N.J.S.A. 18A:36B-16.

The purpose of the Choice Act is "to increase options and flexibility for parents and students in selecting a school that best meets the needs of each student, thereby improving educational opportunities for New Jersey citizens." N.J.A.C. 6A:12-1.1.

To provide funding for the School Choice Program, a choice student in a choice district is "counted in the resident enrollment of the receiving district" and the receiving district receives school choice aid "for each choice student equal to the adequacy budget local levy per pupil amount." N.J.S.A. 18A:7F-62. By these terms, the School Choice Program is entirely State funded, with no transfer of funding between the sending districts and the choice districts.

Funding for the School Choice Program is governed by the annual State Appropriations Act. See L. 2013, c. 77 § 34; L. 2012, c. 18, § 34. The State Appropriations Act for Fiscal Year 2014 allocated $49,065,000 for the School Choice Program. The DOE had projected that the program would grow in the 2014-25 school year to a cost of $67,943,464. Respondent's Brief in Opposition to Petitioners' Cross-Motion for Summary Decision, 7. However, the State Appropriations Act for Fiscal Year 2015 allocated $49,246,000 for the School Choice Program, and specifically provided that "approved enrollment shall not exceed the district's maximum funded choice student enrollment as determined by the Commissioner of Education." L. 2014, c. 14, § 34.

Here, the Commissioner was granted authority over the School Choice Program. To fund the program, the Commissioner relies on the State Appropriations Act. The court will likely grant deference to the Commissioner with regard to the amount required to fund the School Choice Program. The evidence shows that the NJDOE was expecting the program to grow larger than it could afford under the Appropriations Act. Thus, to keep the program funded, the Commissioner decided to impose a five percent

cap on enrollment for the 2014-2015 school year, which was governed by the Fiscal Year 2015 Appropriations Act. Because the Commissioner is tasked with establishing the School Choice Program in New Jersey, the Commissioner acted within legislative authority by imposing an enrollment cap to keep the program funded. Also, the record contains evidence supporting the decision to impose the enrollment cap because the projected cost of the program for the 2014-2015 school year exceeded the budget afforded by the Appropriations Act for the 2015 Fiscal Year. The Commissioner made a reasonable decision to ensure the School Choice Program remained funded. Therefore, the Commissioner's decision was not arbitrary, capricious, or unreasonable.

Whether the Commissioner's decision to impose a five percent enrollment cap constituted improper rulemaking.

Administrative agencies are afforded great latitude in selecting the appropriate procedures to effectuate their regulatory duties and statutory goals. St. Barnabas Med. Ctr. v. NJ Hosp. Rate Setting Comm'n, 250 N.J.Super. 132, 142 (App. Div. 1991); Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 333 (1984). This flexibility does not allow the agency to overlook the requirements of the Administrative Procedure Act ("APA"). Therefore, an agency's discretion in selecting a procedure best suited to advance its regulatory objectives is not without parameters. Metromedia, supra, 97 N.J. at 333-34; Crema v. New Jersey Dep't of Envtl. Prot., 94 N.J. 286, 299 (1983).

The New Jersey Legislature enacted the APA to create and define procedures to be used by agencies and departments in their rule-making process. N.J.S.A. 52:14B-1 to –15. For any rule promulgated by an agency to be considered valid, the APA requires compliance with its standards and guidelines and specifically states, "[p]rior to the adoption, amendment, or repeal of any rule, except as may be otherwise provided, the agency shall...give ... notice of its intended action . . . [and] [a]fford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing . . . ." N.J.S.A. 52:14B-4(a).

The APA defines an "administrative rule" as being, unless otherwise modified, "each agency statement of general applicability and continuing effect that implements or

interprets law or policy, or describes the organization, procedure or practice requirements of the agency." N.J.S.A. 52:14B-2(e). If an agency's action or determination falls within the contours of a rule it must comply with the specific procedures outlined in the APA. Metromedia, supra, 97 N.J. at 330-34. An important aspect of rulemaking that makes it the favored regulatory method is the quest for "general fairness and decisional soundness that should surround the ultimate agency determination." Id. at 331. Typically, when the agency action deals with broad policy issues that affect a significant segment of the regulated or general public, rulemaking is implicated. Id.

In Metromedia, the Supreme Court developed a six-factor test to determine if an agency is engaged in rulemaking or policy setting. A conclusion that the agency is engaged in rulemaking is warranted if it appears that the agency determination, in many or most of the following circumstances:

1. is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or narrow select group;

2. is intended to be applied generally and uniformly to all similarly situated persons;

3. is designed to operate only in future cases, that is, prospectively

4. prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;

5. reflects an administrative policy that:
   i. was not previously expressed in any official and explicit agency determination, adjudication or rule, or
   ii. constitutes a material and significant change from a clear, past agency position on the identical subject matter; and

6. reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

[Id. at 331-332.]

These factors, either singly or in combination, determine in a given case whether agency action must be rendered through rulemaking procedures. Metromedia, supra, 97 N.J. at 332; Woodland Private Study Group v. Dep't of Environmental Protection, 109 N.J. 62, 67 (1987). "If the several relevant features that typify administrative rules and rulemaking weigh in favor of action that is quasi-legislative in character, rather than quasi-judicial or adjudicatory, that balance should determine the procedural steps required to validate the ultimate agency action." Metromedia, supra, 97 N.J. at 332.

Here, under the Metromedia six-factor test, the NJDOE's decision to impose a five percent cap on enrollment in the School Choice Program does not amount to a rule.

First, the cap only applies to the 2014-2015 school year. It is not designed to operate in all future cases. It was specifically designed for the 2014-2015 school year due to the budget constraints imposed by the Fiscal Year 2015 Appropriations Act.

Next, the Commissioner was granted the authority to establish enrollment parameters by statute and this decision does not materially change a clear, past agency decision. The School Choice Act grants the Commissioner authority to establish an interdistrict school choice program. This program is funded by the Appropriations Act each year. The Legislature granted the Commissioner authority to determine funding for the School Choice Program under the Appropriations Act. Thus, the decision to impose a five percent cap to fund the School Choice Program was within the Commissioner's statutory authority.

Also, the Fiscal Year 2015 Appropriations Act specifically stated that the districts were limited to enrollment in the amount determined by the Commissioner. Thus, the Commissioner acted within legislative authority to limit the enrollment by imposing a cap.

Finally, the enrollment cap does not change the policy behind the School Choice Program. Students may still apply and enroll in available seats in eligible districts. However, the funding for the program is limited by the Appropriations Act. The enrollment cap is in place to ensure the schools in the program are funded in

accordance with the appropriation. The cap still allows for school choice so long as the program can be funded. Therefore, it does not change the substance of the program.

These four factors weigh against the conclusion that the NJDOE engaged in rulemaking. Instead, these factors show that the decision is an exercise of the Commissioner's statutory authority. Therefore, the NJDOE's Motion for Summary decision should be granted on this issue.

Whether a discovery dispute prevents the OAL from granting the NJDOE's Motion for Summary Decision.

Petitioners claim that the NJDOE is not eligible for Summary Decision because it has not complied with their discovery requests. However, in an interlocutory decision, on August 26, 2015, the Commissioner reversed the Administrative Law Judge's decision granting Petitioners' Motion to Compel Discovery. In the decision the Commissioner asserted that the requested discovery was protected by the deliberative process privilege.

"Judicial review of administrative agency action is a constitutional right." Silviera-Francisco v. Board of Educ., 224 N.J. 126, 136 (2016). Rule 2:2-3(a)(2) also authorizes an appeal as of right to the Appellate Division from final decisions or actions of any state administrative agency or officer and to review the validity of any rule promulgated by a state administrative agency with the exception of certain tax matters. Id. "In the absence of a final judgment or order considered final by rule or law, an appeal from an interlocutory order or decision may only be taken by leave granted by the Appellate Division." R. 2:2-3(b).

Because the Commissioner has already issued an interlocutory order on discovery, petitioners' recourse is to request leave to appeal the decision to the Appellate Division or to continue until there is a final decision and then appeal to the Appellate Division as of right.

CONCLUSION

The Commissioner acted reasonably by imposing a five percent enrollment cap on the School Choice Program and this decision did not amount to improper rulemaking. The OAL does not have jurisdiction over petitioners' contracts claims and the Commissioner has already decided the discovery issues so Petitioners may appeal that decision to the Appellate Division.

ORDER

The NJDOE's motion for summary decision is hereby **GRANTED**. West Cape May's cross motion for summary decision is **DENIED**. Springfield's cross motion for summary decision is **DENIED**.

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

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

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

12/1/16

DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: December 1, 2016

Date Mailed to Parties: 12/1/16

JSK/dm

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

Briefs and Certifications of petitioners' and respondent

40-17

Pursuant to Referral By the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire

In the matter of:

The Tenure Hearing of Lydia Wilson	:	
	:	**Agency Docket No. 174-6/16**
State Operated School District of The City of Newark, Essex County	:	

Decision

Appearances:

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On behalf of Lydia Wilson:
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Introduction

This matter arises from tenure charges of conduct unbecoming a staff member against Lydia Wilson, (Respondent) by the State Operated School District of The City of Newark, Essex County (the District) alleging Respondent's failure to supervise or monitor her classroom as to permit certain six and seven year old students in her class to engage in inappropriate sexual/genital contact and exposure. The tenure charges were referred to the

undersigned by the New Jersey Department of Education, Bureau of Controversies and Disputes pursuant to *N.J.S.A. 18A:6-16* as amended by P.L. 2012, *c. 26* AND P.L. 2015, c. 109 by letter dated July 18, 2016.

The hearing in this matter was conducted in Newark, New Jersey on October 6, October 11, October 17, October 18 and November 7, 2016. All parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent Lydia Wilson was present for the entire hearing and testified on her own behalf. At the close of the hearing on November 7, 2016, the parties elected to submit written closing argument, upon the receipt of which by the arbitrator on December 30, 2016 the matter was deemed submitted.

This Decision is made following careful consideration of the entire record in the matter, including the undersigned's observations of the demeanor of all witnesses.

Issues

The issues presented in this matter may be accurately stated as follows:

> Has the District met its burden of establishing the truth of its conduct unbecoming tenure charges against Respondent, and (a) if so, what is the appropriate penalty, if any, and (b) if not, what is the appropriate remedy?

The Tenure Charge

The tenure charges in this matter were certified by the State District Superintendent of the State Operated School District of the City of Newark, Christopher Cerf on June 20, 2016. The Notice of Tenure Charges presents various facts and findings

of the District and, among other things, bases its recommendations of tenure charges for termination on:

> 55. The internal investigation found that Ms. Wilson was in the classroom while 6 and 7-year-old students engaged in physical activity that included viewing and engaging in mouth to genitalia conduct.
>
> 56. The internal investigation found sufficient evidence of conduct unbecoming a teacher in that 6 and 7-year-olds were exposing their genitalia to each other, as well as touching one another's genitalia, in Ms. Wilson's classroom during her classroom instruction.
>
> 57. Respondent's actions are highly egregious.
>
> 58. The confirmed, repeated incidents of genital exposure and reported mouth to genitalia contact among Ms. Wilsons's 1st grade students, that occurred in her classroom during classroom instruction, constitutes conduct unbecoming a teacher.

Evidence

Introduction

Respondent has worked as a teacher in the District for approximately 12 years, the last four of which as a first grade teacher. For the 2015-2016 school year Respondent was assigned to the District's Quitman Street Elementary School (Quitman). Prior to her working there, Respondent did not know any of the administrators nor any of the students at Quitman. Respondent had approximately 21 students in her class, all of whom were age 6 or 7. Her first day assigned to Quitman was September 1, 2015[1]. Classes began on September 3. Respondent's students were scheduled for instruction outside of her classroom (such as music, gym and art) for a 50-minute period four times per week.

[1] All dates are 2015 unless otherwise indicated.

Respondent had a support teacher scheduled to be in her classroom every day from 9:00 a.m. to 11:00 a.m.

On Monday, September 21 - the twelfth day of school for students at Quitman - Respondent suffered an injury causing her to be out of school/work until November 2015.

Testimony of District Witnesses

Monterique Johnson

Monterique Johnson, who had substituted before at Quitman and another of the District's schools, was hired by the District to substitute teach for Respondent during her convalescence. Johnson began teaching on Tuesday, September 22, 2015. After the lunch/recess period on Friday, September 25 – Johnson's fourth day of teaching the class - Johnson held circle time for her students. Johnson was called by the District and testified at the arbitration hearing that:

> ...-when they came back from recess, we have a circle time when I have them sit in a circle where they tell me the activities they was doing outside in recess and some of the students was telling me what happened, what they were doing outside and they said "Ms. Johnson, you weren't there. Ms. Wilson was there so you wouldn't know. K.L.[2] and some of the other students was telling me she did such and such to this student, but they said I wasn't there, they said Ms. Wilson was there and I asked did she let parents know and they said no, so what I did, I brung it to my administrator's attention because I wanted to cover myself because I wasn't there and I let them know what happened.

When asked by District counsel what students said, Johnson testified:

> L.W. said to her, K.L. wanted her to play The Nasty Game, Kissing Game during recess and she said "Ms. Johnson, I can't do that because I'll get in trouble and my mom will get in trouble and I told her I wasn't going to play that game" and that's when A.J. and A.G. said she

[2] For purposes of privacy, involved students are referred to herein by initials.

asked them to play the game with them as well and K.L. said to me ---

I said well, you know, you can't play the game, this is not appropriate.

K.L. said. "You wasn't here, Ms. Johnson. Ms. Wilson let my mom and them know and I was on punishment."

And I said okay, but I still wrote it up to let the administrators know what was going on. I wasn't there. I wanted to make sure I wrote it down in case anything happened while I was covering the classroom.

Counsel for the District then asked Johnson to describe with specificity what the students said, to which Johnson testified:

Well, I know they said K.L. went down on, I think it was A.J. I don't know if I'm saying his name right. They said she pulled his pants down and wanted to, you know, touch his private part and then she, A.J. she kissed him on the mouth. That's what they said K.L. did.

Q And that was L.W. who told you that?

A Yes

Q And then you also said that A.G. spoke with you?

A Yes. A.G. spoke with me too, because she was saying K.L. wanted her to play the game as well and she wanted her to, she wanted her to kiss A.J. – I don't know is I'm saying his name correctly – and that's when she said "Ms. Johnson, I didn't play because I didn't want to get in trouble."

Q And did A.J. describe any activity that the student's took part in, Ms. Wilson's students?

A Yes. He said he played the game, but he said he was saying he didn't touch them. He said, "I played the game, Ms. Johnson, but didn't do what K.L. did."

When asked if the children described the game, Johnson answered:

"Yes. It was called the Nasty Game…K.L. described it very good…She said when you kiss, you kiss a boy, you kiss a boy and then you touch a boy and that's when I, that's when I definitely wrote everything down and you know, I brung it to my administrator's attention because I felt that in the first grade that was very inappropriate and I didn't know what was going on with that situation before I got there.

Q Did any of the children describe where a boy was touched in the Nasty Game?

A Well, I know when they was outside in recess they played the game, but they also said they was in the classroom before I got there, they said they played the game and I wasn't there, but they said Ms. Wilson was there so I don't know, they said that they was in the classroom.

Q Did they describe the game that they played in the classroom when Ms. Wilson was there?

A They said K.L. touched - - I can't think of his name. It starts with a "J". I can't think of his name but they said they played that one in the classroom so, you know, they said, "Ms. Johnson, you wasn't there so you don't know about it, Ms. Wilson knew."

And I said, did anybody bring it to yawl's attention of your parents?

K.L. said, "Yes, I was just on punishment. I didn't get in trouble, I just got on punishment" and that was it.

Q Did the children say that this inappropriate touching took place in the classroom?

A Yes. They said it took place in the classroom and on recess.

Johnson further testified that after the children spoke to her she wrote down what was said and gave her writing to school Vice Principal Ebron, who told her to give a copy to school principal Glover. Johnson also testified that she orally told both Ebron and Glover what the children had told her.[3]

On cross examination Johnson testified repeatedly that all she asked the children at circle time – an activity involving the entire class – was "[name of student] how was your recess?" that she did not ask follow-up questions about the Nasty Game other than to ask, as they went on telling Johnson about it, "...does you parents know about it?" Johnson further testified on cross that following circle time, her class went to gym and

[3] The District did not offer any such writing into evidence and represented that no such writing could be located.

she had a 35 to 45-minute prep period; during which time she wrote down what each student had said; a note of a page in length. After she completed her note she went to vice principal Ebron and told Ebron what the students had said at circle time and Ebron made a copy of the note and asked Johnson to give it to principal Glover. Johnson had to get back to her class so waited until she dismissed her class at 2:55 to give her note to the principal.

Kimberley Ebron

Quitman Street School vice principal Kimberley Ebron testified that when she was in the hallway outside of Respondent's classroom on September 25 she was told by substitute teacher Johnson that students had reported to Johnson that there was inappropriate activity going on and that the activity had been going on in the classroom; that Johnson told her that the activity involved kissing and touching of genitalia. Ebron testified that Johnson identified six students who were involved in the activity. According to Ebron, she does not remember Johnson giving her a note describing the reports of the students. Ebron testified that she immediately reported Johnson's account to school principal Erskin Glover, and the two administrators decide to get school social worker CaMisha Steward involved.

Ebron testified that the school has a procedure when a student complains about actions of another student or teacher whereby the social worker speaks to the student to take information and then to decide a course of action. Ebron recalled that after Stewart interviewed the students identified by Johnson she reported back to Glover and Ebron and the two administrators decided they needed to contact the parents of the involved

students. Additionally, Ebron testified, she and Stewart completed an incident report and Stewart contacted the state Office of Institutional Abuse.

Ebron also testified that she was present, sometime in the end of September 2015, when principal Glover telephoned Respondent, asked her how she was doing after her injury, "briefly" told the teacher of the conduct her students had reported and that she would be contacted by the Office of Institutional Abuse. According to Ebron, Respondent stated that she did not know anything about the conduct reported.

Ebron testified that under the school's policy the social worker's interaction with students in circumstances as are presented here is neither an investigation nor an interview. Instead, Ebron explained, the interaction is more accurately described as "an asking about what happened." Ebron also testified that she believes she was present for some of the time Stewart met with students, but she does not recall either if she was present for all of the meetings (she later recalled being present for meetings with L.W., K.L., A.J. and N.B) or the location of the meetings. She further testified that she did not ask any questions of the children, except perhaps asking the first two students they met with what had happened, and that she did not recall that the social worker had any written questions prepared for the meetings.

CaMisha Stewart

According to school social worker CaMisha Stewart, she was initially informed by the vice principal that Ebron had been told by Johnson that Johnson had been informed by her students that two students had kissed each other during lunch time, and that Ebron wanted Stewart to meet with the students and find out more information about

the incident. Stewart testified that she did not conduct an "investigation" but rather, per policy of the school involving incidents of disruptive or other problematic conduct by students, Steward met with the students to "interview" them about what had been reported at recess.

Stewart testified that she first learned of the "Nasty Club" when she met with the first two students. In this regard, Stewart testified:

> I met with, I don't recall which student first, either N.B. or K.L. I asked them about the incident that was reported to me of them kissing. I asked the students what actually happened, where this occurred, who else this occurred with, if there was an adult that was present and how the adult responded if the adult was present. I also asked the student had this behavior occurred prior to, had they engaged in any of this before. And during that time, the student mentioned that there was a "nasty club" and that that had happened prior to in a classroom of exposing the genitals with other students, touching genitals, and a couple of students putting their mouths on genitals.

Stewart testified that upon learning of the details of the conduct and identity of students involved she immediately interviewed all six identified students; and that these six interviews occurred on September 25 between 2:30 p.m. and when students were excused for the day at 3:10 pm. Stewart testified that she met individually with each student on a couch in the back half of the library - a quite area with privacy. Stewart initially testified that Ebron may have been present for one or more interviews, but on cross examination testified twice that Ebron was not present. She recalled that she pulled

the students from their classroom individually and returned them after their interview and that she asked each student the same set of questions she keeps in her head.[4]

According to Stewart,[5] she began her meetings with, she believes, N.B. She testified that she started the meeting by introducing herself and letting N.B. know that she was informed he and another student reportedly kissed each other and asked if he could tell her what happened. The student answered that he was in the "cafetorium" standing next to K.L near the tables and K.L. kissed him. Steward asked the student if there were any adults around and the students responded that there were.[6] When Steward asked if that had happened before, the student said that K.L had invited him to join the "nasty team." Stewart testified that she asked N.B. what the nasty team was and that he explained it was a group of students "that did things to and with each other." When Stewart asked what things, N.B. responded that: "they exposed their genitals. They touched genitals and some had put their mouths on each other." According to Stewart, when she asked where this took pace, N.B. said in the classroom. According to N.B., Stewart continued, K.L. invited him to the activity and that K.L. had put her mouth on him and had crawled under the table and put her mouth on A.J., another student. Stewart

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[4] As quoted above; "what actually happened, where this occurred, who else this occurred with, if there was an adult that was present and how the adult responded if the adult was present. I also asked the student had this behavior occurred prior to, had they engaged in any of this before."

[5] When testifying to the details of her talks with each student, Stewart referred to the student's Social Worker Referral Form and relied upon the forms, rather than her independent recollection, for her testimony. The admissibility and reliability of (a) Stewart's testimony as to what the six students said and (b) the content of these referral forms are potentially determinative herein and are discussed at length infra. The testimony of Stewart relating to her meetings with the six involved students is presented in detail here to aid in the understanding of my evaluation and rulings made later in this Decision.

[6] Although Stewart repeatedly testified that it was her practice when a student indicated there was an adult present to ask about how the adult responded, the record fails to establish that Stewart ever asked such a follow-up question about the adults present during the kissing.

testified that she then asked N.B. if any adults were in the classroom when this happened and N.B. stated that Respondent was in the classroom, and that when she asked where in the classroom, N.B. said Respondent was at the whiteboard. N.B. then started to cry, Stewart testified.

Stewart then testified relating to her meeting with K.L. She again started by telling the student; "I was notified that she had engaged with a kissing act with another student. Asked if she could tell me what happened." After reviewing her referral form on the student, Stewart testified that K.L. denied kissing N.B. Stewart then asked why people would identify her as having kissed N.B. and K.L. replied that she was standing next to him. According to Stewart:

> I then asked had there been any other interactions or inappropriate engagements between her and other students…and she mentioned that N. B. asked to show, asked her to show him her private parts…she said she didn't show him anything…I asked were there any other students in the room that had engaged in any similar activity or touching, kissing, anything like that, and she reported that there was a nasty team or nasty game, and just gave a list of other students that participated in this activity. I asked where this occurred and she stated that it occurred in Ms. Wilson's classroom, and I asked if there were any adults in the classroom and she stated Ms. Wilson was in the classroom. I also asked her if Ms. Wilson did anything about whatever she was reporting, and she just stated that she was told to move her seat.

Steward was then asked by counsel if K.L. described what she was doing when she was asked to move her seat and Stewart testified: "I believe she said she was like under the table on the floor."

As for her meeting with L.W., Stewart testified:

> She shared with me that the nasty team was a game or a group that K.L. invited students to and they needed to show their genitals and touch or put their mouths on their genital area, she

said her private parts. I then asked her when did this happen. Who else was involved. She gave me a list of students who were involved. Where did this take place. If there were any adults in the room. ...

Q And when did she say it happened?
A It happened during her class time.
Q And did she identify what class?
A In Ms. Wilson's class.
Did she say how many times it happened?
A Off the top of my head. I don't remember. I just put it in my report whatever she mentions.
A And did you ask her if anyone was in the room other than children?
A Yes.
Q And what did she tell you?
A I believe she mentioned Ms. Wilson was in the room.

As for her meeting with A.G., Stewart testified:

> I asked her, I asked her about if she was aware of what the nasty team was, that she was mentioned to have participated in the nasty team. I asked her what the nasty team was, what she did in her involvement with the nasty team, where this occurred, who the adult was, if there was an adult in the room, where was the adult and how the adult responded.

According to Stewart, A.G. told her that to be part of the nasty team she need to show her private parts; that she lifted up her dress, pulled her panties over to the side and exposed them to other students that were on the nasty team who would look under the table. Stewart further testified that A.G. said Respondent was in the room and that she had K.L. move her seat. When Stewart asked A.G. how often this occurred, A.G. first said she did not do it any times, then said she did not do it a lot of times and that when Steward inquired; "was it one time? Was it maybe three or four times? Was it ten times" that the student responded it was "like three or four times." According to Stewart, AG stated that she saw K.L. expose herself to N.B. and put her mouth on N.B. and A.J.

Stewart continued by reviewing her social worker referral form relating to Q.L. and testified that when she met with Q.L. she began by introducing herself and:

> ...I informed him I was informed he participated in a group of students in his classroom called the nasty team. I asked him what the nasty team was, who was on the nasty team, what they did, where it occurred, who the adult was in the classroom and what the adult did.

According to Stewart, Q.L. told her that K.L. started the nasty team and you needed to expose your private parts; and that he had unzipped his pants and pulled out his penis and that he did it under the table in the Respondent's classroom and that Respondent was present but that he did not think Respondent saw him.

Stewart testified that she gave the same introduction to A.J. as she had to Q.L. and that A.J. responded that K.L. had a team and she wanted him to show her his private area, that if he showed his private area to her she would show him hers, so they both exposed themselves under the table; and that K.L. put her mouth on his penis. According to Stewart, A.J. stated that they would do this under the table when Respondent was at the white board. A.J. told her this happened a few times.

Stewart testified that she took notes during her interviews (no such notes were offered into evidence) and that after the interviews – still on September 25 – she reported what each student told her to Ebron and Glover and that the administrators determined that the state DCP&P (Division of Children and Families) should be notified. She made the call to the DCP&P with Glover being present and Ebron and Glover made calls to parents of the six students. Stewart testified that Tomeika Cherry was eventually sent from the DCP&P to the school to conduct an investigation.

Stewart confirmed that each of her six Social Work Referral Forms relating to her September 25 meetings with students references a note receive by Ebron from Johnson. Stewart testified that she did not see the Johnson note nor ask what the note stated. She did not recall the amount of time she met with each student, testify the shortest was in the 5 to 10-minute range but that she did not know the length of her longest meeting. She did not video tape or audio tape her interviews with the students, nor did she take a verbatim record of her questions and the students answers, and that she asked the same set of questions of each student, a list of five or six questions she keeps in her head. Stewart testified that she did not interview Johnson, she did not interview any student who reported the matter to Johnson or any student not identified as participating in the nasty game and she did not interview any adults who were on the playground. She also testified that she did not make any assessments of the students she met with relating to their ability to know the difference between telling the truth and a lie, understanding the difference between reality and fantasy, understanding the concepts of numbers and time or the ability to sequence events.

Erskin Glover

Glover was principal of the Quitman Street School at all times relevant. He testified that he first learned of the student conduct relevant here on September 25 when he and vice principal Ebron were approached by substitute teacher Johnson in the hallway outside of Respondent's classroom. At that time, Glover testified, Johnson informed the two administrators of reports by students of inappropriate behavior such as

kissing, touching genitals and mouth to genital contact. According to Glover, Johnson identified two students as being involved; N.B and K.L.

Glover immediately got school social worker Stewart involved. Per school policy, Glover testified, Stewart's primary responsibility was to talk with the students and gather information. Stewart reported the content of her conversations with students to Glover late in the day of September 25. Upon hearing of the conduct described by Stewart, Glover directed Stewart to contact DCP&P. Glover testified that he believes he was present when Stewart telephoned and spoke to the DCP&P from his office.

Glover testified that he spoke with Respondent by telephone in late September or early October and asked her if she was aware of the conduct reported by students to have occurred in her classroom over a period of time. Glover described the conversation as follows:

> A The beginning of the conversation was more about her health and how she was doing and the follow-up comment was that was she aware of or have any knowledge of students performing inappropriate acts in the classroom over the period of time I noted that these were the dates that it was brought to the attention, did she have any knowledge of that.
> Q When did you use the term "inappropriate activities" or did you describe to her the activities?
> A I actually described a couple of the – I described very vividly. It was stated that there was showing of genitalia to each other and there was mouth - - K.L.'s mouth was put on private parts.
> Q And what was Ms. Wilson's response?
> A Her statement was no, she wasn't.

The state IAIU completed an investigation[7] and issued a report. Glover testified that he relied upon that IAIU report, Stewart's referral forms and the District's internal investigation when he certified the Tenure Charges and signed the Statement of Evidence in support of the charges.

Michelle Takyi

Takyi is the District' Manager of Compliance and Tenure and conducted the District's internal investigation of the matter. Takyi testified that she became aware of the potential issues concerning Respondent's tenure sometime in January 2016 when she received the findings report relating to the "nasty team" conduct of the six students in Respondent's class from the IAIU.[8] She was assigned the internal tenure investigation of Respondent's conduct. For purposes of her investigation, in addition to the IAIU report,

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[7] The school provided the IAIU investigator demographic and contact information for the six students involved, and whenever an investigator met with a student, a school administrator sat in on the interview.

[8] The Institutional Investigation Unit report is dated January 7, 2016 and provides in its section entitled "Investigative Finding":

> Neglect/Inadequate Supervision is **Not** Established, in accordance with N.J.S.A. 9:6-8.21. No adjudicative findings have been made. IAIU's review herein is solely investigative. Not Established findings are not disclosed in a Child Abuse Record Information check, but they are maintained in agency records.
> (Emphasis in original)

And in its section entitled "Investigative Observations":

> The results of the investigation revealed that K.L., age 6 Q.L., age 6, L.W. age 6, A.G., age 6, N.B., age 7, were covertly playing a game dubbed 'nasty team' in the classroom that entailed consensual sexual/genital contact and exposure. However, there was no information obtained to conclusively determine that teacher, Ms. Lydia Wilson, who was in charge of the class, had knowledge of these incidents.

Takyi requested and reviewed an Incident Report initially submitted by Quitman Street School administration and the 6 Social Worker Referral forms completed by Stewart. She also spoke with the administrators of the Quitman Street School, met with two of the student's identified in the IAIU report and met with substitute teacher Johnson and Respondent. Takyi testified that the first student she met with completely shut down and the second student refused to answer any "nasty team" or inappropriate-conduct-related questions. As a consequence, Takyi testified, for purposes of her investigation, she relied upon the content of the six Social Worker Referral forms completed by Stewart. She further explained that when she met with Respondent, the teacher described the children in her class as normal students; playful and active, but nothing out of the ordinary.

Takyi's investigation culminated in an Internal Investigation Report dated March 22, 2016. Following a description of the background leading to the referral to the IAIU, the report provides, in part:

> The incident was reported to the Institutional Abuse Investigation Unit (IAIU) and an investigation was conducted. The department returned a findings report to the District on September 25, 2015. This agency returned a finding of "Not Established." "Not Established" means that there existed the potential risk of harm and that due to staff

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> Based upon the information gathered and physical observations of the children, K.L., N.B., A.J. Q.L., L.W., and A.G. are not neglected children as defined by statues.
>
> As previously noted, the Institutional Abuse Investigation Unit's findings have not been adjudicated and should not be considered binding or conclusive. No determination as to the accuracy of the allegations, statements or accounts of the incidents has been made.

The report then went on to list remedial actions already taken by the District and further provided; " [t]he appropriate licensing or supervising authority may take additional action as a result of this investigation."

> member's action or lack thereof, the student was placed in harm. The IAIU's investigation could not *"conclusively determine that Ms. Wilson, who was in charge of the class, had knowledge of these incidents."*
>
> Upon receipt of the IAIU findings the District conducted an investigation into the matter.

The report then goes on to describe the other documents reviewed, provided detailed recitations of the content of each of the six social worker referral forms, and summaries of interviews conduct of the two reluctant students, substitute teacher Johnson, social worker Stewart, principal Glover, vice principal Ebron and Respondent. After describing substitute teacher Johnson's initial report to Ebron, Takyi's report states:

> After speaking to Ms. Johnson, Ms. Ebron began a school level investigation. To start, Ms. Ebron and social worker Ms. Camisha Stewart met with [N.B.] In this meeting he reported that he and [K.L] kissed during lunch time…that [K.L.] invited him to join the *"nasty team"* and play a *"nasty game"* which involved *"show[ing] their private parts to each other under the table*...During the investigation led by Ms. Ebron, the students were asked whether Ms. Wilson was in the room or whether she was aware of what was happening and Ms. Ebron recalled that all students acknowledged that Ms. Wilson was in the classroom during the times the interactions occurred.[9]

[9] The evidence submitted at arbitration establishes that Ebron did not conduct an investigation. Both Ebron and Stewart testified that the September 25 meetings of Stewart and the six students was not an "investigation." Ebron testified Stewart more accurately engaging in an "asking" of what happened. The Vice Principal initially testified that she could not recall being present during any interview of students by Stewart, but changed her testimony and stated that she believes she may have been present for four of the interviews. Stewart initially testified that Ebron may have been present for some of her interviews, but also testified that Ebron was not present when she met with students. All six of the Referral Forms completed by Stewart state that Ebron was present during the interviews. As a result, I find that Ebron was present during the interviews of at least four of the students by Stewart.

The report further provides that in her telephone interview of Glover, the principal opined that he believed Respondent should have had knowledge of the incidents, and that when he called Respondent to apprise her of the events that had unfolded, Respondent told the administrators that she had never heard of "nasty team" or nasty game".

In its description of the interview of Respondent the report provides that Respondent:

> indicated that *"the only time [I] heard of nasty team was when [I] was interviewed by [an IAIU] case worker."* However, this statement conflicted with her statement made earlier in an interview with District representatives, Ms. Wilson stated that while on leave Principal Glover and vice principal Ebron called her on the day the incidents came to light and "*asked if [I] knew of students touching each other. I said no."*

The report then concludes with a section entitled "Recommended Action" and therein provides:

> Based on the findings, Ms. Wilson was in the classroom while male and female students engaged in inappropriate physical activity, which included looking at and touching one another's genitalia. Although Ms. Wilson claims that she knew nothing about the incidents that took place in her classroom during instruction, students attested not only to her presence in the classroom, but that on some occasions she addressed students' behavior and warned students about actions that were linked to nasty team and nasty game. As such, I recommend the District pursue tenure charges for termination against Ms. Lydia Wilson for neglect of duty that allowed students to engage in sexually explicit behavior.

Dr. Wayne Threlkeld

Dr. Threlkeld was called by the District as an expert on teacher classroom management. He testified that he reviewed all of the evidence contained in the

"Statement of Evidence Under Oath" submitted in support of the tenure charges, and that in reviewing the matter, *he understood the facts to be those reported in the social worker referral forms and that Respondent's classroom was accurately reflected in drawings and photographs presented to him by the District.* Threlkeld further testified that he did not physically observe the classroom, does not know if the pictures of the classroom he reviewed accurately represented the state of the room at the time the nasty game conduct is alleged to have occurred, and does not know if the dimensions on the drawings he reviewed are accurate.[10] Nor did he interview any of the individuals involved. Threlkeld concluded that based upon his review of the materials presented to him and his education and years of experience as a teacher, school administrator and superintendent, that due to the proximity of Respondent to the student's involved in the nasty game conduct under the table, it would have been "about impossible" for Respondent not to have seen the behavior; particularly when students went under the table. A teacher with 16 years of experience monitoring classroom activities would have seen the behavior reported by the students, Threlkeld stated. If Respondent did not see the conduct, Threlkeld continued, such would mean that she was in such a "parallel universe" as to be totally unaware of what was going on in the classroom; conduct contrary to one of the tenants of good teaching.

Respondent's Witnesses

Respondent

[10] Because his opinions are largely based upon his assumptions as to the accuracy of the contents of the Social Worker Referral Forms and photographs, I find the testimony of Threlkeld to be of little or no value to my resolution of the issue of Respondent's presence during any sexual conduct by the students.

Respondent has taught in the District for 12 years, four years of which was first grade. She did not know the administrators or students at the Quitman school prior to her working there. Her first day of work at Quitman was September 1. She had approximately 21 students in her class. She testified that prior to her going out on leave on September 21 she did not observe any inappropriate conduct, any genital exposure or any mouth to genital contact by students. Nor did she receive any complaints from parents about such conduct occurring in her classroom and no students talked about any such conduct during her classroom circle times.

Respondent recalled that the first she learned of any inappropriate behavior of her students was when she was called by principal Glover during the time she was out on leave. Respondent testified that Glover asked her if she was aware of any children allegedly acting inappropriately in her classroom and she responded that she was not aware of any such conduct. She recalled that during that first conversation the principal informed her that she would be contacted by a state investigator. She further testified that Glover did not ask her specifically about the "nasty team." During her time off she was called a second time by Glover on which occasion they discussed when Respondent would be returning to work. During that second conversation Respondent again told the principal she had nothing to do with the incident that happened.

Respondent returned November 9 and took over the teaching of another class (referred to as Ms. Wiley's class). She was told by school administration that due to low enrollment, the school had reduced its first grade classes from four to three, and that her old class had been combined with Ms. Wiley's class (Wiley having been sent to the "rubber room") and some of the students from her original class were assigned to other

classrooms. Respondent recalled that she met with the state investigator soon after she returned and testified that following her November 9 return to work she taught for about two and a half months before she was informed that tenure charges were being brought against her and she was suspended without pay.

Susan Esquilin, Ph.D.

Esquilin was offered by Respondent as an expert in issues regarding child sexualized behavior and the interviewing of children engaging in, or allegedly engaging in, those activities. Following testimony on her education, professional body of work and related experience, Esquilin was accepted by the District and by the undersigned as an expert.

Esquilin reviewed all of the documents submitted by the District in support of its tenure charges and the evidence submitted in the District's case in chief at the hearing, including testimony of Ebron, Stewart, Glover, Johnson and Threlkeld, and offered the opinion that the statements by the students involved in this matter and the related content of the social worker referral forms are not reliable.

In this regard Esquiline testified, the first reports of conduct occurred, according to substitute teacher Johnson, after recess during circle time (or rug time), and such a circumstance is problematic as it sets the stage for "contamination." Instead of separating the students as soon as the subject was raised and thereby preserving the opportunity to independently interview each student, Johnson let the students go on about the conduct and allowed other students to hear what others had to say. At the age of these students, Esquilin explained, if this type of conduct (exposure and mouth to genital conduct)

"happened for real," the children would be focused on the conduct itself and not the peripherals of what adult may or may not be present. According to Esquilin, when subject to questioning about such conduct by an adult, children want not to be blamed and can be influenced to answer questions in a way consistent with the agenda of the adult questioner. In Esquilin's view, it was apparent from Johnson's own testimony about the circle time conversation that Johnson was very concerned about clarifying which adult was present during the conduct, and it is likely that the subject of what adult may have been present at the time of the conduct was initially raised by Johnson. Thus, Esquilin testified:

> ...What one child says can be picked up by another one and then another one so you don't know at that point you would have wanted to separate the children immediately and not continue that discussion in the classroom, but it apparently continued enough that she got all kinds of statements from a number of different children. It's unclear who said what first that suggested a number of different kinds of sexualized behavior that has gone on for some period of time.
>
> What was most apparent to me about what she said was – her questioning the children about who was present. It did seem that she was very concerned, from the testimony I read, that she not be held responsible.
>
> Now, from my experience with children when they are engaged in sexual behavior with each other as alleged in this situation, they are focused on what's going on between them, that's the central issue that they are focused on, not what I would call or what's called in the literature, peripheral detail; who is in the room, what so-and-so was wearing and so forth so – but Ms. Johnson's, what seems to me from her statement, suggestions that there was questioning of the children before that, because the first report from the children before that, because the first report from the children was not who was present, the first report was that it actually happened outside on the playground and there's no report of who was present there, but suddenly in this conversation in the classroom, that's all this conversation is about, which adult was present and so it

seems to me that it's at least likely, I'm not going to say it happened, I wasn't there, but I'm saying it's at least likely that the question of who was present and not her and the previous teacher was introduced by Ms. Johnson, since that was clearly a major concern of hers and when children are being questioned about behavior that they know there's some problem with, they are eager to get out of getting in trouble so they are very vulnerable to being pushed in one direction or another in questioning, because most children by this age when they come into a situation where someone's questioning them about sexual behavior, feel like they are being blamed and in fact, what is being reported in the testimony is that some child is saying that child tried to get somebody else to do this so there's – and children being identified as having been involved in behavior that they would regard as something they shouldn't be doing and now you have an adult asking about it so that's a point at which children are very malleable to being pressured in one way or another to being what the agenda of the adult so that's why so much of the effort in training is about decreasing that anxiety level, creating rapport in general with a child trying to not have the child feel pressured whether by the adult or other children so that their account can emerge as spontaneously as possible and it seemed to me that scenario being described by Ms. Johnson, it seemed to me she was very anxious, and her anxiety is very understandable, but I think it could easily have impacted what the children said.

On the topic of Johnson, Esquilin was thereafter asked:

Q. Is it your opinion that that initial rug time incident with Ms. Johnson could have corrupted the statements thereafter given by those children?

A. Absolutely, its my impression that that could have happened.

Q. And is it your opinion that children engaged in sexual behavior – and I want to make sure I understand the peripheral issue – may not be able to tell which adult is in the class when they were engaged in that game?

A. It's my opinion that if that behavior were taking place as has been explained, if in fact, it was happening, they would have been preoccupied with what they were doing among each other and they might have checked, looked over to see who was

> watching, but the focus was not on who was in the classroom. I think, unless that person then interacted with the child, the focus was on just making sure no adult is watching while we do whatever we are doing, which we are not supposed to be doing so it's my understanding there were a number of adults in that classroom from the beginning of the school year until that time in the Circle Time and it's my understanding from what allegedly was said, that this was an ongoing activity. Whatever it was, whatever had happened, its described by the kids as something that happened repeatedly so its my impression that if it was happening repeatedly, the focus was on the activity, not what adult was there and what that adult was doing at the time that they were doing, except, that person wasn't looking at them so to that extent, I believe they checked it out so I believe there were more than one persons said it happened at recess, that say there was no question that it was at recess, it's quite possible to me that this total focus on Ms. Wilson was really the result of Ms. Johnson's focus on her questioning them to make sure that they wouldn't say she was present.

Esquilin testified that the note written by Johnson the class period following the student's circle time and given to school administration is important because it is the first memorialization of what the children allegedly said and was written close in time to the event.

Esquilin noted that the testimony of District witnesses is confused as to whether or not Ebron was present for some or all of social worker Stewart's interviews of the six children. In this regard, Esquilin continued, it is not good practice to have two adults present during an interview with a young child about sexual conduct as such creates an intimidating atmosphere.

As for the questioning by social worker Stewart, Esquilin testified, although Stewart may have had her standard six or seven questions in her head, - questions that are not inappropriate questions in and of themselves - it is typically important to have some

form of contemporaneous record of what questions are asked when, and what answers were offered to each question. Is is important not to ask leading questions and to spend enough time with the child to build a rapport. By using the "Finding Words" technique of interviewing children, the whole point is to not direct the child to a result, but to let the child become comfortable so the child can unload his or her burden. Reviewing the social worker's testimony and the manner in which she completed her referral forms, Stewart did not use such a technique. In this regard, Esquilin testified, according to Stewart she pulled each of the six children from class individually between 2:30 and 3:10 p.m. on September 25. As a result, at most, Stewart spent no more than five minutes with each child, not enough time to bring the child to a comfortable place of conversation. Typically, the time necessary to conduct an effective interview is at least fifteen to thirty minutes, according to Esquilin. Additionally, it is apparent that Stewart did not complete her referral forms at the time of her interviews; instead waiting until after they were all complete before attempting to memorialize the conversations. Such a practice results in forgetting the order in which questions were asked for each child and the answers each child offered.

In reviewing Stewart's entries on the six social worker's referral forms and manner in which the interviews were conducted as reflected by the content of those forms, Esquilin testified:

> ...Then you have to be able to, without leading, basically ask them about what has happened with those body parts and so there's a sequence of things that you need to do in order to get some reliable information. The questions have to be asked, this is very important, in a non-suggestive, non-leading way. You can't say to the child, and she testified in at least two situations, I think, that she said to the child, we know you were involved because so-and-so said you were involved.

> That's like one of the biggest no-no's that we dealt with in those cases in the 80's. You can't tell a child, basically, somebody else has already identified you, now tell us what happened, because that puts the child in a position to having to say no, that's not true and now I'm either badmouthing my friend or telling you what you believe is wrong. It pressures children. You can't ask children questions, isn't this what happened. You can't suggest the series of events.
>
> Now again there's no contemporaneous report. There's just the only report that's given is what the children allegedly said, not how they were asked and not their exact words so the reports by the social worker basically, are reporting over and over again and all six kids are saying the same thing. It's doubtful that if you interview six children individually in a non leading way that you would get identical statements so it strongly suggests that the way the kids were questioned and the short way that they were questioned, produced the same information over and over again and that's a problem.

Position of the School District

The District argued that Respondent was so disengaged from her class as to allow six and seven-year old students to repeatedly engage in inappropriate sexual behavior, including four instances of mouth-to-genital contact, in her presence over a twelve-day period. According to the District, the children's' statements are competent evidence of the activity occurring at the time Respondent was present. Although she was not found guilty by the IAIU of statutory neglect or inadequate supervision, the District argued, the IAIU found that inappropriate sexual behavior took place. Regardless, the District maintained, the District necessarily holds its teachers to a higher standard than merely not to violate criminal statues in the classroom. According to the District, Respondent was found by the preponderance of evidence to have either harmed or placed these children in harm's way which constitutes conduct unbecoming.

The crux of the decision in this case, the District asserted, falls squarely upon the admissibility and weights ascribed to statements of first grade students to their school social worker, who then recorded them on Social Worker Referral Forms, stating that they participated in genital exposure and mouth-to-genital contact with each other in the classroom during a twelve-day period while Respondent was present. Under the AAA rules the arbitrator may consider evidence relevant and material to the dispute and although he need not following the rules of evidence, the rules may provide guidance. Here, the District maintained, New Jersey rule of evidence 803(c) 27 providing for the admission of statements of children relating to a sexual offense should be followed. Moreover, as held by the New Jersey Supreme Court, spontaneous out of court statements by children regarding sexual matters are highly credible because children lack sexual experience. The determining factor with respect to reliance on children's statements regarding sexual activity is whether the statements are trustworthy considering the totality of the circumstances. Circumstances including; the spontaneity of statements, consistency of repetition, lack of motive to fabricate, mental state of the child speaking, use of words unexpected of a child of a similar age, the interrogation and manipulation by adults. Here, the District asserted, the six children spontaneously told substitute teacher Johnson about students kissing and touching in response to her question; "How was recess?" In response to social workers Stewart's questions, the children consistently responded that they were subjected to peer pressure to join the nasty game and consistently described the process by which they exposed themselves and each stated that Respondent was in the classroom when the conduct was going on. Importantly, the

District continued, the children who engaged in mouth to genital contact self identified and identified the others who engaged in such conduct.

Nor did any of the students have reason to fabricate; as no witness identified any outstanding problem between Respondent and any of the children. There was no "interrogation" of the children by Stewart. Rather, the evidence establishes that Stewart used the same procedure approved by Respondent's expert witness. In this regard, Stewart used the same set of non-leading questions she always uses when interviewing students; questions the Respondent's expert testified were all appropriate. Stewart has a Masters degree in Social Work with a concentration in Children and Family and a sub-concentration in School Settings and has been interviewing students at the school for five years. Moreover, the District pointed out, the investigator who completed the IAIU Repost, Tamika Cherry, is trained in the "Finding Words" technique endorsed by the Respondent's expert, and she found that mouth to genital contact occurred in the classroom when Respondent was present.

Importantly, the IAIU finding of "Not Established" includes a finding that the children were harmed or placed at risk of harm in Respondent's class. Considering all of the circumstances, the District argued, the Social Worker Referral Forms satisfy the standard of trustworthiness and are admissible for their truth.

In regard to the Respondent's assertion the the "Residuum Rule" prevents the introduction of the social worker referral forms, - a rule that requires that notwithstanding the admission of hearsay evidence, some legally competent evidence must also exist sufficient to provide assurance of reliability – the District argued that the argument must fail. In this regard, the District asserted, the student statements are not hearsay as they

constitute competent and admissible evidence in their own right. As a result, on their own, the statements offer the assurance of reliability and avoidance of arbitrariness sought by the residuum rule and are, of their own accord, admissible pursuant to exceptions to the hearsay rule.

The student statements establish that students engaged in sexual activity in the classroom when Respondent was present and Respondent testified that she was not aware of any such conduct. Such constitutes competent and compelling evidence of Respondent's unbecoming conduct.

In regard, to Respondent's claim she has a right to confront the student witnesses, the District argued, the Sixth Amendment right to confrontation does not apply to a non criminal case such as this.

Finally, the District asserted, the conclusions of Respondent's witness that statements of students are unreliable should not be given weight. Dr. Esquilin testified that it is possible that students could have spontaneously provided information about the nasty game in response to Johnsons' question; "How was recess?" And Johnson repeatedly and consistently testified that that is all she asked the students other than eventually asking; "do your parents know?" Moreover, Esquilin confirmed that the questions asked the students by Stewart were proper and there is nothing in the record to suggest that the subject of mouth to genital contact was discussed by the students other than in the one-on-one interviews with Stewart. In this latter regard, the District noted, even Dr. Esquilin testified that if any child was interviewed individually without any group discussion beforehand and raised such a subject, "it is likely to have happened."

The District has shown that Respondent's disengagement from her students resulted in repeated sexual activities by students in her presence and with her knowledge. Such constitutes conduct unbecoming warranting dismissal.

Position of Respondent

Respondent argued that although the arbitrator has a wide latitude in determining the admissibility and relevance of evidence, the arbitrator's decision in such regard must be made based upon considerations of fundamental fairness. Here, Respondent asserted, the District's case is based upon; (1) the alleged statements of six students made to the school social worker and the social worker's completion of Social Worker Referral Forms, (2) a report on the results of an IAIU investigation and (3) an internal investigation including the interviews of only two of the students allegedly involved wherein the students either denied knowledge of the incidents or were non-responsive during the interview. The District failed to call any of the six students involved, or the IAIU investigator and made no showing that the students or investigator were not available. Under such circumstances, Respondent maintained, the District's case consists entirely of inadmissible hearsay and denied Respondent the opportunity to cross examine the students or state investigator; a denial of fundamental fairness.

Here, Respondent continued, the District offered only hearsay evidence and even if the residuum rule is applied, the District offered no residuum of competent evidence to support the admission of the District's hearsay evidence. As for the District's reliance upon New Jersey Rule of Evidence 803(c)27 to support its claim that the Social Worker

Referral Forms are admissible as an exception to the hearsay rule, Respondent argued, that rule of evidence is limited to cases of alleged sexual abuse and there is no such allegation here. Moreover, even if the rule was applicable to the issues raised in this arbitration, the District failed to comply with the requirements of the Rule. In this regard, Respondent explained, the District failed to provide Respondent the means to contact the students involved in a timely manner; the District did not call the students to testify at the hearing, the District did not show that the students were unavailable and – like the requirement of the residuum rule - the District failed to offer admissible evidence corroborating the act of sexual abuse. In this latter regard, Respondent argued, the District's claim that corroboration is shown in the consistency of the statements of the students as reported by the social worker on the Social Worker Referral Forms must fail. As established by the testimony of Respondent's expert witness, the very consistency of the student statements reflects the unreliability of the statements and likelihood that the reports of students were contaminated.

Even if the Social Worker Referral Forms were admissible as an exception to the hearsay rule, Respondent continued, the Forms are unreliable. In this regard, Respondent asserted, the statements reported by students on the forms were the result of contamination that began with Ms. Johnson at circle time. As explained by expert witness Esquilin, it is wholly unlikely that children of ages 6 and 7 would have "spontaneously" provided the identities of which children were involved, the detailed descriptions of conduct engaged in, or the presence and location of Respondent at the times the students engaged in the conduct described under the tables. Instead, Respondent asserted, the fact that Johnson claimed more than ten times in her testimony that the children assured her –

without her even asking questions – that Respondent and not Johnson was present during the conduct, must be considered alarming.

Similarly, Respondent argued, the Social Worker Referral Forms are also unreliable. The forms do not reflect the actual questions asked each student in the order the questions were asked and do not memorialize the actual words offered by students in their answers. The Forms do not contain the unedited statements made by the children. Instead the forms use words of adults, not six year olds and are likely summaries containing embellishments. Additionally, the record establishes that there was no way the social worker could conduct effective, individual interviews of the students in the short period of 40 minutes the District claims; particularly where social worker Stewart testified that she walked back and forth from the library to the classroom to get each student. Nor is there evidence that Stewart made any assessments of the students to determine if they were capable of distinguishing between the truth and a lie or their ability to sequence events and the social worker did not ask the students any questions relating to any efforts made to keep the reported conduct secret.

The District's internal investigation should be given no weight, Respondent argued. The investigation was predisposed. The investigator spoke with only two students and received no information from the students implicating Respondent, and the investigator failed to interview any of the other students in the class or any of the many adults who were in the classroom or in the cafeteria or on the playground. As reflected by the testimony of the District's investigator Takyi, the internal investigation was a rehash of the District's incident report, the Social Worker Referral Forms and the IAIU findings.

The District also failed to establish that the charges, if proven, warranted the dismissal of Respondent. Thus, the Respondent argued, the District returned Respondent to the classroom notwithstanding that all of the allegations here were raised and investigated. Finally, Respondent asserted, after the District returned Respondent to work and assigned her to the "Rubber Room" just prior to the last day of hearing in the matter, the District marked her as AWOL for the days she attended the tenure hearing while she was on payroll and was notified that she may use her personal days for such missed days if she has them. Such is retaliation and denies Respondent the right to assist in her defense at the hearing.

Discussion

Introduction

The District's charges here are narrow; that Respondent engaged in conduct unbecoming by failing to observe her students engaging in certain sexual-related behavior (student genital exposure and student mouth to genital contact) and failed to appropriately respond to such behavior. The District did not offer the students as witnesses at the hearing, did not show that the students were unavailable to testify and did not offer any other statements of the students that would be considered otherwise reliable evidence. Nor did the District offer any other form of competent or trustworthy evidence that the student conduct took place when Respondent was present.

The primary "evidence" offered and relied upon by the District to show that sexual behavior may have taken place in Respondent's classroom *when Respondent was present*, is: (1) the testimony of substitute teacher Johnson about statements made to

Johnson during "circle time" after recess on September 25; (2) the testimony of school social worker Stewart about statements allegedly uttered by students later in the afternoon of September 25 during interviews and (3) the Social Worker Referral Forms completed by the social worker documenting her September 25 interviews of students. I find that such testimony of Johnson and Stewart, as well as the Social Worker Referral Forms completed by Stewart are; (a) hearsay and (b) that even treating such proffers as admissible, are otherwise unreliable for purposes of establishing the presence of Respondent during any conduct that may or may not have occurred in classroom.

As for the District's reliance upon the IAIU Investigation Report and its own internal investigation, I find in regard to the former that the District reliance is unsound and as to the latter, the internal report is largely based upon the content of the unreliable Social Worker Referral Forms and additionally does not reflect a full and fair investigation of the issues raised by the tenure charges.

Considering such, I find the record evidence is insufficient to establish by a preponderance of the evidence that any incident took place in the classroom when Respondent was present.

The Testimony of Johnson

Johnson's testimony about what students told her is hearsay. Even if considered as admissible, her testimony was not reliable as to the determinative issue of whether student "nasty game" conduct took place when Respondent was present.

Based upon her demeanor and the content of her testimony, I find that on both; (a) September 25, 2015 in regard to her own interaction with her students and (b) the day she

testified in the instant matter about such, Johnson's primary concern was that she not be found to have been present at the time the students engaged in the nasty game. I do not credit the testimony of Johnson that she did not ask students questions about the nasty game conduct during the September 25 circle time, or that students repeatedly and "spontaneously" stated that Johnson was not present and that Respondent was present during the nasty game conduct without Johnson either overtly or subtly leading them toward such statements.

I found Johnson's testimony to be contrived. Considering: (1) that September 25 was the fourth day Johnson had been teaching the class – amounting to a full 25% of the student days in the school year to that point - and there was ample opportunity for students to have engaged in the conduct described when Johnson was present; (2) that the initial report of the students to Johnson was of two students kissing earlier that day during recess and it is not believable that the students transitioned into describing the under-the-table conduct and then further transitioned into making assurances that (a) Johnson was not present and (b) that Respondent was present - the issue upon which the tenure charges focus - without some influence being exercised by Johnson; (3) Johnson's insistent repetition of unsolicited testimony at the hearing that students stated she was not there when the "nasty game" conduct occurred and (4) the credible testimony of the Respondent's expert witness as to the suggestibility of children of the age involved, I am persuaded that Johnson embellished her testimony in an effort to place herself in a positive light. I further find that any statements made by students to Johnson or later to social worker Stewart about the presence of Respondent during the conduct at issue was

to a significant extent the product of intended or unintended influence on the students by Johnson and are not reliable accounts of fact.

Stewart

I find both the testimony of Stewart and the Social Worker Referral Forms drafted by Stewart are hearsay, (the Forms being double hearsay) and neither are admissible for the truth of the matters stated on their own or under any exception to the hearsay rule. Even if considered under a more relaxed standard for admission recognized on occasion in arbitration, I find that neither Stewart's testimony nor the Forms she completed reflect the degree of reliability necessary to evidence that Respondent was present during any "nasty game" or other sexual conduct of the students.

The manner in which Stewart interviewed the six students involved may very well have been appropriate for her and the school's initial purpose. One cannot fault the school for wanting to get on this matter promptly and promote the best interests of the children as quickly as possible. However, one size does not fit all when it comes to interviews of children, and conversation that may be adequate for the school to determine if psychological or medical aid is recommended for a student or for purposes of making an initial determination that further investigation is warranted, is a far cry from the fairly and competently conducted interviews that would be necessary as part of a full and fair investigation required for purposes of supporting the dismissal of a tenured teacher. Thus, the initial non-investigation, non-interrogation, non-interview "asking" of students what happened by social worker Stewart may have served an important function at the time, however such an "asking" is not, and does not become, an effective and adequate

"investigation" by default simply because the District needs an investigation at a later time. It is plain from the record here that the District applied such a default process by relying upon the quick and truncated "asking" by Stewart as the basis of its referral to the state and, importantly, as primary support; (a) for the finding in the District's internal investigation that Respondent was present when students engaged in the nasty game and (b) for the District's tenure charges. The results of Stewart's process of asking are not reliable bases for a finding that Respondent was present in the classroom when the nasty game was ongoing.

In addition to her testimony being hearsay, Stewart did not reflect any significant independent recollection of her interviews of students. Instead, her testimony was largely a recitation of what was written on her Referral Forms. Also, Stewart could not clearly explain when she conducted her interviews, what information she had been provided prior to conducting the interviews, or if any other adult was present with her during her interviews of students. In this latter regard, Stewart testified variously that Ebron may have been present for the interviews, that Ebron may have been present for some of the interviews and that Stewart conducted the interviews alone. However, the Social Worker's statement on all six of her Referral Forms provides in the "Actions Taken..." section "SW, Mr. Glover, and Ms. Ebron discussed the matter in detail sharing conversations SW and Ms. Ebron held with students."[11]

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[11] Considering all of the evidence on the question, including Ebron's testimony that she was present during at least four of the interviews, I find that Ebron was present for Stewart's interviews of at least four of the students. I also find, consistent with the testimony of the Respondent's expert witness, that such presence of another adult during the social worker's questioning of students increased the likelihood that the students would be more interested in getting the meeting over with than providing accurate and reliable responses to questions.

As for the completed Referral Forms authored by Stewart themselves, they do not reflect specific questions to each student and verbatim answers individually offered, but rather largely consist of summaries of what was reported collectively by the students. Thus, the narrative provides; "[a]fter further exploration ***students*** shared that K invited other students to play the 'Nasty Game,'" (emphasis added) and, the narratives are so similar to one another as to reflect a compilation of information and do not reflect the variety of descriptions that one would expect from six individual first-grade students. Additionally, Stewart's testimony about her interviews reflect that she began some of them by stating that the student being interviewed had been identified as having been kissing another student and began others of them by telling the student being interviewed that Stewart had been informed the student was part of the nasty team and then asking the student what the team was. I find, again consistent with the credited testimony of Dr. Esquilin, that such preliminary statements by the adult interviewer in such a context would not create the non-threatening, open rapport necessary for students to accurately and reliably describe events.

Finally, in regard to the content of the referral forms, as reflected in my discussion of the testimony of Johnson above, by the time Stewart met with these students, their impressions on whether or not Respondent – as opposed to Johnson – was present during any "nasty game" conduct had already been subjected to adult influence, and, I find, was more likely than not corrupted by the students' circle time conversation with Johnson.

Based upon these considerations, I do not find either the testimony of Stewart, or the Referral Forms she completed, to be reliable evidence on the issue of Respondent's presence in the classroom at the time of any "nasty game" conduct.

The Students did not Spontaneously Report the Presence of Respondent

The District argued that the testimony of Stewart and the Referral Forms she completed were not hearsay, but that even if they were hearsay they would be admissible because the reported statements of the students that Respondent was present for the "nasty game" conduct were spontaneous, not made prior to their meeting with Stewart, and were made independently of one another. I am not persuaded by the District's argument. What is made plain form the testimony of Johnson is; (a) that the students told her about something and what they told her was of such a nature that Johnson did not want to be found to have been present at the time of its occurrence, and (b) that there was significant and detailed discussion by the students about the nasty game in the presence of one another during circle time immediately after recess and before any interviews of the students conducted by Stewart. Contrary to the argument of the District, I do not find that during their subsequent discussions with the social worker the students autonomously reported genital exposure and mouth to genital conduct in Respondent's classroom. Rather than being the result of students independently engaging in or witnessing such conduct, I find that it is more likely than not that any details of genital exposure and mouth to genital contact that may have been expressed to the social worker were the result of the students' shared experience of the circle-time conversation that took place only an hour to two hours prior to meeting with the social worker.

In finding that the full description and detail of the "nasty game" and not just details of students kissing in the playground were openly discussed at circle time prior to the social worker meetings, I rely upon the testimony of principal Glover who testified that Johnson provided Ebron and himself such details when Johnson initially reported the

matter to Glover and Ebron in the hallway outside of the classroom on September 25, the testimony of Ebron that she was told by Johnson in the hallway of the details of the nasty game and identity of the six students involved, and the testimony of Johnson who testified that during circle-time the students talked about a student "going down on" another student and a student kissing a boy and touching a boy and the rules of the nasty game.

Based upon such considerations, I find that the record fails to support the District's claim that the students "spontaneously" reported that conduct took place while Respondent was in the classroom, or the District's claim that the children "independently" reported to Stewart that sexual conduct took place when Respondent was present. As a consequence, I am not persuaded by the District's argument that independent reporting by students be found reliable and separately admissible, non-hearsay evidence that Respondent was present in the classroom when the nasty game was going on.

The IAIU Report

The District's Internal Investigation Report states (and the District repeatedly implied throughout the instant matter) that the IAIU finding of "'Not Established' means that there existed the potential risk of harm and that due to staff member's action or lack thereof, the student was placed in harm" and suggested that the IAIU report reflects that Respondent was found by a preponderance of the evidence to have either harmed or placed children in harms way. I find that the IAIU report concludes neither. First, as explained by the New Jersey Department of Children and Families;

> An allegation shall be "Not Established" if there is **NOT a preponderance of the evidence** that a child is an abused or neglected child (i.e., child abused or neglect did NOT occur), BUT evidence **indicates** that the child was harmed or was placed at risk of harm.
> (Emphasis added)

Thus, contrary to the argument of the District and the finding of the District's internal investigation, the IAIU report did not find a preponderance of the evidence establishing anything relating to Respondent, and whatever evidence may have been disclosed of child harm or placement at risk reflected in the IAIU report was limited to the level of "indicates." Considering context, where the Department had previously used the term "preponderance of the evidence" in the very same sentence, I read the Department's use of the word "indicates" to mean "suggest" – as in; the results of the investigation suggests, but was insufficient to prove by a preponderance of the evidence, that children were harmed or placed in harm.

Second, and most importantly in this regard, the January 7, 2016 report states that the:

> Institutional Abuse Investigation Unit's findings have not been adjudicated and should not be considered binding or conclusive. No determination as to the accuracy of the allegations, statements or accounts of the incidents has been made.

Rather than heed the admonitions by the state, the District inappropriately treated the IAUI report – as it did the Social Worker Referral Forms – as conclusive evidence that the conduct of the six children at issue took place in the presence of Respondent.

The District's Internal Investigation

The District's Internal Investigation Findings Report relies heavily upon the content of the Social Workers Referral Forms. The only direct evidence of the narrow issues raised in the tenure charges disclosed during the District's own investigation were statements by two students, KL and AJ that provided no evidence to support the tenure charges and Respondent's statement that she witnessed no such conduct in her classroom. In regard to the two students, the Report provides:

> **D. KL, Student, Age 6**
> KL acknowledges that Ms. Wilson was her teacher but she did not know if Ms. Wilson knew about the "nasty team." KL also denied ever hearing about nasty team. She indicated she forgot who may have known about the nasty team.
>
> **E. AJ, Student, Age 7**
> AJ stated that Ms. Wilson was his teacher. AJ refused to talk about "nasty team" and when asked whether he had heard of the team before, he responded *"Are we still talking about that?"* and covered his face with his hands.

In addition, the internal investigation included interviews of school administrators Ebron and Glover, social worker Stewart and substitute teacher Johnson. Johnson stated that when she was initially told of the "kissing game" conduct, the students told her it had been going on by KL "on a regular basis during lunch time," and that the students explained other events that had taken place, including that "KL pulled her pants down." But the District's did not investigate such reported lunch-time conduct. As for the others interviewed by the District investigator, a review of the investigation report reflects that the statements of Stewart and the two school administrators were primarily derived from the content of the Social Worker Referral Forms.

The District's investigation was otherwise inadequate as a basis to show the truth of the District's tenure charges. The investigator made no effort to interview other students about what may have been said or not said during the September 25 circle time, or other of the numerous adults who were in the classroom on a regular basis, or other adults who were supervising children during their lunch time or recess.

Based upon such considerations, I agree with the assertion of Respondent that the outcome of the District's internal investigation was to a significant degree predetermined. In any event, I find that the District investigation disclosed no reliable evidence showing that Respondent was present during student "nasty game" conduct, and the internal report's conclusion that Respondent was in the classroom when students played the "nasty game" is based primarily upon non admissible evidence that even when considered by the undersigned is unreliable.

Findings

An initially unreliable body of evidence, such as the Social Worker Referral Forms here, does not gain reliability from its mere repetition. No matter that the Forms were cited by Stewart as true, subsequently relied upon by Ebron and Glover as being true and taken by the District's internal investigator and expert at trial as being true; the initial evidentiary failings of Stewart's "askings" of the students and the failings of her completed Referral Forms, remain.

Considering the full record in this matter including all testimony, evidence and argument of the parties, I find that the District has failed to establish either the truth of its unbecoming conduct charge against Respondent, or that Respondent engaged in any

conduct that otherwise warrants her termination, suspension or reduction in salary[12] and as remedy hereby:

ORDER

The subject tenure charges against Respondent Lydia Wilson are dismissed.

The District is ORDERED to:

1. Rescind its Suspension and/or discharge of Respondent and promptly offer Respondent reinstatement to her former position.
2. Make Respondent whole for any and all losses of pay, seniority and other benefits she may have suffered as a result of her suspension and discharge from the date of her suspension to the date of her reinstatement by the District.
3. Expunge all record of her suspension and/or discharge from the District's files.

Dated: February 1, 2017

Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Decision in Agency Docket Case No. 174-6/16 relating to tenure charges against Lydia Wilson on Wednesday, February 1, 2017.

Timothy J Brown

[12] Respondent's attendance at the tenure hearing amounts to school District business in the same way that the attendance at the hearing of teachers, social workers, school and district administrators is school business. As a consequence, I also find that any requirement by the District that Respondent use personal days or other leave for her attendance at the hearings in this matter is inappropriate and Order the District to reinstate any and all leave she may have taken as the result of any such requirement by the District.

45-17

S.O., on behalf of minor child, L.O.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ORANGE	:	
RESPONDENT.	:	

SYNOPSIS

The petitioning parent appealed the decision of the respondent Board to expel his daughter, L.O., after an incident that began with L.O. wearing a hat in school in violation of the established dress code, and escalated into angry words, threats and aggressive physical behavior towards the school vice principal. The Board's disciplinary committee charged L.O. with violation of several provisions of the school district's Code of Student Conduct, including "Insubordination/Open Defiant Behavior", "Profanity/Inappropriate Language", "Threat to Staff", and "Physical Assault on Staff". Thereafter, the disciplinary committee recommended that L.O. be expelled from school and placed in an out-of-district alternative program; the recommendation was subsequently approved by the full Board. L.O. contended that she should not have been subjected to expulsion, as she was not treated with dignity and respect, and that the vice principal provoked and insulted her when she refused to return L.O.'s hat.

The ALJ found, *inter alia*, that: the Code of Student Conduct and the Student/Parent Handbook were distributed and explained to students at an assembly at the beginning of the school year; L.O.'s assertion that she had never seen these publications and was unaware of the prohibition against headwear was not credible, given the fact that at the beginning of the incident at issue here, the vice principal verbally warned L.O. that she could not wear her hat in school; L.O. continued to wear the hat in disregard of the vice principal's instruction to take it off inside the school building, and became increasingly belligerent after the vice principal took the hat and told her that it would be returned at the end of the school day; L.O. ultimately was restrained by a security officer, but continued to lob profanity and threats of physical harm at the vice principal; L.O.'s behavior was openly defiant of the vice principal's authority; and L.O.'s behavior violated the above provisions of the Code of Student Conduct. The ALJ concluded that the facts of the case fully support the findings and recommendations of the disciplinary committee, and the resulting Board decision to expel L.O. for threatening and assaulting the vice principal. Accordingly, the ALJ affirmed the Board's imposition of the penalty of expulsion.

Upon review, the Commissioner clarified that the penalty had been improperly characterized as "expulsion", but otherwise concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter for the reasons expressed therein. Accordingly, the petition was dismissed with prejudice.

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

February 6. 2017

OAL DKT. NO. EDU 02763-16
AGENCY DKT. NO. 12-1/16

S.O., on behalf of minor child, L.O.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ORANGE	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner, S.O., filed exceptions.[1]

Upon such review, the Commissioner adopts the Administrative Law Judge's (ALJ) recommended decision for the reasons expressed therein.[2] Accordingly, the petition is dismissed with prejudice.

IT IS SO ORDERED.[3]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/06/17
Date of Mailing: 2/07/17

[1] S.O.'s exceptions were not timely filed in accordance with *N.J.A.C.* 1:1-18.4. Additionally, there is no indication that S.O.'s exceptions were served upon the Board. Accordingly, the exceptions were not considered by the Commissioner.

[2] L.O.'s removal from Orange High School has been improperly characterized as an "expulsion." Under *N.J.A.C.* 6A:16-1.3, expulsion is defined as "discontinuance of educational services or the discontinuation of payment of educational services for a student." The record in this matter does not support a finding of expulsion, as L.O.'s educational services were not discontinued and she was placed on Home Instruction – following which, the Board proposed L.O.'s placement in an in-district alternative education program with the option of transferring back to Orange High School.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02763-16
AGENCY REF. NO. 12-1/16

S.O. ON BEHALF OF MINOR CHILD L.O.,

Petitioner,

v.

CITY OF ORANGE BOARD OF EDUCATION, ESSEX COUNTY,

Respondent.

S.O. on behalf of **L.O.**, petitioner, pro se

Ronald C. Hunt, Esq., for respondent

Record Closed: August 9, 2016 Decided: December 22, 2016

BEFORE **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case arises out of an incident at Orange High School on October 8, 2015, wherein L.O., an eleventh-grade student, and the school's vice principal engaged in a series of discussions about the student's wearing of a hat in the school building, which was prohibited by the school's Code of Student Conduct and the school's Student/Parent Handbook. The discussions allegedly escalated into angry words,

threats, and aggressive physical behavior. L.O. was charged with threatening of, disrespectful behavior towards, and attempted assault of the vice principal. On October 22, 2015, a disciplinary/expulsion hearing was held by the Orange Board of Education (BOE) disciplinary committee. Testimony was taken, and thereafter the disciplinary committee recommended that L.O. be expelled from the school and that she be placed in an out-of-district alternative program. On November 10, 2015, the BOE approved the recommendation. By letter dated November 18, 2015, the BOE notified L.O.'s parents of the decision and advised them of L.O.'s right to appeal to the Commissioner of Education. An appeal was timely filed. The Department of Education, Bureau of Controversies and Disputes, transmitted this matter on February 22, 2016, to the Office of Administrative Law (OAL), where it was filed on February 24, 2016, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The parties engaged in formal discovery. Significant efforts were made to settle the matter over the course of several telephone conferences and face-to-face meetings at the OAL, but were unsuccessful. The hearing was held on August 9, 2016, and the record closed. The undersigned requested and was granted additional time to issue the Initial Decision.

THE ISSUES

(1) Did L.O. commit any acts that were violative of the Code of Student Conduct?

(2) Does the preponderance of the credible evidence support the disciplinary committee's findings and recommendations?

(3) Was the penalty of expulsion supported by the evidence or was it imposed in an arbitrary and capricious manner?

FACTUAL DISCUSSION

The Orange Board of Education's disciplinary committee charged L.O. with disrespectful behavior towards Orange High School vice principal Stefanie Matthews in violation of the following provisions of the Code of Student Conduct: "Insubordination/Open Defiant Behavior"; "Profanity/Inappropriate Language"; "Threat to Staff"; and "Physical Assault on Staff." (R-5 at 25–26.) (Any of the above-mentioned charges would also come under the aegis of Code of Student Conduct at 24 "Disorderly Conduct".)

Vice Principal Stefanie Matthews

Vice principal Stefanie Matthews testified that Orange High School holds an annual assembly at which it distributes and explains the Code of Student Conduct ("Code") (R-5) and the Student/Parent Handbook (R-6) to all students of Orange High School, and that this assembly was held at the beginning of the school year in question. The Code includes a dress code. Matthews testified that on the morning of October 8, 2015, she saw L.O. inside, on the school's second-floor hallway, wearing a hat. She told L.O. to take off the hat, and L.O. removed her hat. A few minutes later she saw L.O. in the hallway wearing the hat, and she removed it from L.O.'s head. L.O. explained that she wanted to wear the hat because it was her birthday. Matthews said she wished L.O. a happy birthday, but reminded L.O. about the school's prohibition against the wearing of any headgear inside the school building. She also told L.O. that she would get the hat back at the end of the school day at 2:40 p.m. Matthews walked away towards a staircase, and L.O. followed her, asking for the hat because her hair was messed up. Matthews said that she helped fix L.O.'s hair twist, told her that it looked fine, and reiterated that the hat would not be given back until 2:40 p.m. Matthews then walked down to the first floor.

A few minutes later Matthews heard security officer William Starks telling someone to go to class. She rounded a corner and saw that Starks was speaking to L.O. Matthews testified that L.O. said in an angry tone, "I want my f-ing hat!" L.O. then

saw her and approached her, demanding her hat. L.O. said that she had paid for the hat, and said, "You're going to give me my hat!" as she ran towards Matthews. Matthews testified that because L.O. was running towards her she put her hands up, and L.O. ran into her hands. L.O. tried to snatch her hat away from Matthews. Matthews stated that Starks stepped between Matthews and L.O. while L.O. continued to scream that she wanted her hat. Matthews informed L.O. that she would be suspended for her conduct. Starks then led L.O. down the hall to turn her over to security guard Lisa King, while L.O. continued to scream at Matthews and threatened that she would "beat her ass" and that she was going to "f" her up.

Matthews stated that at no time did L.O. ever say that she was unaware that the school's rules prohibited the wearing of headgear.

Security Officer William Starks

Security officer William Starks was in his second year of employment at Orange High School when the subject incident occurred. His job is to promote safety at the school. He wrote a report regarding the incident that occurred on the morning of October 8, 2015. The report was dated "9/8/15," but Starks corrected the date at the hearing. He testified that on the morning of October 8, 2015, he noticed L.O. walking in the hallway and told her to go to class. L.O. responded by saying that she wanted her "f-ing" hat, in an angry, raised voice. L.O. ran towards Vice Principal Matthews in a manner that Starks characterized as "aggressive." Starks made ready to intervene. He testified that he saw Matthews put up her hands to keep L.O. out of her personal space, and saw L.O. make contact with Matthews's hands. L.O. continued to yell at Matthews. By this time Starks had positioned himself between L.O. and Matthews. He turned L.O. over to security officer Lisa King, who escorted L.O. away from Matthews.

On cross-examination, Starks answered questions about the date of his report and the time of the incident. He also was cross-examined about both actors' demeanor. He testified that Matthews was calm throughout the incident, and that L.O.

became irate. Starks testified that at no time did Matthews engage in verbal abuse of L.O.

Director of Special Services Shelly Harper

Shelly Harper testified that as the director of Special Services she provides students with guidance and provides services to special education students. Regarding L.O., Harper testified that it was her duty to write to L.O.'s parents. She sent a letter dated October 16, 2015, (R-3) advising them of the disciplinary charges brought against L.O. arising out of the October 8, 2015, incident and informing them about their rights at the October 22, 2015, Board of Education expulsion hearing. Harper also wrote a November 18, 2015, letter to L.O.'s parents (R-4) informing them that on November 10, 2015, the Board of Education approved the disciplinary committee's October 22, 2015, recommendation that L.O. be expelled for her conduct. In that letter Harper also stated that L.O. would be on home instruction until placement in another school could be confirmed. She informed L.O.'s parents of their right to appeal to the Commissioner of Education within ninety days. Harper testified that she made several attempts to contact L.O.'s parents. Eventually she spoke with S.O. and explained that it was the school's duty to set up an alternative education program for L.O.

L.O.

L.O. testified that she went to school on October 8, 2015, her birthday, wearing clothes that were compliant with the school's dress code. She stated that she did not know that wearing a hat inside the school building was prohibited. She added that she had never seen copies of the Code of Student Conduct or the Student/Parent Handbook. L.O. stated that when she walked into the school building she was wearing her hat, and neither Assistant Principal Belton nor the security guard, both of whom were present at the school entrance, asked her to remove her hat. When she went to her first class the teacher did not ask her to remove her hat.

L.O. stated that after class she felt ill and was walking to the nurse's office when she encountered Vice Principal Matthews. Matthews told her to remove her hat and L.O. complied. L.O. stated that the nurse was not in her office, so she decided to go to class. L.O. put her hat back on. She encountered Matthews a second time about five to ten minutes later, and on this occasion Matthews took the hat off her head, telling her she would get it back at 2:40 p.m. Matthews also fixed her hair. L.O. stated that she pleaded for her hat, explaining that it was her birthday, but Matthews refused and walked away. L.O. followed Matthews downstairs and said something that she could not recall. The security guard asked L.O. whom she was talking to "like that." L.O. admitted that she used profanity, but said it was not directed towards Matthews. When speaking with the guard, who was sitting five to ten feet away, L.O. complained, raising her voice, that Matthews wouldn't give her back her "f-ing" hat. Matthews overheard this remark and told L.O. that she was suspended for three days and would not get her hat back at all. L.O. stated that she walked towards Matthews and told her that she paid for the hat, and was going to get her hat back. She then tried to grab the hat, which Matthews was holding in her hand. Starks placed himself between L.O. and Matthews. L.O. admitted that she came into contact with Matthews. King then came over to her.

L.O. claims that she was not treated with dignity and respect, and that when Matthews told her that she would never be able to have her hat back, it was intended to provoke and insult her. She claims that this provocation caused the situation to escalate. L.O. stated that students at the school wore hats inside the building all the time, and that she felt that she was being singled out on October 8, 2015.

FINDINGS OF FACT

Based on the evidence presented at the hearing, as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** as **FACT** the following:

1. The distribution of the Code of Student Conduct (R-5) and the Student/Parent Handbook (R-6) took place at the beginning of the school year in

2015, as it annually takes place (see N.J.A.C. 6A:16-7.1(a)(3)) at Orange High School, where the contents of each are explained by school officials. This finding of fact is based on the regularity of the distribution of these publications and Vice Principal Matthews's testimony that the assembly took place at the beginning of the school year. These factors outweigh L.O.'s assertion that she never saw these publications and was unaware of the headwear prohibition. Also, L.O.'s failure to ask Matthews why she would not be allowed to wear her hat in school at their first meeting on October 8, 2015, indicates that L.O. was, in fact, aware of the prohibition.

2. Approximately five to ten minutes after their first meeting on October 8, 2015, a second meeting between L.O. and Matthews occurred. At their second meeting Matthews found L.O. wearing the hat in disregard of Matthews's instruction not to wear the hat inside the school building. Matthews took the hat off L.O.'s head and informed L.O. that the hat would be returned to her at 2:40 p.m., the end of the school day.

3. After the second meeting, L.O. followed Matthews; when Security Officer Starks instructed L.O. to go to class, L.O. used an angry and loud voice, demanding the return of her hat, and L.O. used profanity; and when Matthews heard these words and saw who the speaker was (the third meeting of L.O. and Matthews), she immediately, in the presence of Starks, informed L.O. that she was suspended from school and that the hat would not be returned to her.

4. L.O. approached Matthews demanding her hat and used profanity against her; Matthews put up her hands to preserve her personal space from intrusion by L.O.; and Starks intervened, placing himself between L.O. and Matthews, but not before L.O. made contact with Matthews as L.O. reached out and tried to snatch the hat, which Matthews was holding in her hand. As L.O. was escorted away by Security Officer King, L.O. continued to use profanity and uttered threats of doing physical harm to Matthews.

5. It was L.O., not Matthews, who lost her composure and temper, resulting in L.O.'s disrespectful behavior, her uttering of threats, and her rude, unprivileged, and hostile touching of Matthews. L.O. willfully disregarded the school's rule against wearing headgear inside the school building; willfully disobeyed the direct order of Matthews by putting the hat back on her head within the minutes between their first meeting and their second meeting; and failed to acknowledge the vice principal's authority over her.

LEGAL ANALYSIS AND CONCLUSIONS

The laws governing the discipline of public-school students are found in N.J.S.A. 18A:37-1 through -37. N.J.S.A. 18A:37-1 obligates students to comply with the school's rules, to pursue the prescribed course of study, and to submit to the authority of the teachers and others in authority over them.

N.J.S.A. 18A:37-2 sets forth the causes for suspension or expulsion of students. This section states that conduct that shall constitute good cause for suspension or expulsion includes, but is not limited to:

> b. Open defiance of the authority of any teacher or person, having authority over him.

N.J.S.A. 18A:37-2.1 states:

> a. Any pupil who commits an assault, as defined pursuant to N.J.S. 2C:12-1, upon a teacher, administrator, board member or other employee of a board of education, acting in the performance of his duties . . . shall be immediately suspended from school consistent with procedural due process pending suspension or expulsion proceedings before the local board of education.

The New Jersey Administrative Code defines terms relevant to this matter in N.J.A.C. 6A:16-1.3:

> "Alternative Education Program" means a comprehensive educational program designed to address the individual learning, behavior, and health needs of students who are not succeeding in the general education program or who have been mandated for removal from general education, pursuant to N.J.A.C. 6A:16-5.5, 5.6 and, as appropriate, 5.7. The alternative education program shall provide a variety of approaches to meet the state-adopted standards, such as, through non-traditional programs, services and methodologies to ensure curriculum and instruction are delivered in a way that enables students to demonstrate the knowledge and skills specified for all students in N.J.A.C. 6A:8.
>
> "Code of Student Conduct" means standards, policies, and procedures established by district boards of education for positive student development and student behavioral expectations on school grounds, including on school buses or at school-sponsored functions, and, as appropriate, conduct away from school grounds, in accordance with N.J.A.C. 6A:16-7.1.
>
> "Expulsion" means the discontinuance of educational services or the discontinuance of payment of educational services for a student.
>
> "Long-term suspension" means removal of a student for more than 10 consecutive school days from the general education program, or the special education program when the appropriate procedures set forth in N.J.A.C. 6A:14-2.8 have been followed, but not the cessation of the student's educational services.
>
> "Short-term suspension" means removal of a student for one but not more than 10 consecutive school days from the general education program or the special education program, in accordance with N.J.A.C. 6A:14-2.8, but not the cessation of the student's educational services.

Regulations concerning the "Code of Student Conduct" are set forth at N.J.A.C. 6A:16-7.1 in pertinent part as follows:

> (a) Each district board of education shall develop, adopt, disseminate, and implement a code of student conduct that establishes standards, policies, and procedures for positive student development and student behavioral expectations

> on school grounds and, as appropriate, for conduct away from school grounds.
>
> . . . .
>
> (3) The code of student conduct shall be disseminated annually to all school staff, students and parents.
>
> . . . .
>
> (c) The code of student conduct shall include, at a minimum:
>
> (1) A description of the students' responsibilities that includes expectations for academic achievement, behavior and attendance, pursuant to N.J.A.C. 6A:32-8 and 12.1; and
>
> (2) A description of behaviors that result in suspension or expulsion, pursuant to N.J.S.A. 18A:37-2.

In the instant case, the Code of Student Conduct (R-5), which as found above was compiled and distributed by Orange High School in accordance with applicable laws and regulations, contained a student dress code that prohibited the wearing of headgear, including hats, inside the school building. I **CONCLUDE** that Vice Principal Matthews properly interpreted and enforced the dress code when she stopped L.O. at their first meeting on October 8, 2015, and asked her to remove her hat. L.O., minutes later, placed the hat on her head again. I **CONCLUDE** that by doing so, she violated the vice principal's direct order not to wear the hat inside the school building, and, therefore, I **CONCLUDE** that she thereby violated the Code's "Insubordination/Open Defiant Behavior" provision.

Vice Principal Matthews confiscated L.O.'s hat during their second meeting, having found that L.O. was wearing the hat in contradiction of her order not to wear the hat inside the school building. During their third meeting, L.O. used profanity and loudly and angrily demanded that Matthews return her hat. I **CONCLUDE** that L.O.'s use of profanity and her loud, angry tone violated the Code's "Insubordination/Open Defiant Behavior" provision.

I **CONCLUDE** that L.O.'s approach towards Vice Principal Matthews, her attempt to snatch the hat from the vice principal's hand, and her touching of the vice principal during this episode violated the Code's "Threat to Staff" and "Physical Assault on Staff" provisions.

I **CONCLUDE** that L.O.'s repeated verbal threats of physical harm against the vice principal, as she was being escorted away by security officer Lisa King, violated the Code's "Threat to Staff" provision.

I **CONCLUDE** that the facts fully support the findings and recommendations of the disciplinary committee, and, in turn, the decision of the BOE to expel L.O. for threatening a member of the school's staff (Matthews) so as to reasonably raise a concern for the staff member's safety, and (2) actually assaulting Vice Principal Matthews.

I **CONCLUDE** that the BOE did not act in an arbitrary and capricious manner when it imposed the penalty of expulsion against L.O. Accordingly, I **CONCLUDE** that the findings of the BOE and the penalty imposed should be affirmed.

ORDER

Based upon the foregoing, I **ORDER** that the findings of the respondent BOE should be and hereby are **AFFIRMED**, and I **ORDER** that the BOE's imposition of the penalty of expulsion against L.O. should be and hereby is **AFFIRMED**.

ORDER

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

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

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

December 22, 2016
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: December 22 2016

Date Mailed to Parties: December 23, 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Db

APPENDIX

List of Witnesses

For Petitioner:

L.O., petitioner

For Respondent:

Vice Principal Stefanie Matthews
Security Officer William Starks
Director of Special Services Shelly Harper

List of Exhibits

For Petitioner:

P-1 Not in evidence
P-2 Not in evidence
P-3 L.O.'s January 11, 2016, letter of apology
P-4 Not in evidence
P-5 Code of Student Conduct (partial, 14 pages)

For Respondent:

R-1 Not in evidence
R-2 Not in evidence
R-3 BOE's October 16, 2015, letter to L.O.'s parents providing notice of hearing
R-4 BOE's November 18, 2015, expulsion letter
R-5 Code of Student Conduct (complete, 55 pages)
R-6 Student/Parent Handbook (complete, 49 pages)

48-17

BEFORE THE COMMISSION OF EDUCATION OF NEW JERSEY DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges between State-Operated School District of the City of Newark, NJ, Petitioner, and Priscilla Umeizu, Respondent.	**MOTION-TO-DISMISS**
Agency Docket No. 273-10/16	**Dr. Andrée Y. McKissick Arbitrator**

RULING ON RESPONDENT'S PRE-HEARING MOTION-TO-DISMISS

APPEARANCES:

For the District: Petitioner: Teresa L. Moore, Esquire
Riker Danzig Scherer Hyland Perretti
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981

For the Respondent: Colin M. Lynch, Esquire
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
One Riverfront Plaza, Suite 320
Newark, New Jersey 07102-5410

BACKGROUND

The record reflects that on November 1, 2016, the New Jersey Commission of Education referred this charge to arbitration. On November 3, 2016, there was a conference between the Parties and the Arbitrator. It was established that the hearing would be held on the following days: December 12, December 13, and December 21, 2016. However, on

December 8, 2016, the Respondent moved to dismiss the charges for lack of discovery due to untimely and incomplete responses by the District. By email, the Respondent notified the Arbitrator on Friday, December 9, 2016 and requested that the Motion-to-Dismiss be considered. Thereafter, the Arbitrator entertained the Respondent's Motion. The hearing was to commence on Monday, December 12, 2016. The Respondent's brief was mailed to the Arbitrator later on December 27, 2016. The District's reply brief was mailed on January 6, 2017 as well. On January 14, 2017, the Arbitrator granted the Respondent's Motion-to-Dismiss. Tentative dates were allotted for a hearing on January 18, 19, and 20, 2017. However, these dates were subsequently cancelled because of the Arbitrator's ruling to dismiss the charges for procedural reasons.

STATEMENT OF FACTS

Principal Pellegrine of Louise A. Spencer School filed a charge of inefficiency against Priscilla Umeizu, a tenured teacher employed by the State-Operated School District of the City of Newark. The Notice of Tenure Charge of Inefficiency of the above teacher was rated as Partially Effective and Ineffective in three (3) consecutive annual evaluations in the following years: Partially Effective in her 2012-2013 annual evaluation; Partially Effective in her 2013-2014 annual evaluation; Ineffective in her 2014-2015 annual evaluation (see Exhibit A).

On August 14, 2015, the Respondent received Tenure Charges. On September 8, 2015, the Respondent submitted a Position Statement to the State-District Superintendent. The record reflects that the Tenure Charges were not certified until a year later, on September 8, 2016. Thereafter, the District served the "Supplemental Statement of

Evidence" to revive the dormant Charges. On September 26, 2016, the Respondent filed a Supplemental Position Statement with the Superintendent opposing the renewed Charges (Exhibit D). Thus, there was a referral to arbitration on November 1, 2016.

On the day of the conference call between the Parties and the Arbitrator on November 3, 2016, the District served the Respondent with a witness list, amounting to a seven-hundred-twelve (712)-paged document (Exhibit F). On November 11, 2016, the Respondent served the District with twenty-five (25) interrogatories (Exhibit G). However, the interrogatories were not answered until after business hours on Friday, December 9, 2016 (Exhibit J). The hearing was to commence on Monday, December 12, 2016.

ISSUE

Whether or not this Motion-to-Dismiss should be granted?

If not, what shall the remedy be?

PERTINENT PROVISIONS

N.J.S.A. 18A: 6-17.1 (b) (3)

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

limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to twenty-five (25) without subports.

N.J.S.A. 18A: 16-14

... the board may suspend the person against whom such charge is made ... without pay, but if the determination of the charge by the arbitrator is not made within one hundred twenty (120) calendar days after certification of the charges, excluding all days which are granted at the request of such person, then the full salary ... of such person shall be paid beginning on the one hundred twenty-first (121st) day until such determination is made.

POSITIONS OF THE PARTIES

It is the District's position that there is no legal basis to dismiss the Tenure Charges because the statute provides no deadline for serving or responding to interrogatories. The District argues that there is no sanction provided for failure to respond to interrogatories.

In regards to the Respondent's complaint regarding the witness list being short, repetitive and essentially a generalized summary, the District counters that the Respondent failed to object from November 3, 2016 to December 27, 2016. Moreover, the District points out that the first time an objection was made to the District's witness list was during the second conference call on December 14, 2016, after the adjournment of the hearing.

Moreover, the District also points out that the Respondent identified no deficiency as to the answers to the twenty-five (25) interrogatories. Instead, the Respondent's sole argument was that the answers to the interrogatories were submitted to him too close to the hearing date, December 12, 2016.

As to the lack of sufficiency regarding the witness list, the District asserts that the same six (6) individuals named in that list are the same persons cited in the "Statement of Evidence" received by the Respondent on August 15, 2015. In particular, the District still further points out that the Respondent did not cite this deficiency regarding the witness list in his brief, requesting a dismissal of charges. Instead, the District contends that the Respondent's sole basis for asking for a dismissal was the late interrogatories only.

In response to the Respondent's argument that he was prejudiced by the deficient summaries of the witness list, the District rebuts that there is no basis for a dismissal of charges for a defective witness list. Moreover, the District further contends that the statute provides no sanction except for the preclusion of the testimony of witnesses. Based on the foregoing, the District sums up that there are no sanctions to be imposed on them for the Respondent's attempt to evade review on the merits. Thus, the District concludes that the Motion-to-Dismiss must be denied and the hearing should commence as tentatively scheduled for January 18, 2017.

In support of the District's position to deny this Motion-to-Dismiss, the District offers the following cases: State v. Santomauro, 261 N.J. Super. 339 (N.J. Super. App. Div. 1993); Barcon Associates v. Tri-County Asphalt Corp., 86 N.J. 179, 190-91 (N.J. 1981); Nogue v. Estate of Santiago, 224 N.J. Super. 383, 385-87 (App. Div. 1988); Plainfield v.

Public Service Electric and Gas Company, 82 N.J. 245, 258-59 (N.J. 1980). These cases shall be discussed in the Findings.

It is the Respondent's position that there is little time to engage in the discovery process because it is the District that controls access to information. Thus, the Respondent reasons that it is imperative for the arbitration process to move forward as expeditiously as possible. In particular, the Respondent asserts that after the case is filed that the Respondent must receive all evidence which includes a complete summary of each witnesses' testimony expeditiously. Moreover, the Respondent further asserts, when a District does not meet its discovery obligation under N.J.S.A. 18A: 16-17.1 (b) (3), then the statute provides that the District is prohibited from presenting additional evidence at the hearing with the limited exception, the impeachment of witnesses.

Specifically, the Respondent contends that the District failed to meet its discovery obligations in two (2) ways. First, the Respondent asserts that it failed to provide a timely response to the Respondent's interrogatories. The Respondent adds that this was not an inadvertent omission because the District was reminded of this obligation via email. Instead, the Respondent asserts that the District ignored this request and only provided its response to interrogatories on the last business day and after business hours prior to the commencement of the hearing. Second, the Respondent also contends that the District was remiss in never providing a complete summary of its witnesses' testimony, as required by the statute.

The Respondent further asserts that the Notice of Charges was provided over a year and a half ago. Thus, the Respondent maintains that there is no reason that the complete summaries could not also have been prepared long ago. The Respondent further points out

that such summaries are critical to preparing a viable defense to the charges presented. Therefore, the Respondent still further asserts that without a complete summary, a teacher does not have an opportunity to discern what specific matters will be raised by the District's witnesses. Correspondingly, the Respondent contends that this means that there will be no opportunity to query potential witnesses or obtain responsive documents. In sum, the Respondent concludes that these factors unfairly prejudices his client and that prejudice has a continuing effect. Thus, the Respondent concludes that such late and inadequate presentation is violative of the TEACH NJ Act and this Motion-to-Dismiss must be dismissed. Besides, the Respondent adds that there is no evidence which the State-Operated School District can be legally presented at the hearing.

In support of this Motion, the Respondent offers the following arbitration award: In the Matter of the Tenure Hearing of Marie Ebert, State-Operated School District of the City of Newark, Essex County, Agency Docket No: 267-9/14, Tia Schneider Denenberg, Arbitrator, dated January 30, 2015. This case will be discussed in depth in the Findings.

FINDINGS AND DISCUSSION

After a careful review of the briefs presented and prevailing case law along with attached exhibits, this Arbitrator finds that this Motion-to-Dismiss must be granted for the following reasons.

First, the District failed to meet its discovery obligations in a timely and sufficient manner. Specifically, it failed to provide a timely response to the Respondent's interrogatories. Instead, the record indicates that the District finally responded on the last business day and after business hours prior to the commencement of the hearing. In addition, the District was remiss in never providing a "complete" summary of its witnesses' testimony, as required by the statute.

N.J.S.A. 18A: 6-17.1 (b) (3) states, in pertinent part, as follows:

> Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses ...

Applying this provision to our factual scenario, this case was referred to this Arbitrator on November 1, 2016. A conference call was held between the Parties on November 3, 2016. This was the same day that the District served the Respondent with a witness list, amounting to a seven-hundred-twelve (712)-paged document. On November 11, 2016, the Respondent served the District with twenty-five (25) interrogatories. Nonetheless, the interrogatories were not answered until after business hours on Friday, December 9, 2016. The hearing was to commence on the following Monday, December 12, 2016 and continue to December 13 and December 21, 2016.

Based on the foregoing, the District breached the discovery obligations of N.J.S.A. 18A: 6-17.1 (b) (3). Consequences of that breach, as set forth in that provision, is that the District shall not present any additional evidence at the hearing except for purposes of impeachment of witnesses.

Second, although the District counters that on December 14, 2016 during the second conference call was the first time that the Respondent objected to the lack of a "complete" summary, the record reflects that the statute is quite clear that "all" evidence must be submitted upon the referral to an arbitrator. It also is clear that a "complete summary" of the witness is an absolute requirement.

In regards to the cryptic responses of the District's answers to the twenty-five (25) interrogatories, such short, pithy responses did not include specific information. As such, these answers were non-responsive and prevented the Respondent from preparing a viable defense to the charges presented. Notwithstanding the District's position that the Respondent was not prejudiced by such summaries or the December 9, 2016 answers to the Respondent's interrogatories sent just before the December 12, 2016 hearing, this Arbitrator disagrees with this assessment.

Third, in support of the Respondent's position, it offers: In the Matter of the Tenure Hearing of Marie Ebert, State-Operated School District of the City of Newark, Essex County, Agent Docket No: 267-9/14, Tia Schneider Denenberg, Arbitrator, dated January 30, 2015. The Respondent correctly finds this case to be directly applicable to our current case. The Ebert case (Exhibit K) also deals with tenure charges for inefficiently and conduct unbecoming a public school teacher. Most importantly, the Ebert case directly addressed N.J.S.A. 18A: 6-17.1 (b) (3) where Arbitrator Denenberg granted a Motion-to-Dismiss for the District's failure to comply with the timeliness mandate of this provision. As with our case, the Ebert case lacked also a complete summary of the witnesses' testimony, as required by said statute. In addition, the facts of the Ebert case reveal a production of late documents despite being reminded by the Respondent of their tardiness.

This is again also directly analogous to our current case. In sum, the Ebert case points out the effect of late and untimely responses is that the Respondent then lacks a detailed account of the facts which witnesses will testify about. Moreover, the Respondent is essentially left to guess about information which emerges at the hearing. Thus, the Respondent in Ebert concludes that the Motion-to-Dismiss must be granted because additional evidence is precluded by statute due to the District's late responses. In sum, it is also interesting to note this school district in our case is the same one discussed in Ebert.

Fourth, on the other hand, the District offers a series of non-applicable cases to support its position of opposition to the Motion-to-Dismiss. For instance, in Barcon Associates v. Tri-County Asphalt Corporation, 86 N.J. 179, Supreme Court of New Jersey, decided May 28, 1981, this case involves the ruling of an illicit business relationship with a party-designated arbitrator, who failed to disclose his business interest with one of the parties. Clearly, this case has nothing to do with the failure to respond to the discovery process of TEACH NJ Act, the prevailing statue of our case.

Another case the District cites is: In the Matter of the Estate of Dudley B. Dawson, Deceased, Late of Boston, Morris County, NJ, decided on June 9, 1994. This case's focus is upon corporate distributions to shareholders where stock splits were confused with stock dividends. Again, this case is not on point. It has no applicability to discovery obligations under our TEACH NJ statute.

Still another case, the District offers in opposition to the Motion-to-Dismiss is: The State of New Jersey, Department of Environmental Protection and Energy, Division of Fish, Game and Wildlife v. Richard Santomauro, decided January 15, 1993. This case involves the difference between res judicata and collateral estoppel as it relates to a statue's

applicability to deer heads. Clearly, there is no applicability of this case to current case involving discovery obligations under the TEACH NJ Act statute.

Fifth, based upon the totality of the pre-hearing record of events and the merits of the Respondent's position, as delineated, this Arbitrator finds that the Motion-to-Dismiss must be granted. To rule otherwise, would be a travesty to due process and in violation of N.J.S.A. 18A: 6-17.1 (b) (3), the prevailing statute.

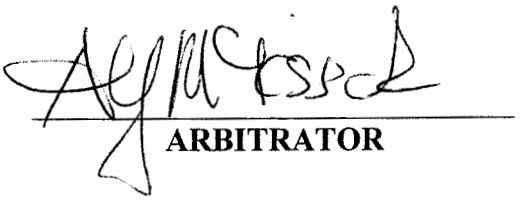
RULING

The Respondent's Motion-to-Dismiss shall be granted due to the District's failure to comply with the timeliness mandate of N.J.S.A. 18A: 6-17.1 (b) (3). Priscilla Umeizu shall be reinstated with full back pay and benefits. This dismissal is without prejudice to the District's right to file charges again.

AFFIRMATION

I, Dr. Andrée McKissick, do hereby affirm that I am the individual described in and who executed this instrument, which is my Opinion and Award.

DATE OF AWARD: January 28, 2017



ARBITRATOR

C:\Priscilla Umeizu (New Jersey Panel) January 28, 2017.docx

STATE BOARD OF EXAMINERS DKT. NO. 1415-124
AGENCY DKT NO. 4-12/16A

IN THE MATTER OF THE SUSPENSION :		
OF THE CERTIFICATES OF	:	COMMISSIONER OF EDUCATION
DAVID PEKAREK BY THE STATE	:	DECISION
BOARD OF EXAMINERS.	:	
	:	

Order of Suspension Decision by the State Board of Examiners, November 11, 2016

For the Respondent-Appellant, Edward A. Cridge, Esq.

For the Petitioner-Respondent State Board of Examiners, Jennifer Hoff, Deputy Attorney General (Christopher S. Porrino, Attorney General of New Jersey)

In this case the appellant, David Pekarek, is appealing the State Board of Examiners' (Board) November 11, 2016 Order suspending his teaching certificates for two years.[1] This matter was referred to the Board after the appellant was charged with Aggravated Assault based on an incident that occurred during an adult soccer game. Following a hearing at the Office of Administrative Law (OAL), the Administrative Law Judge (ALJ) found that the appellant was guilty of unbecoming conduct for stomping on the head of an opposing player with his cleated shoe. The ALJ recommended that the appellant's certificates be revoked based on the violent and brutal loss of control and self-restraint exhibited by the appellant. Thereafter, the Board adopted the Initial Decision of the ALJ with regard to the finding of unbecoming conduct, but modified the penalty to include a two year suspension of the appellant's teaching certificates.

On appeal the appellant does not deny that he stomped on the head of an opposing player with his cleated shoe; however, he maintains that the Board's decision to suspend him for

[1] The appellant has a Teacher of Health and Physical Education Certificate and his Teacher of Health and Physical Education Certificate of Eligibility with Advanced Standing.

two years was arbitrary, capricious and unreasonable because it is an unduly harsh penalty. The appellant argues that the penalty imposed by the Board is disproportionately severe when compared to penalties imposed by the Board in cases where far more serious unbecoming conduct occurred both in and out of school. In furtherance of his argument, the appellant cites to prior cases that he contends are analogous to his case where the Board imposed a lesser penalty on the teaching staff member for conduct that pales in comparison to the circumstances here. The appellant also emphasized that the penalty should reflect the fact that he was playing in a fiercely competitive adult soccer league, and that he was immediately remorseful for his actions. Moreover, the appellant's conduct had nothing whatsoever to do with his teaching duties, and he has an unblemished teaching record. Therefore, the appellant requests that the Commissioner vacate the suspension imposed by the Board.

In reply, the Board maintains that the decision to suspend the appellant for two years was not arbitrary, capricious or unreasonable, and should be affirmed by the Commissioner. The Board stresses that the appellant is raising the same arguments on appeal that he previously made in his post-hearing brief at the OAL, his exceptions to the Initial Decision, and in his motion for reconsideration filed with the Board. The appellant's arguments were fully taken into consideration when the Board issued the decision to suspend the appellant's certificates for two years. The Board also cited cases to demonstrate that the two-year penalty imposed by the Board – for forcefully stomping on the head of a defenseless player – is well within the parameter of penalties the Board has applied in other comparable cases. The appellant's actions were violent and brutal, and fell far short of the self-restraint and controlled behavior New Jersey requires of its teachers. Therefore, the Board maintains that the two-year suspension of the appellant's certificates should be upheld.

The challenge on appeal focuses exclusively on the extent of the penalty assessed by the Board for appellant's unbecoming conduct. In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute his judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

Upon a comprehensive review of the record, the Commissioner finds that the Board's decision to suspend the appellant's certificates for two years was not arbitrary, capricious or unreasonable. Notably, the Board did not simply adopt the penalty of revocation recommended by the ALJ. Instead, in accordance with *In re Fulcomer,* 93 *N.J. Super.* 404 (App. Div. 1967), the Board properly evaluated the nature and extent of the unbecoming conduct proven during the hearing at the OAL, which – coupled with the appellant's unblemished teaching record and immediate remorse – led to the finding that the more appropriate penalty was a two-year suspension of the appellant's certificates. There is nothing in the record to indicate that the Board's penalty determination was arbitrary, capricious or unreasonable. Therefore, the Commissioner finds no basis upon which to disturb the decision of the State Board of Examiners.

Accordingly the decision of the State Board of Examiners is affirmed for the reasons expressed therein.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/10/17
Date of Mailing: 2/13/17

*This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

50-17

OAL DKT. NO. EDU 16175-15
AGENCY DKT. NO. 270-9/15

B.U. AND N.U., ON BEHALF OF MINOR CHILD, M.U.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF MONTVALE, BERGEN COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/13/17

Date of Mailing: 2/13/17

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 16175-15

AGENCY DKT. NO. 270-9/15

B.U. & N.U. o/b/o M.U.,

Petitioner,

v.

MONTVALE BOARD OF EDUCATION,

Respondent.

Charles Shaw, Esq., for petitioners

Caitlin Lundquist, Esq., for respondent (Methfessel & Werbel, P.C., attorneys)

Record Closed: December 21, 2016 Decided: December 28, 2016

BEFORE **JOHN P. SCOLLO,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 8, 2015 and filed on October 9, 2015 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within fifteen days, this recommended decision shall become a final decision in accordance with N.J.S.A. 56:12-37(b).

December 28, 2016

DATE

JOHN P. SCOLLO, ALJ

db

AGENCY DATE AND MAILED TO PARTIES December 29, 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Montvale Board of Education

Andrea Wasserman
Business Administrator/Board Secretary
Phone: 201-391-6226

47 Spring Valley Road
Montvale, NJ 07645
Fax: 201-391-8935

December 13, 2016

I hereby certify that the following is an excerpt of the meeting of the Montvale Board of Education held on December 12, 2016:

Motion by: Mrs. McGauley-Eichhorn
Seconded by: Mr. DiFiore

SETTLEMENT AGREEMENT

Motion 9.6

RESOLVED, by the Montvale Board of Education (hereinafter referred to as the "Board") agrees that the terms, stipulations and conditions as established in the Settlement Agreement between the Board and Petitioners B.U. and N.U. O/B/O M.U, are hereby authorized and directed to execute the Settlement Agreement, and any other documents necessary to effectuate the settlement.

BE IT FURTHER RESOLVED, that the Board President be authorized to sign the Agreement on behalf of the Board.

Aye Votes: Mrs. Baskin, Mrs. Bagdat, Mr. Carvelli, Mr. DiFiore, Mrs. McGauley-Eichhorn, Ms. Harris-Bardes, Mr. Rossig
No Votes: None
Absent: None

Andrea Wasserman

Andrea Wasserman
Board Secretary/
Business Administrator

Caitlin Lundquist - ID #020422009
METHFESSEL & WERBEL, ESQS.
2025 Lincoln Highway, Suite 200
PO Box 3012
Edison, New Jersey 08818
(732) 248-4200
1(732) 248-2355
lundquist@methwerb.com
Attorneys for Montvale Board of Education
Our File No. 81701CAL

B.U. AND N.U. O/B/O M.U. Petitioners, V. MONTVALE BOARD OF EDUCATION Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 16175-2015N AGENCY REF NO.: 270-9/15 **SETTLEMENT AGREEMENT**

WHEREAS, the Montvale Board of Education ("Board") is a local educational authority with the responsibility of complying with its obligations under the New Jersey Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13 et seq.; and

WHEREAS, Petitioners B.U. and N.U. are the parents of M.U. (collectively referred to as "Petitioners"), a minor student residing within and attending school in the Montvale School District ("District"); and

WHEREAS, the District's anti-bullying staff members conducted a harassment, intimidation, and bullying ("HIB") investigation relating to events involving M.U. which occurred on May 19, 2015, following which

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M.U. was determined to have engaged in acts of HIB against another student; and

WHEREAS, on June 15, 2015, Petitioners and their attorney appeared before the Board for a hearing regarding the HIB matter, following which the Board voted to affirm the decision that M.U. had engaged in acts of HIB against another student; and

WHEREAS, Petitioners disagreed with the HIB decision and filed a petition of appeal with the Commissioner of Education ("Commissioner"), which was assigned Agency Reference Number 270-9/15and OAL Docket Number EDU 16175-2015N; and

WHEREAS, the parties, each having a desire to amicably settle any and all claims in all jurisdictions, asserted and unasserted, now hereby agree as follows:

1. The parties agree that the Board will not release or authorize the release of any document or student record, or any information contained therein, relating to the HIB matter involving M.U.to any third party, unless specifically directed by court order or lawfully issued subpoena or otherwise required to do so by law.

2. The parties agree that all documents relating to the HIB matter, the HIB investigation, and this Agreement will not be included in M.U.'s student records. With respect to the disciplinary consequences imposed as a result of the HIB matter, M.U.'s student disciplinary record will indicate only that M.U. engaged in an unspecified "Code of Student

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Conduct violation" on May 19, 2015, and will not include any reference to the HIB matter, the HIB investigation, or this Agreement.

3. The parties expressly understand and agree that the terms of this Agreement are not intended to apply and will not apply to any future disciplinary incidents and/or HIB incidents which may occur and/or which may be reported to the District after the date on which this Agreement is signed.

4. B.U. and N.U., on their own behalf and on behalf of M.U., and the Board mutually release and forever discharge each other, its/their officers, employees, administrators, agents and servants from any and all past, present or future claims, whether known or unknown to B.U., N.U., or M.U., arising out of events that have occurred prior to the date on which this Agreement is signed, including but not limited to the HIB matter relating to M.U.

5. B.U. and N.U., on behalf of themselves and M.U., release and forever discharge the Board, its officers, employees, administrators, agents and servants from any and all past, present or future claims which they or M.U. have or might have against them, because of all damages, liabilities, losses or injuries to person or property, or both, whether developed or undeveloped, including attorneys' fees, resulting or to result from the HIB matter relating to M.U. from the beginning of time through the date on which this Agreement is signed.

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6. The parties agree to refrain from filing any proceeding, action or complaint regarding any claims by or rights of B.U., N.U., and/or M.U. from the beginning of time through the date of this Agreement. It is expressly understood and agreed, however, that the parties reserve the right to bring a claim before any tribunal of competent jurisdiction to enforce their rights under this Agreement.

7. The terms of this Agreement represent the compromise of disputed claims between the parties. This Agreement shall not be treated as an admission on the part of the Board of liability, responsibility, or wrong doing, that its HIB decision was incorrect, inappropriate, or unlawful, that any rights of B.U., N.U., and/or M.U. were violated at any time, or that either party has failed to act in accordance with any laws, statutes, regulations and/or codes.

8. Each party shall be fully responsible for its own attorney's fees and costs.

9. The drafting and negotiation of this Agreement have been participated in by each of the parties and their respective counsel and, for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the parties. No ambiguity shall be resolved against any party based upon authorship. The parties acknowledge that they have been represented by counsel throughout the settlement of this matter, throughout the negotiation of this Agreement, and at the execution of this Agreement, and that they have read and consulted with counsel

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regarding this Agreement and fully understand its requirements and limitations. The parties further acknowledge that they enter into this Agreement voluntarily and free of coercion.

10. The parties further agree that this Agreement may not be altered, amended, modified, superseded, canceled or terminated except by an express written agreement duly executed by all of the parties or their attorneys on their behalf, which makes specific reference to this Agreement.

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

12. This Agreement shall be subject to ratification by the Board and is without prejudice to either party if the terms are not ratified. Petitioners are not bound by this Agreement until it has been ratified by the Board. Upon ratification of this Agreement, the Board shall cause a copy of the relevant resolution to be forwarded to Petitioners.

13. This Agreement contains the entire agreement between the parties hereto and is intended to resolve any and all disputes and issues, known or unknown, between them as of the date of execution of this Agreement.

14. This Agreement shall become effective upon entry of an Initial Decision incorporating its terms by the Administrative Law Judge assigned to this matter and approval as a Final Decision by the Commissioner of Education.

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WITNESS:

B.U. o/b/o M.U. Brent Unger

DATED: 12-5-16 DATED: 12/5/16

Charles Shaw, Esq.

WITNESS:

N.U. o/b/o M.U. Nancy Unger

DATED: 12-5-16 DATED: 12/5/16

Charles Shaw, Esq.

WITNESS: Board Secretary/BA

Andrea Wasserman

DATED: 12/16/16

Montvale Board of Education

By: Board President, Scott Rossig

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51-17

D.V., ON BEHALF OF MINOR CHILD, N.V.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner D.V. filed an appeal contending that the respondent Board had allowed various incidents of harassment, intimidation, and bullying (HIB) against her grandson, N.V., a special needs student who had been placed by the Board at the Rugby School in Neptune, New Jersey by way of an Individualized Education Program. Petitioner alleged that the incidents of HIB occurred during N.V.'s participation in a lacrosse program operated by the Edison Township Recreation Department – a program the Board asserts is not affiliated with Edison Township Public Schools. The Board filed a motion to dismiss in lieu of an answer to the petition.

The ALJ conducted a telephone pre-hearing conference with the parties, during which petitioner stated that she would be withdrawing her petition of appeal. Petitioner was instructed to submit a letter confirming the withdrawal of this matter. When no such letter was received, multiple attempts were made to contact petitioner, to no avail. Ultimately, the matter was scheduled for a hearing on December 21, 2016. Petitioner did not attend the hearing, and has offered no explanation for her failure to appear. Accordingly, the ALJ concluded that the petitioner has abandoned this matter and that the file must therefore be returned to the agency pursuant to *N.J.A.C.* 1:1-14.4(a).

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. Accordingly, the petition was dismissed with prejudice.

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

February 13. 2017

OAL DKT. NO. EDU 12094-16
AGENCY DKT. NO. 186-7/16

D.V., ON BEHALF OF MINOR CHILD, N.V.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner notes that the Administrative Law Judge (ALJ) returned this matter to Commissioner for appropriate disposition – in accordance with *N.J.A.C.* 1:1-14.4 – because petitioner failed to appear at the December 21, 2016 OAL hearing without providing an explanation. The Commissioner finds that since petitioner failed to appear at the December 21, 2016 hearing – after having indicated to the ALJ that she intended to withdraw her petition of appeal, but failing to submit a letter to that effect – the petition of appeal shall be dismissed with prejudice.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/13/17

Date of Mailing: 2/13/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 12094-16
AGENCY DKT. NO. 186-7/16

D.V. ON BEHALF OF MINOR CHILD N.V.,
Petitioner,
v.
TOWNSHIP OF EDISON BOARD OF EDUCATION, MIDDLESEX COUNTY,
Respondent.

D.V., petitioner, pro se

Adam S. Weiss, Esq., for respondent (The Busch Law Group L.L.C.)

Record Closed: December 21, 2016 Decided: December 30, 2016

BEFORE **JOAN BEDRIN MURRAY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, D.V., charged respondent, the Township of Edison Board of Education (the Board), with allowing various incidents of harassment, intimidation, and bullying against her grandson, N.V., to take place. In response, the Board filed a Motion to Dismiss, or in the alternative, Motion for Summary Decision in lieu of an Answer. The

matter was transmitted to the Office of Administrative Law (OAL), and filed on August 10, 2016, as a contested case.

FINDINGS OF FACT

The following **FACTS** are undisputed; therefore, I **FIND** that they are the **FACTS** of this case:

On September 26, 2016, I conducted a telephone pre-hearing conference with the parties in this matter, which concluded with petitioner stating that she would be withdrawing her petition of appeal. She was directed to submit a letter to that effect within the next few days. When no such letter was received, my judicial assistant, Ms. Ramos, placed two telephone calls to petitioner to ascertain her intention in this matter. Although she left two voice messages for petitioner, the telephone calls went unreturned. On October 17, 2016, Ms. Ramos emailed petitioner, again receiving no response. On November 29, 2016, I sent a letter to the parties advising that if I did not receive a letter of withdrawal from petitioner by December 2, 2016, I would schedule the matter for a hearing on December 21, 2016. As no letter was forthcoming, the matter was scheduled for a hearing on said date. Petitioner failed to appear on December 21, 2016. She has not since made any contact with the OAL to explain her failure to appear.

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that respondent has abandoned this matter and it should be returned to the agency.

N.J.A.C. 1:1-14.4(a) provides as follows:

> If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge

> shall . . . direct the Clerk to return the matter to the transmitting agency . . . .

Petitioner failed to appear at the scheduled proceeding, and failed to provide an explanation for her nonappearance within the allotted time for doing so. Accordingly, the Clerk should return this matter to the New Jersey Department of Education, Bureau of Controversies and Disputes.

ORDER

It is **ORDERED** that the Clerk return this matter to the New Jersey Department of Education, Bureau of Controversies and Disputes, for appropriate disposition.

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

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

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

December 30 2016
DATE

JOAN BEDRIN MURRAY, ALJ

Date Received at Agency: 12-30-16

Date Mailed to Parties: JAN 4 2017

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

52-17L

52-17

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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

KIMBERLEY HARRINGTON
Acting Commissioner

February 13, 2017

Cherie L. Adams, Esq.
Adams Gutierrez & Lattiboudere, LLC
The Legal Center
1037 Raymond Blvd., Suite 900
Newark, New Jersey 07102

Frank S. Gaudio, Esq.
Miller and Gaudio
River Run Building
104-110 Maple Avenue
Red Bank, New Jersey 07701

Re: *James Baldini v. Board of Trustees of the Sussex County Charter School for Technology, Sussex County, OAL Dkt. No. EDU 20523-15, Agency Dkt. No. 339-10/15.*

Dear Counsel:

I have considered the papers filed in connection with the respondent's request for interlocutory review of the January 26, 2017 Order of Administrative Law Judge Thomas R. Betancourt in the above-captioned matter. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

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

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: Honorable Thomas R. Betancourt
County Superintendent
State Law Library

KH/MKD/JKH
Via Facsimile and Regular Delivery

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

53-17

IN THE MATTER OF THE SUSPENSION OF :

THE CERTIFICATES OF MAGGIE STAWECKI, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE TOWNSHIP OF : DECISION

EAST GREENWICH, GLOUCESTER COUNTY. :

SYNOPSIS

In April 2016, an Order to Show Cause was served upon respondent, requiring her to show cause why an order should not be entered suspending her teaching certificates for unprofessional conduct pursuant to *N.J.S.A.* 18A:28-8 for resigning her tenured teaching position without giving the requisite 60 day notice. A pre-hearing conference was scheduled for August 2, 2016; petitioner's counsel was prepared to take part in the conference, but respondent failed to do so. Respondent subsequently advised that she was unable to participate in any court proceedings in this matter because she could not take time off from work. She later failed to respond to the Board's discovery requests. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; respondent is a tenured teacher and, as such, the consequences for termination of her employment without the required notice are governed by *N.J.S.A.* 18A:28-8, which requires at least 60 days written notice of intent to resign a teaching position; additionally, *N.J.S.A.* 18A:26-10 provides that teaching staff members resigning without proper notice, and without consent of the Board, shall be deemed guilty of unprofessional conduct; further, in this circumstance, the Commissioner may suspend the teaching certificates of the former staff members to a period of up to one year; on or about February 25, 2016, respondent provided the Board with a letter of resignation effective March 9, 2016 – thereby providing just thirteen days' notice of her resignation. The ALJ concluded that respondent's resignation constitutes unprofessional conduct, warranting the suspension of her certificates; accordingly, the ALJ granted the petitioner's motion for summary decision and suspended respondent's instructional certificates for a period of one year.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter. A copy of this decision shall be forwarded to the State Board of Examiners for implementation of the suspension.

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

February 13, 2017

OAL DKT. NO. EDU 8807-16
AGENCY DKT NO. 112-4/16

IN THE MATTER OF THE SUSPENSION OF	:	
THE CERTIFICATES OF MAGGIE STAWECKI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP OF	:	DECISION
EAST GREENWICH, GLOUCESTER COUNTY.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons outlined in the Initial Decision – that the respondent's certificates should be suspended pursuant to *N.J.S.A.* 18A:28-8 because she resigned without providing the Board with the requisite statutory notice. The Commissioner is also in accord with the ALJ's determination that a one year suspension of the respondent's certificates is the appropriate penalty.

Accordingly, the Initial Decision is adopted as the final decision in this matter. The respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/13/17
Date of Mailing: 2/13/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 8807-16
AGENCY REF. NO. 112-4/16

IN THE MATTER OF THE CERTIFICATES OF MAGGIE STAWECKI, SCHOOL DISTRICT OF THE TOWNSHIP OF EAST GREENWICH, GLOUCESTER COUNTY.

Stephen M. Bacigalupo, Esq., for petitioner

Maggie Stawecki, respondent, pro se

Record Closed: December 11, 2016 Decided: December 28, 2016

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

STATEMENT OF THE CASE

Petitioner seeks to take action against the instructional certificates of respondent. Petitioner files a motion to strike respondent's answer, enter summary decision in favor of petitioner, and suspend respondent's instructional certificates for a period of one year.

PROCEDURAL HISTORY

The petitioner filed a petition seeking to take action against the instructional certificates of respondent on April 6, 2016. It was determined to treat the matter as a contested case under N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Respondent's answer was perfected on June 13, 2016. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on June 14, 2016. A notice of motion for summary decision was filed by petitioner on November 3, 2016, with supporting brief. The motion seeks to strike respondent's answer, enter summary decision in favor of petitioner, and suspend respondent's instructional certificates for a period of one year. Proof of service indicates that respondent was served with the motion via Federal Express at her address of record.

No response to the motion was filed by respondent, and as a result, the record closed on December 11, 2016.

FACTUAL DISCUSSION

The facts of this matter are not in dispute, and as a result, I **FIND** the following as the **FACTs** of this case: Respondent is the holder of the following certificates issued by the State Board of Examiners:

1. Instructional Certificate with an Elementary School Teacher in grades K-8 endorsement;
2. Instructional Certificate with an Elementary School Teacher in grades K-5 endorsement;
3. Instructional Certificate with a Teacher of Reading endorsement; and
4. Instructional Certificate with a Teacher of English endorsement.

Respondent originally sought employment with the East Greenwich Board of Education (Board) as a teacher for the 2010-11 school year and entered into a written contract regarding said employment. Since the 2010-11 school year, respondent has been continuously employed by the Board and attained tenure in the East Greenwich

school district (District). On or about February 25, 2016, respondent provided a February 24, 2016, written letter of resignation effective March 9, 2016. Respondent thus provided the District with a thirteen-day notice of her intention to resign. Having given notice of her intent to resign on or about February 24, 2016, respondent was required to work for the Board until April 23, 2016.

Respondent was subsequently advised that she would be required to continue her employment with the Board until an acceptable full-time candidate was found. On March 8, 2016, respondent sent an e-mail to the Board in which she wrote, "Please be aware that my final day as an employee of [the] East Greenwich Twp. Schools will be tomorrow, March 9th. I will not be returning following tomorrow's school day."

In response to respondent's e-mail, the Board advised respondent "[t]hat should you not be at work until formally released you will be considered both in violation of your contract and insubordinate and appropriate action will be filed against you." Moreover, on March 10, 2016, respondent was advised that:

> On Wednesday, March 16, 2016, the School Board will accept your resignation dated February 24, 2016 . . . [T]his resignation per statute will be sixty (60) days of your letter or April 23, 2016. You are expected to continue with your service to the East Greenwich School District through that time.

On March 16, 2016, the Board accepted respondent's "resignation effective 60-days from February 24, 2016 or April 23, 2016." On March 17, 2016, respondent was advised of the following:

> At the March 16, 2016 School Board meeting, the School Board voted 8-0 with 1 abstain to accept your resignation effective . . . April 23, 2016 . . . Until you are officially released from employment, you are expected to be at your position. Should you not be at your position until officially released, you will be subject to disciplinary action.

Respondent has not reported to work since March 9, 2016, and has ceased to perform her duties before the expiration of the term of her employment. As a result, the Board was forced to look for and secure the services of a substitute teacher until a permanent replacement for respondent could be secured.

Following respondent's resignation, an Order to Show Cause and Petition were filed with the Commissioner of Education (Commissioner), on or about April 5, 2016, seeking a suspension of respondent's teaching certificates for unprofessional conduct pursuant to N.J.S.A. 18A:28-8.

On or about April 11, 2016, Commissioner David C. Hespe entered the Order to Show Cause. On or about April 15, 2016, a copy of the fully executed Order to Show Cause, along with an affidavit in support of same with attached exhibits, were served upon respondent via lawyer's service and certified (return receipt) mail. That same day, a proof of service evidencing said service upon respondent was filed by M. Kathleen Duncan, Director, Bureau of Controversies and Disputes, New Jersey Department of Education.

Respondent subsequently filed an answer to the subject Order to Show Cause. Respondent's answer was initially deemed deficient, but respondent corrected any deficiencies in her answer, and the matter was transmitted to the OAL. The matter was assigned to this tribunal, and a prehearing conference was scheduled for Tuesday, August 2, 2016. While petitioner's counsel was prepared to take part in the prehearing conference, respondent failed to do so. As a result, she was instructed to issue correspondence explaining the reason(s) for her absence.

In response, respondent advised this tribunal, on or about August 4, 2016, that she "was not able to participate in the prehearing phone conference . . . due to . . . [her] work schedule." Respondent further advised this tribunal that she was "unable to take off time from work to appear in any court proceedings . . . [and could] no longer proceed any further with this matter.

On or about August 4, 2016, petitioner served discovery upon respondent via certified mail and regular mail. At the time of said service, respondent was advised that N.J.A.C. 1:1-10.4(c) required her to provide her discovery response "[n]ot later than 15 days from receipt of a notice requesting discovery." Respondent failed to respond to petitioner's discovery requests.

LEGAL DISCUSSION

The New Jersey Uniform Administrative Procedure Rule, N.J.A.C. 1:1-12.5, governs the petitioner's motion for summary decision. The provisions of N.J.A.C. 1:1-12.5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. Summary decision is appropriate "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). To prevail, the adverse party "must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). The non-moving party establishes a genuine issue of material fact if "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

"An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submissions of the issues to the trier of fact." R. 4:46-2. While it is true that a judge is not to "weigh evidence and determine the truth of the matter," Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995), "there is in this process a kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials." Id. at 536. Thus, a judge is to scrutinize the competent evidential materials presented, in a light most favorable to the non-moving party, and consider whether a rational fact-finder could resolve the disputed issue in favor of the non-moving party. Id. at 540.

When a motion for summary decision is made and supported, the burden shifts to the adverse party to set forth, by affidavit, specific facts showing there is a genuine issue resolvable only by an evidentiary proceeding. N.J.A.C. 1:1-12.5(b). Given this burden shift, a party opposing a summary judgment motion "who offers no substantial or material facts in opposition to the motion cannot complain if the court takes as true the uncontradicted facts in the movant's papers." Burlington County Welfare Bd. v. Stanley, 214 N.J. Super. 615 (App. Div. 1987). As discussed further below, as the facts are not in dispute in this matter, the petitioner has established, as the moving party, that it is entitled to prevail as a matter of law.

The petitioner requests this tribunal to strike respondent's answer due to her unwillingness to participate in this matter and her failure to adhere to the requirements of the New Jersey Administrative Code. This tribunal has the authority to impose sanctions upon a party for his/her "failure to comply with the requirements of this subchapter." N.J.A.C. 1:1-10.5 For instance, in the matter of Absolut Spirits Co., Inc. v. Monsieur Touton Selection, Ltd., OAL Dkt. No. ABC 4217-04, 2006 N.J. AGEN LEXIS 508, Final Decision (May 10, 2006), aff'd in part, rev'd in part on other grounds, A-5453-05 (App. Div. Oct. 22, 2007), petitioner sought the dismissal of respondent's answer because respondent chose to either answer some interrogatories in a "vague and/or unresponsive" manner or not answer others at all. In striking/dismissing respondent's answer, the Administrative Law Judge determined that petitioner was prejudiced by respondent's failure to respond to previously served discovery requests.

Applying the aforementioned decision to the present matter, this tribunal must strike/dismiss respondent's answer. In accordance with N.J.A.C. 1:1-10.4(c), "[n]o later than 15 days from receipt of a notice requesting discovery, the receiving party shall provide the requested information, material or access or offer a schedule for reasonable compliance with the notice." (emphasis added.) Moreover, in the event the receiving party fails to abide by said provision or any other provision, sanctions may be imposed pursuant to N.J.A.C. 1:1-10.5 and 1:1-14.14(a), up to and including suppressing "a defense or claim." N.J.A.C. 1:1-14.14(a)2. Here, respondent was served with a "First Set of Interrogatories" and "First Notice to Produce" on or about August 4, 2016. As

such, respondent had until August 19, 2016, to provide some form of response to discovery. Instead, respondent ignored the requests. Having not received any response from respondent, correspondence was issued, on or about September 1, 2016, in which respondent was afforded the opportunity to provide her outstanding answers to discovery and respondent was advised that her "now overdue responses to the . . . discovery requests [were due] within five (5) days of . . . [her] receipt of this notice." Despite the issuance of the aforementioned correspondence, respondent again ignored the same and made no attempt to provide any type of response. Accordingly, this tribunal must strike/dismiss respondent's answer pursuant to N.J.A.C. 1:1-10.5 and 1:1-14.14(a)2.

In addition, no issue of material fact exists that would preclude the granting of summary decision as it is beyond dispute that respondent failed to provide petitioner (i.e., her employer) with sixty days' notice of her intent to resign. Accordingly, summary decision is warranted.

Respondent is a tenured teacher and therefore the consequences for termination of her employment without the required notice are governed by N.J.S.A. 18A:28-8, which provides:

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

Additionally, N.J.S.A. 18A:26-10 provides that:

> Any teaching staff member employed by a board of education, who shall, without the consent of the Board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

In accordance with these provisions, resignation without the consent of the Board and absent the required sixty days' notice constitutes unbecoming conduct per se. The central purpose of these provisions is to provide the board and its administration with notice so that a suitable replacement can be hired without adversely impacting students and disrupting the education process. See In the Matter of the Suspension of the Teaching Certificates of Robert F. Galgano, Central Jersey, College Prep Charter School, Somerset County, (OAL Dkt. No. EDU 3808-10, aff'd., Comm'r., March 21, 2011); Penns Grove-Carneys Point Board of Education v. Regina Leinen, 94 N.J.A.R. 26 (EDU) 405, 407.

The Commissioner of Education has consistently held that where facts demonstrating a teacher's resignation without providing requisite notice and without the consent of the board of education are clearly established, the teacher is guilty of unprofessional conduct as a matter of law. See In the Matter of the Suspension of the Teaching Certificate of Maximilian Capshaw, OAL Dkt. No. EDU 12318-06 (2007); In the Matter of the Suspension of the Teaching Certificate of Mary Savino, OAL Dkt. No. 11688-04 (2005); In the Matter of the Suspension of the Teaching Certificate of Marty Elizabeth Farran, Agency Dkt. No. 415-11/04 (2005).

Consistent with the above, respondent's conduct constitutes unprofessional conduct per se. Respondent was a tenured employee of the Board. On or about February 25, 2016, respondent provided the Board a written letter of resignation effective March 9, 2016. Respondent only provided the District with thirteen days' notice of her intention to resign, despite the fact that N.J.S.A. 18A:28-8 specifically requires a tenured employee such as respondent to provide the employing school district with "at least 60 days written notice of . . . [her] intention" to resign. As a tenured employee, respondent either knew or should have known that she was required to provide the District with sixty days' written notice of her intent to terminate her employment with the Board. Having given notice of her intent to resign on or about February 24, 2016, respondent was required to work for the Board until April 23, 2016.

Moreover, the Board advised respondent that she would be required to continue her employment with the Board until an acceptable full-time candidate was found. On March 8, 2016, respondent sent an e-mail in which she wrote, "Please be aware that my final days as an employee of [the] East Greenwich Twp. Schools will be tomorrow, March 9th. I will not be returning following tomorrow's school day." In response to respondent's e-mail, the Board advised her "[t]hat should you not be at work until formally released you will be considered both in violation of your contract and insubordinate and appropriate action will be filed against you." Moreover, on March 10, 2016, the Board advised Mrs. Stawecki: "On Wednesday, March 16, 2016 the School Board will accept your resignation dated February 24, 2016 . . . [T]his resignation per statute will be sixty (60) days of your letter of April 23, 2016. You are expected to continue with your service to the East Greenwich School District through that time."

Subsequently, the Board accepted respondent's "resignation effective 60-days from February 24, 2016 or April 23, 2016." On March 17, 2016, the Board advised respondent that at its March 16, 206, meeting, the Board "voted 8-0 with 1 abstain to accept your resignation effective . . . April 23, 2016 . . . Until you are officially released from employment, you are expected to be at your position. Should you not be at your position until officially released, you will be subject to disciplinary action." Thereafter, notwithstanding having been advised multiple times that the Board would hold her to the sixty days' notice required by State law, and that her resignation would not be effective until April 23, 206, respondent failed to report to her position and ceased to perform her duties before the expiration of the term of her employment in violation of N.J.S.A. 18A:28-8.

Respondent's failure to provide the District with the statutorily required period (i.e. sixty days) regarding her notice to resign and complete unwillingness to perform her duties has had a direct and negative impact on the East Greenwich School District by denying its students a full-time teacher who would have been able to provide them with continuity of instruction until such time as a full-time replacement was found.

Therefore, I **CONCLUDE** that respondent's resignation was without the requisite notice, and that the Board refused to consent to respondent's resignation without the

requisite notice. Accordingly, respondent's conduct constitutes a clear violation of the applicable statutes and is unprofessional conduct per se, warranting the suspension of her certificates.

As to a penalty, it has been consistently held that absent mitigating circumstances, the appropriate penalty for a violation of N.J.S.A. 18A:28-8 and N.J.S.A. 18A:26-10 is suspension of a certificate for one year. As observed by the Administrative Law Judge in Penns Grove-Carney Point Board of Education v. Reginal Leinen, supra:

> Most cases have resulted in the suspension of any and all teaching certificates for the maximum, one-year permitted if the Commissioner finds the teacher guilty of violating N.J.S.A. 18A:26-10. See In Re Russo, 33 C.D. 92; Collingswood Borough Board of Education v. Cashel, 88 S.L.D. 1898; In re Matthews, 267 C.D. 88; Dunellen Borough Board of Education v. Drake, 87 S.L.D. 206; In Re Evans, 249 C.D. 87; In Re Horter, 170 C.D. 87; Acken, 86 S.L.D. 2803; In Re Langford, 142 C.D. 84; In Re Minnich, 218 C.D. 83; In Re Cohen, 27 C.D. 83; In Re Reehill, 66 S.L.D. 201; In Re Finkelstein, 60 S.L.D. 75

In only the most rare and exceptional cases will the Commissioner of Education decline to impose the maximum one-year suspension for violations of N.J.S.A. 18A:18-8 and N.J.S.A. 18A:26-10. The Commissioner has noted that in determining the length of such a suspension for violations of these provisions the general rule is:

> given the underlying purpose of the statute, this evaluation – with rare exception – has resulted in suspension of any and all certificates for the maximum one year period, particularly where the facts demonstrate that individuals have violated the 60-day notice requirement for strictly personal reasons, putting their own self-interest above the interests of students and their professional obligation to provide adequate notice to the Board.

In the Matter of the Suspension of the Teaching Certificate of Maximilian Capshaw, Upper Freehold Regional School District, Monmouth County (OAL Dkt. No. EDU 12318-06, aff'd Comm'r., June 12, 2007)

Although the Commissioner may impose a reduced suspension in cases which present compelling mitigating circumstances, such as a previous promise by the Board to consent to termination without notice, an employee's noble purpose, or an employee's attempt to ensure a smooth transition for her replacement, no such mitigating circumstances are present in this case. Respondent terminated her employment with the Board due to personal reasons. The law is clear that teachers are not free to unilaterally terminate their teaching obligations at the last minute, as was done herein by respondent. As a result of respondent's unprofessional conduct, I **CONCLUDE** that the appropriate penalty is suspension of her certificates for a period of one year.

Therefore, I **CONCLUDE** that respondent's answer is stricken, summary decision is entered in favor of petitioner, and respondent's instructional certificates are suspended for a period of one year. Petitioner's motion for summary decision requesting summary decision be granted in its favor must be **GRANTED**.

ORDER

It is hereby **ORDERED** that the petitioner's motion for summary decision is **GRANTED**.

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

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

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

December 28, 2016
DATE

EDWARD J. DELANOY, JR., ALJ

Date Received at Agency: 12/28/16

Date Mailed to Parties: 12/28/16

mph

54-17

CHRISTOPHER CONCATO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – who was hired by the respondent Board in February 2002 under his Teacher of Industrial Arts certification – claimed that his tenure and seniority rights were violated when the Board abolished his full-time position as part of a reduction in force (RIF), and reduced his assignment to a .2 part-time position for the 2015-2016 school year. Petitioner sought restoration of a full-time position under his certifications/endorsements or the creation of a new position, claiming that the Board continued to employ non-tenured and less-tenured teachers in twenty-two positions to which petitioner claimed entitlement based on his endorsements in Elementary Education with Specialization in Science 5-8 and in Industrial Arts. Petitioner claimed that the Industrial Arts endorsement had been "converted" into an endorsement in Technology Education pursuant to *N.J.A.C.* 6A:9B-10.6(b). The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue, and the matter is ripe for summary decision; an "endorsement" is an authorization that allows an instructional certificate holder to teach one or more specific subject areas; pursuant to *N.J.A.C.* 6A:9B-9.2(a), a teaching endorsement is required for a corresponding teacher assignment; by means of a special "grandfather" provision found at *N.J.A.C.* 6A:9B-10.6(b), an endorsement in "Technology Education" is available to holders of an Industrial Arts endorsement who had been employed by a school before April 23, 2004; despite the "grandfather" provision, the Technology Education endorsement must be procured actively through application to the Board of Examiners; *N.J.S.A.* 18A:28-1 to -18 defines the conditions under which teachers may obtain tenure, which is achieved in a particular position; individuals may claim eligibility to a new position based on tenure in another position only when the two positions are substantially similar, and when the individual holds the appropriate certification; here, petitioner did not obtain the Technology Education endorsement until after the RIF occurred in June 2015, even though he had been eligible to apply for this additional endorsement for years; petitioner notified the Board of his application on September 29, 2015, but did not receive the endorsement until November 2015 – well after the date of the RIF in June 2015; and careful analysis of each of the twenty-two positions to which petitioner claimed entitlement revealed that his credentials, as of June 8, 2015, did not entitle him to teach any of the disputed positions. The ALJ concluded that: petitioner has not met his burden to show that he is entitled to any of the positions he sought; the issue of seniority does not arise in this case; and, as a tenured teacher affected by a RIF, the petitioner's name must be maintained on a preferred eligibility list in a position for which he is qualified. Accordingly, the ALJ granted the Board's motion for summary decision, and denied petitioner's motion.

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

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

February 13, 2017

OAL DKT. NO. EDU 10269-15
AGENCY DKT. NO. 146-6/15

CHRISTOPHER CONCATO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner and the Board's reply thereto.

In his exceptions, petitioner argues that the Administrative Law Judge's (ALJ) findings were not supported by substantial credible evidence in the record. Specifically, petitioner argues that the ALJ erred when he found that petitioner could not use his Technology Education endorsement as a basis for making a seniority claim because it was acquired after the reduction in force (RIF) took place. Petitioner contends that his situation is an exception to the general rule that tenured teachers cannot make a seniority claim using a certificate that was not held at the time of the RIF. Here, petitioner emphasizes that he did not need any additional education or training to obtain the Technology Education endorsement; instead, *N.J.A.C.* 6A:9B-10.6(b) authorized him to obtain the Technology Education endorsement automatically upon application to the Board of Examiners. Accordingly, petitioner argues that he was eligible to teach classes under the Technology endorsement at the time of the RIF.

Petitioner further argues that the ALJ failed to review the curricula of the subjects to determine whether his Technology Education certification would authorize him to teach them. Petitioner emphasizes that the ALJ also erred in finding that petitioner did not have the credentials to teach any classes, despite the fact that he had been teaching the same or similar classes for twelve years. Petitioner maintains that the Board manipulated class assignments to prevent him from being assigned a teaching position. Finally, petitioner contends that the ALJ did not analyze whether the teachers assigned to teach the classes were qualified or had greater seniority than petitioner, and requests that the Commissioner remand this matter for a plenary hearing on this issue.

In reply, the Board urges the Commissioner to adopt the ALJ's initial decision for the reasons expressed therein because petitioner did not meet his burden of proving by a preponderance of the evidence that his teaching certifications and endorsements as of the date of the RIF authorized him to teach any of the courses to which he claims entitlement. The Board asserts that the ALJ properly found that the Industrial Arts endorsement is narrow in focus – pursuant to *N.J.S.A.* 18A:26-2.6(b) – and only qualifies petitioner to teach certain subject areas, none of which were available at the time of the RIF; likewise, petitioner's endorsement for Elementary School with Subject Matter Specialization: Science in Grades 5-8 did not qualify him to teach any available courses. Further, the board contends that the ALJ correctly found that petitioner may not use his Technology Education endorsement as a basis for entitlement to the positions because it was not acquired prior to the RIF, and there is no basis in law for petitioner's argument that it should be considered a valid endorsement. Therefore, as petitioner does not have the required endorsements, he is statutorily precluded from teaching any of the classes.

The Board further argues that the ALJ properly conducted a course-by-course analysis of the twenty-two courses to which petitioner claims entitlement. Specifically, the Board points out that the ALJ examined the curriculum, the course content, the endorsements required to teach the courses, as well as petitioner's arguments as to why his credentials were sufficient. The Board asserts that the ALJ appropriately found that the twenty-two courses have additional duties and different responsibilities than the courses petitioner previously taught, and that petitioner lacked the credentials to teach any of the courses. Finally, in response to petitioner's argument that the ALJ should have compared the seniority of the staff members who were assigned to teach the courses at issue, the Board maintains that such an exercise would be irrelevant, as petitioner did not possess the proper endorsements to teach those courses.

Upon review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that petitioner is unable to use his Technology Education endorsement as a basis for claiming one of the twenty-two positions that he seeks because he obtained the endorsement after the RIF took place. Even though petitioner argues that he was able to obtain the Technology Education endorsement automatically after the "ministerial task" of submitting an application, the Commissioner agrees with the ALJ that seniority rights are fixed as of the date of the RIF and petitioner did not submit his application for the Technology endorsement until more than three months after that date. See *Fracey v. Board of Education of the City of Salem, Salem County*, 286 *N.J. Super.* 354, 358-61 (App. Div. 1996).

The Commissioner further agrees with the ALJ that petitioner – using his endorsements in Industrial Arts and in Elementary School with Subject Matter Specialization: Science in Grades 5-8 – does not have the qualifications necessary to teach any of the twenty-

two courses to which he claims entitlement. The Commissioner does not find petitioner's exceptions to be persuasive. The ALJ thoroughly and comprehensively conducted an analysis of each course – examining the curriculum, the endorsements the Board states are required, as well as petitioner's arguments – prior to making a determination on each course as to the necessary endorsement and whether petitioner has the required credentials to teach the course. As the ALJ found that petitioner lacked the certifications and endorsements to teach these twenty-two courses, there was no need for the ALJ to analyze the seniority of those teachers who were assigned to teach them.

Accordingly, the Initial Decision of the OAL is adopted – for the reasons thoroughly set forth therein – as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/13/17

Date of Mailing: 2/13/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 10269-15
AGENCY DKT. NO. N/A

CHRISTOPHER CONCATO,

Appellant,

v.

RIVER DELL BOARD OF EDUCATION,

Respondent.

Alfred F. Maurice, Esq., for Appellant (Springstead & Maurice, attorneys)

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

Record closed: November 14, 2016 Decided: December 29, 2016

BEFORE **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE

The River Dell Regional Board of Education (hereinafter, River Dell, the Board or BOE) operates a school district comprised of grades seven (7) through twelve (12), i.e. both a Middle School and a High School for the residents of the Borough of Oradell and the Borough of River Edge in Bergen County, New Jersey. Appellant, Christopher Concato (Concato) was employed by the Respondent Board and taught under his Teacher of Industrial Arts certification since February, 2002. On June 8, 2015, the BOE

passed a resolution abolishing one of two full-time positions of teacher of Industrial Arts and creating a .2 or twenty percent (part-time) position in its place. By letter dated June 11, 2011, the BOE informed Concato that his full time position was reduced to a .2 part-time position for the 2015-2016 school year for reasons of economy and efficiency. The BOE also stated that due to enrollment, positions had been reduced and programs had been restructured.

PROCEDURAL HISTORY

On June 22, 2015, Concato filed a Petition of Appeal with the Commissioner of Education (the Commissioner) claiming that the BOE had violated N.J.S.A. 18A:6-10, et seq. by continuing to employ, on a full-time basis, non-tenured teachers and teachers with less seniority than him to teach courses which he is qualified to teach. Concato seeks restoration of his full-time position, retroactive salary and benefits including pension contributions, lost seniority, and other just and equitable relief. On July 13, 2015, the BOE filed its Answer with the Commissioner. The Commissioner transferred the matter to the Office of Administrative Law on July 14, 2015, as a contested case.

On October 22, 2015, the first of several Pre-Hearing conferences took place, wherein the parties expressed their opinion that the matter might be resolved via cross-motions for Summary Decision. A Pre-hearing order was issued on October 28, 2015, which included the setting of dates for propounding and responding to discovery requests. The parties agreed that disposition of the case via cross-motions for summary decision was appropriate. Several sets of Certifications and Supplemental Certifications with Briefs, responding Briefs, and Replies were exchanged. Several case-management conferences took place before and after each set of submissions as well as several conferences to explore settlement possibilities.

The Petitioner filed his Notice of Motion for Summary Decision, Certification of Christopher Concato and Brief on March 1, 2016. Respondent filed its Motion for Summary Decision, Certification of Superintendent Patrick J. Fletcher and Brief on March 4, 2016. The Petitioner opposed the Respondent's Motion in his Reply Certification and Reply Brief dated March 17, 2016. The Respondent opposed the

Petitioner's Motion in the (first) Supplemental Certification of Patrick J. Fletcher and its Reply Brief dated March 18, 2016.

Thereafter, during a telephone settlement conference, the parties and the tribunal discussed several questions of fact which appeared to be unresolved. It was decided that both parties would benefit from further discovery in order to clarify the facts. On May 6, 2016, Attorney Alfred Maurice, on behalf of Petitioner, served a one-item Notice to Produce upon the Respondent seeking the job histories, certifications, and endorsements of certain individuals whom Petitioner claimed were teaching courses which he was qualified and entitled to teach. On May 26, 2016, the Respondent responded to the Petitioner's Notice to Produce with documents showing the job histories and certifications of the fourteen teachers of the twenty-two courses in dispute. On June 30, 2016, Petitioner's counsel submitted supplemental argument and materials. On July 1, 2016, Respondent's counsel submitted the Second Supplemental Certification of Patrick J. Fletcher dated June 28, 2016, as well as respondent's Supplemental Brief dated July 1, 2016.

Subsequently, the tribunal and counsel held a telephone conference wherein the tribunal requested further clarifications from counsel. The tribunal framed a number of questions in a letter dated October 31, 2016. The parties responded with further clarifying submissions between November 7 through 9, 2016. Thereafter, the record closed on November 14, 2016.

FACTUAL DISCUSSION

The parties submitted a "Joint Stipulation of Facts." (See attached.) The parties agree that Concato was employed by the Respondent and taught under his Teacher of Industrial Arts certification since February, 2002. They also agree that on June 8, 2015, the River Dell Board of Education passed a resolution abolishing one of two full-time positions of Teacher of Industrial Arts and creating a .2 or twenty percent (part-time) position in its place. The parties also agree that by letter dated June 11, 2015, the BOE informed Concato that his full-time position was reduced to a .2 part-time position for the

2015-2016 school year and that the BOE stated that this was done for reasons of economy and efficiency.

LEGAL ANALYSIS AND CONCLUSIONS

Certificates And Endorsements

In New Jersey, no teaching staff member can be employed as a teacher unless he is a holder of a valid certificate to teach. N.J.S.A. 18A:26-2 and N.J.A.C. 6A:9B-5.1. A "certificate" is defined as a legal document that permits an individual to serve as a teaching staff member. N.J.A.C. 6A:9-2.1. Three categories of certificates are available: instructional, administrative, and educational services. N.J.A.C. 6A:9B-5.3. An "instructional certificate" is a certificate that permits an individual to serve as a teacher in a classroom setting. N.J.A.C. 6A:9B-2.1. A "standard certificate" is a permanent certificate issued to a person who has met all requirements for a particular certificate. N.J.A.C. 6A:9B-2.1. A "standard instructional certificate" is a permanent certificate issued to a person who has met all teacher certification requirements. N.J.S.A. 18A:26-2a(a).

The requirements for obtaining instructional certification, referred-to as a "standard instructional certificate," are set forth in N.J.A.C. 6A:9B-8.1 through 8.10. (The case at bar involves only instructional certificates.) Each certificate must be issued with at least one "endorsement." N.J.A.C. 6A:9-2.1

The entity responsible for the promulgation of rules setting forth certification and endorsement requirements for teachers is the State Board of Education, an agency under the New Jersey Department of Education. N.J.S.A. 18A:26-2.5. The entity that has the power to issue and to revoke certificates is the Board of Examiners. N.J.A.C. 6A:9B-3.2.

The Board of Examiners of the Department of Education issues certificates pursuant to N.J.A.C. 6A:9B-5.3 and 5.4 in accordance with the "Professional Standards For Teachers" set forth in N.J.A.C. 6A:9-3.3 and 3.4, which are designed to evaluate the

teacher's knowledge of how and why learners (i.e. students) learn; the teacher's knowledge of content (i.e. the subject matter of the body of knowledge he teaches); instructional practice (ability to assess the learners, planning instruction; and instructional strategies for encouraging learners to build skills and apply knowledge) and the teacher's ability to take responsibility for furthering the teacher's continued development of his teaching skills, fostering the learner's development, and abiding by ethical practices to promote the success of all students.

An "endorsement" is an authorization allowing an instructional certificate holder to teach one or more specific subject area(s) or to serve in one or more specific teaching staff role(s). N.J.A.C. 6A:9B-2.1

To fulfill the endorsement requirements necessary for instructional certification candidates must complete certain college credit and degrees, which are set forth in N.J.A.C. 6A:9B-9.1(a)(1)(i) an undergraduate degree with a major in the subject area; and/or (ii) a master's degree in the subject area; and/or (iii) thirty credits in a coherent sequence of courses appropriate to the subject area of which at least twelve credits must have been earned at an advanced level of study at a four-year college.

A teaching endorsement is required for a corresponding teaching assignment (position). N.J.A.C. 6A:9B-9.2(a). The types of endorsements issued by the Board of Examiners are found at N.J.A.C. 6A:9B-9.3 through 6A:9B-10.15. The Department of Education maintains a list of approved job titles with their corresponding required certificates and endorsements. N.J.A.C. 6A:9B-5.5(a). Using the aforesaid list of approved job titles, the district superintendent of schools determines which teachers have the appropriate certificates and endorsements. N.J.A.C. 6A:9B-5.4(a). Following the superintendent's determination, the District Board of Education assigns teachers with appropriate certificates and endorsements to positions to perform their assigned duties. N.J.A.C. 6A:9B-5.5(a).

"EDUCATIONAL TECHNOLOGY" versus "TECHNOLOGY EDUCATION

Lest there be confusion in the terminology employed in the regulations, it is important to differentiate the term "educational technology" found in N.J.A.C. 6A:9B-5.17 from the endorsement called "Technology Education" found in N.J.A.C. 6A:9B-9.3(a)(8). The term "education technology" found at N.J.A.C. 6A:9B-5.17(a) refers to the prerequisite that every teacher in New Jersey must demonstrate knowledge and understanding of computers or other "educational technology" resources and tools as defined in the "Professional Standards For Teachers" in N.J.A.C. 6A:9-3.3. N.J.A.C. 6A:9B-5.17(b) provides with certain exceptions that an endorsement shall not be required to deliver instruction in educational technology, computers, and other digital tools. The term "Technology Education" is explained below.

An endorsement titled "Technology Education," found at N.J.A.C. 6A:9B-9.3(a)(8), authorizes the holder of this endorsement to teach, in all public schools, a variety of technical education courses (see those listed in 6A:9B-9.3(a)(8)(1)(A through F), but does not authorize the holder to teach "career and technical education programs" listed in N.J.A.C. 6A:9B-9.4(a) and (c).

By means of a special "grandfather" provision found at N.J.A.C. 6A:9B-10.6(b) an endorsement in "Technical Education" is available to holders of an Industrial Arts endorsement who have been employed by a school district before April 23, 2004. These individuals can obtain the Technology Education endorsement upon his/her application to the Board of Examiners. N.J.A.C. 6A:9B-10.8(b).

Tenure

In New Jersey, state statutes grant teachers the right to tenure. The Tenure Act, N.J.S.A. 18A:28-1 to -18, defines the conditions under which teachers are entitled to the security of tenure. The Tenure Act defines the term "position" as any office, position or employment. N.J.S.A. 18A:28-1. A teacher is entitled to tenure if (1) he works in a position for which a teaching certificate is required (i.e. he is a teaching staff member); (2) he holds the appropriate certificate; and (3) he has served (i.e. been employed in the

district) for the requisite period of time. N.J.S.A. 18A:28-5. When a teacher has achieved tenure under an instructional certificate, he receives tenure for all endorsements under that certificate. See Dennery v. Bd. of Educ., 131 N.J. 626, 634 (1993).

Tenured teaching staff members shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause. N.J.S.A. 18A:28-5. Tenure rights are designed "to aid in the establishment of a competent and efficient school system by affording principals and teachers a measure of security in the ranks they hold after years of service." Viemeister v. Bd. of Educ. of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949). Being of remedial purpose, the Tenure Act is to be liberality construed to achieve its beneficent ends. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 74 (1982). The burden of proving a right to tenure rests with the teacher. Canfield v. Bd. of Educ., Borough of Pine Hill, 51 N.J. 400 (1968).

Tenure is achieved in a particular position. Howley v. Ewing Bd. of Educ., 1982 S.L.D., 1328, 1337, adopted, Comm'r 1982 S.L.D. 1356 (also published at 6 N.J.A.R. 509), aff'd, St. Bd. 1983 S.L.D. 1554. The courts have permitted an individual to claim eligibility to a new position based on tenure in another position only when the two positions are "substantially identical." "When the duties of a position in which a teaching staff member has acquired tenure are substantially identical to those of the position that the person seeks, a local school board may not sidestep an educator's tenure rights by simply re-naming the position or tacking on additional meaningless requirements" and "must extend the teaching staff member's tenure rights to the newly created position." Dennery, supra, 131 N.J. at 639; see Viemeister, supra, 5 N.J. Super. at 218. A mere overlap of duties, however, does not mean that the two positions are equivalent for tenure purposes. If a newly created position is similar to a tenure holder's abolished position but also requires additional duties or different responsibilities, then the newly created position is not considered to be substantially similar to the former position. Dennery, supra, 131 N.J. at 640.

Reduction In Force (Rif)

A Board of Education may effectuate a reduction in force for reasons of economy, because of reduction in the number of pupils, because of a change in the administrative or supervisory organization of the district, or for other good cause. N.J.S.A. 18A:28-9. A RIF, "whether of tenured or non-tenured teachers, if done for reasons of economy, is entirely within the authority of the board," Maywood Bd. of Educ. v. Maywood Educ. Assoc., 168 N.J. Super. 45, 55 (App. Div. 1979), certif. denied, 81 N.J. 292 (1979). A reduction in hours of employment is considered a reduction in force under N.J.S.A. 18A:28-9. Klinger v. Board of Educ. of Cranbury Twp., Middlesex County, 190 N.J. Super. 354 (App. Div. 1982), certif. denied, 93 N.J. 277 (1982).

Seniority

The concept of seniority applies only after tenure has been achieved and only has meaning when an RIF occurs. Seniority "comes into play only if tenure rights are reduced by way of dismissal or reduction in tangible employment benefits." Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 531 (App. Div. 1999). Seniority refers to an employee's "bumping" rights upon a reduction in force. Howley v. Ewing Bd. of Educ., 1982 S.L.D., 1328 at 1339. Seniority provides a mechanism for ranking all tenured teaching staff members so that reductions among the tenured force can be affected in an equitable fashion and in accord with sound educational policies." Capodilupo v. West Orange Bd. of Educ., 218 N.J. Super. 510 (App. Div. 1987), certif. denied, 109 N.J. 514 (1987). Seniority is a right afforded to tenured employees entitling the employee to either continue in an existing job opening based on their longevity of employment or to be placed upon an eligible list for reemployment when a new position becomes available. Id. at 531. Dismissals resulting from an RIF must be made on the basis of seniority according to standards established by the Commissioner and approved by the State Board. N.J.S.A. 18A:28-10. N.J.A.C. 6A:32-5.1 sets forth standards for determining seniority. A tenured teaching staff member dismissed as a result of a reduction in force must be maintained on a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such

person is qualified and must be reemployed if and when such vacancy occurs. N.J.S.A. 18A:28-12.

Summary Decision

Motions for summary decision, the OAL equivalent of a summary judgment motion, are covered under N.J.A.C. 1:1-12.1 et seq. This regulation provides that in order to be granted, the moving party must show that there is no genuine issue of material fact and that they are entitled to prevail as a matter of law. In order to prevail, an adverse party must, by responding affidavit, set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. Ibid. The provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether component evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving the party] must prevail as a matter of law." Id. at 536.

Issue Number One: Did Concato earn the Technology Education endorsement before or after the RIF occurred?

Christopher Concato seeks either restoration of a full-time position under his certifications/endorsements or the creation of a new position. He claims that his tenure and seniority rights were violated because there currently are non-tenured and less-tenured teachers in positions which he claims. Concato claims, by the "breadth of his endorsement in Elementary Education with Specialization in Science 5-8" and by the "breadth of his endorsement in Industrial Arts (which he claims has been "converted" into an endorsement in Technology Education pursuant to N.J.A.C. 6A:9B-10.6(b)), that he possesses the credentials to teach the twenty-two courses (i.e. positions) at issue in

this case. (The twenty-two courses are set forth in Concato's answer to Respondent's Interrogatory Number 6, which is attached to Concato's March 1, 2016, Brief at pages 2-3.) Concato's argument is set forth in his submissions of October 22, 2015; March 17, 2016; and June 30, 2016.

Central to Concato's argument is his contention that his Industrial Arts endorsement has been "converted" into a Technology Education endorsement, which increases the number of positions in which he is eligible to teach and thus enhances his tenure and seniority protections.

Throughout his submissions, Concato's counsel asserts or assumes that his Industrial Arts endorsement converted into an endorsement in Technology Education before the RIF occurred. Examples follow:

First, on page 2 of his October 22, 2015, letter Petitioner's counsel states that Concato's Industrial Arts endorsement "has been *renamed* Technology." On page 4 of the Petitioner's October 22, 2015, Brief it is argued that Petitioner's "Industrial Arts endorsement was converted to a Technology Education endorsement, under N.J.A.C. 6A:9B-10.6(b)."

Second, in Petitioner's March 17, 2016, Reply Brief, in Point II, on page 6, Concato references N.J.A.C. 6:9B-9.3(A)(8) (a superseded regulation) and states that he is "entitled to the benefits of the *conversion* of his Industrial Arts certificates". The tribunal interprets this possibly as an attempt to cite N.J.A.C. 6A:9B-10.6(b), which governs the "grandfather" provision under which holders of Industrial Arts endorsements might obtain a Technology Education endorsement. However, N.J.A.C. 6A:9B-10.6(b) does not provide that an Industrial Arts endorsement can automatically "convert" into a Technology Education endorsement. There are procedures to follow.

Third, in Petitioner's counsel's June 30, 2016, letter (page 2, third paragraph) he refers to "the umbrella of his (Concato's) Industrial Arts/Technology certification." Inherent in this terminology is Petitioner's assumption that his Industrial Arts

endorsement and the Technology Education endorsement, which he earned after the RIF, were one and the same before the RIF.

Concato's argument does not differentiate between positions he is able to teach based solely on his "former" Industrial Arts endorsement and courses he is able to teach based on the "new" endorsement he claims in Technology Education. Underlying Concato's argument is the assumption that, pursuant to the language of N.J.A.C. 6A:9B-10.6(b), his Industrial Arts endorsement "converted" into a Technology Education endorsement before the RIF (reduction in force) occurred and that this "conversion" enables him to lay claim to the twenty-two positions currently occupied by the others. An analysis of that assumption is necessary.

Concato's claim is that his Industrial Arts endorsement converted into a Technology Education endorsement before the RIF occurred. Concato does not specify a date on which the purported conversion took place. His arguments simply presume that he held a Technology Education endorsement on June 8, 2015, the date of the RIF. The text of N.J.A.C. 6A:9B-10.6(b) sets forth procedures and does indeed "grandfather" holders of Industrial Arts endorsements who have been teaching technology education courses before April 23, 2004, if they apply for the Technology Education endorsement. For those who have not been teaching technology education courses, they too can obtain the Technology Education endorsement by applying for it, but they must also pass a State test. Concato availed himself the opportunity to apply for the Technology Education certificate under the "grandfather" provision of N.J.A.C. 6A:9B-10.6(b). However, he notified the River Dell District that he was applying for the Technology Education endorsement on September 29, 2015, (three and one-half months after the RIF) and he received it in November 2015 (five months after the RIF).

Both counsel cite the case of Francey v. Board of Education of the City of Salem, 286 N.J. Super. 354 (App. Div. 1996) as authoritative on the issue of whether post-RIF acquisitions of endorsements can enhance a teacher's tenure or seniority rights. (See Petitioner's counsel's citation of Francey on page 6 of his October 22, 2016, submission and Respondent's counsel's citation of same on page 5 of his March 18, 2016, submission). The Appellate Division in Francey held that a teacher's tenure and

seniority rights are fixed as of the date of the RIF and any subsequent endorsements obtained by a teacher are not afforded any tenure protections. Francey, 286 N.J. Super. at 358-61.

In the Parties' "Joint Stipulation of Facts" (numbered Paragraph 4) it was agreed that Christopher Concato was assigned to teach courses in the River Dell Regional School District pursuant to his Industrial Arts certificate. It was also agreed that he never taught science in the District pursuant to his Elementary School Science grades 5-8 certificate. Although tenure is achieved in a specific position, whenever tenure is awarded under a certificate, tenure extends to all endorsements held by the teacher under that certificate (see Dennery, supra, 131 N.J. at 634). So although Concato never taught science in the River Dell District, he nonetheless earned tenure as a Teacher of Science by virtue of having his endorsement in Elementary Education with Specialty in Science grades 5-8.

Concato taught several courses (all of which have been set forth in his answer to respondent's Interrogatory number 6) pursuant to his Standard Certificate with endorsement in Industrial Arts. He was granted tenure as a teacher of Industrial Arts.

I **CONCLUDE** that because it was procured after the RIF occurred, Concato cannot use his post-RIF Technology Education endorsement as a basis for claiming any of the twenty-two positions he seeks.

I **CONCLUDE** that any claim Concato makes to said positions must be made solely on the basis of the certifications/endorsements he held on the date the RIF occurred (June 8, 2015), namely his Standard Certificate with endorsement in Elementary Education with Specialization in Science grades 5-8 and his Standard Certificate with endorsement in Industrial Arts.

Issue Number Two: Which positions is Concato qualified to teach by virtue of his Standard Certificate with endorsement in Industrial Arts and in Elementary Education with Specialization in Science Grades 5-8?

The holder of an endorsement in Industrial Arts is authorized to teach Industrial Arts, which, by statute, includes: graphic arts, drafting, woodworking, metal working arts, and power mechanics. N.J.S.A. 18A:26-2.6(b). The case of Polo v. Board of Education Vocational Schools County of Bergen, 93 N.J.A.R.2d (EDU) 498, affirmed, 94 N.J.A.R.2d (EDU) 36, demonstrates that the statutory limits of the Industrial Arts endorsement have been narrowly construed. In Polo, a teacher who had a permanent instructional certificate with endorsements in "Skilled Trades" and in "Industrial Arts" was determined to lack the appropriate endorsements to teach plumbing or custodial training courses. Polo illustrates the narrow confines of the subject matter which the holder of an Industrial Arts endorsement may teach.

Concato's argument is that the breadth of his Instructional certificate with an endorsement in Elementary Education with Specialization in Science grades 5-8 and with and endorsement in Industrial Arts qualifies him to teach a wide variety of courses including the twenty-two courses he seeks, which are currently being taught by others.

The District maintains that an appropriate teaching endorsement is required for the corresponding teaching assignment. N.J.A.C. 6A:9B-9.2 and 9.3(a). The District also counters Concato's assertion with the Certifications submitted by Patrick J. Fletcher, Superintendent of Schools for the River Dell School District.

A course-by-course analysis is set forth below. The curriculum of each of the twenty-two disputed courses, the endorsements which the District says are required in order for a teacher to qualify to teach the courses, and Concato's statements about why his credentials meet the requirements for teaching said courses will be analyzed. Concato relies on the breadth of his aforesaid Certificate and endorsements and his work experience. The District relies on Mr. Fletcher's perusal of the Department of Education's list of approved job titles with corresponding authorized certificates/endorsements as referenced in N.J.A.C. 6A:9B-5.5.

Analysis of the Twenty-Two Disputed Courses

(1) Projects and Performances

The District says that the courses in "Projects and Performances 7 & 8" are part of the "Gifted and Talented" curriculum and are a component of the Language Arts Department. These courses emphasize study of fiction, non-fiction, and persuasive writing. The District stated that the Department of Education's required endorsements for this position is "Teacher of English" and/or "Elementary School with Subject Matter Specialization: Language Arts/Literary Specialization in Grades 5-8."

Concato says that he taught this course under his Industrial Arts certification and that teachers of science, social studies, general K-8, and home economics have all taught this course in the past.

I **CONCLUDE** that the parameters of what constitutes Industrial Arts is set forth in N.J.S.A. 18A:26-2.6. The endorsement in Industrial Arts authorizes the holder of that endorsement to teach graphic arts, drafting, woodworking, metal working arts, and power mechanics. I **CONCLUDE** that the teaching of literature (fiction and non-fiction) and the teaching of persuasive writing do not fall within the ambit of Industrial Arts. Clearly the course is a language arts course. I **CONCLUDE** that the requirement that the teacher of this course must hold an endorsement as a "Teacher of English" or "Elementary School with Subject Matter Specialization in Grades 5-8" is correct. I **CONCLUDE** that Concato lacks the required credentials and therefore, as a matter of law, he has no legitimate claim to teach this course.

(2) Research 4 Today

The District claims that the courses in "Research 4 Today" 7 and 8 are a component of the Language Arts Department. These courses emphasize reading, understanding literary devices, and writing. The District stated that the required

endorsements are either "Teacher of English" or "Elementary School with Subject Matter Specialization in Grades 5-8."

Concato says that his Industrial Arts certificate is appropriate for these courses because they are basic courses that teach students to perform digital research and that they are extensions of courses he taught called "Strive for Success" and "Digital Communications."

I **CONCLUDE** that the courses are reading and writing courses that require the teacher to develop the student's critical literary skills and to teach good writing skills, both of which are outside the subject matter (i.e. the scope) set forth for Industrial Arts under the aforesaid statute. I **CONCLUDE** that the requirement that the teacher of this course must hold either a "Teacher of English" or "Elementary School with Subject Matter Specialization in Grades 5-8" is correct. I **CONCLUDE** Concato lacks the required credentials and therefore, as a matter of law, he has no legitimate claim to teach these courses.

(3) Robotics

The District says that "Robotics" is a component of the Science Department. The course emphasizes high-level programming languages and the engineering process. The curriculum entails concepts of science, technology, mathematics, and engineering. The District stated that the required endorsement is "Teacher of Physics."

Concato says that he taught Robotics as part of his previous technology courses in middle school. He says the course is properly classified as a technology course and that it is not a physics course.

I **CONCLUDE** that while Robotics may have been part of a previous course taught by Concato, this particular Robotics course involves the teaching of high-level programming languages and an emphasis on scientific and mathematical concepts that are closer to Physics than they are to the subject matter set forth for Industrial Arts under the aforesaid statute. I **CONCLUDE** that the requirement of a "Teacher of

Mathematics" endorsement is correct. I **CONCLUDE** that Concato does not possess all of the required credentials that would enable him to teach the "Robotics" course and therefore, as a matter of law, he has no legitimate claim to teach this course.

(4) Introduction to Computer Science

The District says that the course is named "Computer Programming with Python" and is also referred to as "Introduction to Computer Programming." The curriculum is for grades 9-12 and includes familiarizing students with computer languages, focuses on the development of mathematical problem-solving skills, enabling them to write programs in the Python computer language, and enabling students to create applets. The District stated that the required endorsement is "Teacher of Mathematics."

Concato says that the course contains more technology material than mathematics. He says that he is qualified to teach the basic math skills which are part of this course under his Elementary Education K-6 endorsement course. He did not state that he is familiar with Python or any other particular computer languages.

I **CONCLUDE** that while Concato taught computer programming as part of a course called Computer Literacy for grades 7 and 8, Computer Programming with Python involves much deeper subject matter and is a math-oriented course. The District's requirement that the teacher of this course must have a "Teacher of Mathematics" endorsement is correct. I **CONCLUDE** that the subject matter set forth for Industrial Arts under the aforesaid statute does not comport with the requirements of Computer Programming with Python. I **CONCLUDE** that Concato does not possess all of the required credentials that would enable him to teach this course and therefore, as a matter of law, he has no legitimate claim to teach this course.

(5) Engineering Your World (Grades 10-12)

The District says that "Engineer Your World" is a component of the high school Science Department. It is a five-credit, full-year honors course wherein students engage in authentic engineering practices applying principles of engineering, science,

technology, and mathematics. The required endorsements are "Teacher of Biological Science" or "Teacher of Physical Science." Concato says that his Industrial Arts/Technology certification authorizes him to teach this course. His argument assumes that he can utilize the Technology Education endorsement that he earned post-RIF to advance his claim to teach this course. As decided above, he cannot do so. Concato's claim can only be based on his Industrial Arts and Elementary Education endorsements.

I **CONCLUDE** that the "Engineer Your World" honors course requires a teacher with credentials in science and mathematics, namely a teacher who holds either an endorsement as a "Teacher of Biological Science" or "Teacher of Physical Science." I **CONCLUDE** that the requirement for either of these endorsements is correct. I **CONCLUDE** that Concato has not presented evidence of his expertise in all of the areas needed to teach this high school honors course. I **CONCLUDE** that Concato lacks the required credentials and, therefore, as a matter of law, has no legitimate claim to teach this course.

(6), (7), (8), (9) TV Production I (Grades 9-10); TV Production II (Grades 10-11); TV Production III (Grades 11-12); and Advanced Media Project (Grade12)

The District says that these four courses are components of the high school Art Department and together constitute a four-level series of television production courses. Each are five-credit, full-year courses. "TV Production I" teaches students the art skills (writing, acting, videotaping, and editing) needed to create video projects. "TV Production II" expands upon the skills acquired in "TV Production I" so as to enable students to obtain skills in interviewing, writing news stories, and the creation of documentaries and short films for TV broadcast on the school's television system. "TV Production III" builds upon the two previous courses in the series with an emphasis on the creation of stories and studio productions for broadcast on the school's TV system, web page, and YouTube channel. "Advanced Media Project" is a course for high school seniors who have excelled (grade of 85 or better) in "TV Production III." This course emphasizes close student-teacher collaboration on special media projects designed for

the particular student's chosen interest. The District says that the required endorsements for "TV Production I" are either "Teacher of Audio/Visual Broadcast Production Technology" or "Teacher of Skilled Trades: Television Broadcasting." For the latter three courses the required endorsement is: "Teacher of Skilled Trades: Television Broadcasting."

Concato says that his Industrial Arts/Technology certificate authorizes him to teach these courses, that his certificate authorized him to teach courses in elementary school or middle school entitled "Information and Communication" and "Technology and Society," which he claims are part and parcel of the above-named courses. He adds that the original curriculum of the TV/Media courses were written by an Industrial Arts teacher.

I **CONCLUDE** that all four courses require a teacher to have an in-depth knowledge of all aspects of the use and operation of any equipment related to television production. They also require in-depth knowledge needed to teach students the skills related to interviewing, writing, and producing TV shows, documentaries, and movies. I **CONCLUDE**, as determined above, that Concato cannot utilize the Technology Education endorsement that he earned post-RIF. I **CONCLUDE** that Concato's credentials in Industrial Arts and Elementary Education are insufficient for teaching courses in Television Production and advanced television projects. I **CONCLUDE** that the requirement of an endorsement in either "Teacher of Audio/Visual Broadcast Television Production Technology" or "Teacher of Skilled Trades: Television Broadcasting" is correct. I **CONCLUDE** that Concato lacks the required credentials ("Teacher of Audio/Visual Broadcast Production Technology" or "Teacher of Skilled Trades: Television Broadcasting") and therefore, as a matter of law, he has no legitimate claim to teach these courses.

(10, 11, 12) Math Plus Algebra a/k/a Math Lab Algebra I; Algebra II Lab a/k/a Math Lab Algebra II; and Geometry Lab a/k/a Math Lab Geometry

The District says that the curriculum for each of these courses are as follows: "Math Lab Algebra I" is a five-credit, full-year course for high school students in need of

remediation or extra assistance while they take the course in "Algebra I." "Math Lab Algebra II" is a five-credit, full-year course for high school students in need of remediation or extra assistance while they take the course in "Algebra II." "Math Lab Geometry" is a five-credit, full-year course for high school students in need of remediation or extra assistance while they take the course in "Geometry." All three courses are components of the Mathematics Department. The District stated that the required endorsement for these three positions is "Teacher of Mathematics."

Concato says that he is authorized to teach basic skills courses under his Elementary Education endorsement. In answer to Interrogatory Number 20 inquiring about the basis of his claim that he is entitled to teach remedial courses, he cites his aforementioned credentials and his unspecified previous teaching assignments.

I **CONCLUDE** based on Numbered Paragraph 4 of the "Joint Stipulation of Facts" that there is nothing in Concato's teaching history which demonstrates that he ever taught Algebra or Geometry to elementary, middle, or high school students. I **CONCLUDE** that the teaching of Mathematics is outside the scope of Industrial Arts as that endorsement is defined in the aforementioned statute. I **CONCLUDE** that the three aforementioned math courses require a teacher that holds the "Teacher of Mathematics" endorsement. I **CONCLUDE** that Concato lacks the required credentials (a "Teacher of Mathematics" endorsement) to teach "Math Lab Algebra I," "Math Lab Algebra II," or "Math Lab Geometry" and therefore, as a matter of law, he has no legitimate claim to teach any of these three courses.

(13, 14, 15, 16, 17) Digital Imaging; Animation; Digital Arts Major; Digital Illustration; Digital Commercial Design

The District says that all five of the above-listed courses are components of the Art Department. "Digital Imaging" is a five-credit, full-year course for grades 9 thru 12. In this course the student learns how to work with digital imaging software, how to distinguish between elements of art and principles of design with the goal of using desktop publishing software to produce a finished work product for a commercial or professional audience. "Animation" is a five-credit, full-year course for grades 9 thru 12

wherein the student is called-upon to learn the basic principles of animation, use various software, and ultimately create his own digital animated movie. "Digital Arts Major" is a five-credit, full-year course for grades 11 thru 12. This course builds upon previous courses to enable the student to expand his knowledge of digital software to solve design problems and produce portfolio-quality artwork. "Digital illustration" is a five-credit, full-year course for grades 9 thru 12. It emphasizes the student's use of Adobe Illustrator software to complete creative assignments is areas such as fashion, publishing, fine art, etc. "Digital Commercial design" is a five-credit, full-year course for grades 10 thru 12. Working alone or in teams on design projects, the students study the design and workflow process to create book illustrations, advertisements, packaging mock-ups, and game designs for everyday use. The District says the required endorsement is "Teacher of Art."

Concato says that his Industrial Arts and Elementary Education credentials qualify him to teach any of these courses. He has previously taught in each of these areas as part of the Middle School "Computer Literacy 7 & 8" courses.

I **CONCLUDE** that while Concato has taught courses in Middle School "Computer Literacy 7 & 8," the subject matter associated with the five above-listed high school courses is much deeper, is geared for students planning a career in jobs involving a high order of digital illustration and creative design. Moreover, the subject matter is decidedly art-oriented. I **CONCLUDE** that the subject matter set forth for Industrial Arts under the aforesaid statute does not comport with the requirements of any of the five, above-listed art courses. Moreover, I **CONCLUDE** that Concato cannot use the Technology Education endorsement, which he acquired post-RIF to advance his claim to teach these five courses. I **CONCLUDE** that the requirement of a "Teacher of Art" endorsement is correct. I **CONCLUDE** that Concato does not hold the "Teacher of Art" endorsement and therefore, as a matter of law, he has no legitimate claim to teach any of these five courses.

(18, 19, 20) Introduction to Photography; Advanced Photography; Advanced Placement Photography

The District says that all three of these courses are components of the Art Department. "Introduction to Photography" is a five-credit, full-year course for grades 10-12. Together they can constitute a three-level series of photographic expertise. "Introduction to Photography" teaches students how to use traditional cameras, to develop black-and-white film, and later how to use digital cameras. "Advanced Photography" is a five-credit, full-year course for students in grades 10 thru 12, who have passed "Introduction to Photography." In "Advanced Photography" students expand upon their earlier knowledge, learn to use compute image processing software like Photoshop. In "Advanced Placement Photography" a five-credit, full-year course for grade 12 students only. These seniors are required to create a portfolio which demonstrates their developing sense of art, an appreciation of the depth of a particular artistic concern, and their formal, technical and expressive artistic abilities. The District says that the required endorsement is "Teacher of Art."

Concato says that his Industrial Arts and Elementary education credentials qualify him to teach any of these courses. He has previously taught in each of these areas as part of the Middle School "Computer Literacy 7 & 8" courses.

I **CONCLUDE** that while Concato has taught courses in middle school "Computer Literacy 7 & 8," the subject matter associated with the three Photography courses involves the use of film photography, not only digital photography. Concato has not presented any evidence demonstrating his expertise in the use of the various types of photographic equipment, film development, etc. Nor has he demonstrated training and expertise that would enable him to instill in his students the sense of artistic sensibility that is an essential element of each of these three courses. I **CONCLUDE** that the three photography courses are decidedly art-oriented. I **CONCLUDE** that the subject matter set forth for the Industrial Arts under the aforesaid statute does not comport with the requirements of any of the three, above-listed photography courses. I **CONCLUDE** that Concato cannot use the Technology Education endorsement, which he acquired post-RIF to advance his claim to teach these three courses. I **CONCLUDE** that the

requirement of a "Teacher of Art" endorsement is correct. I **CONCLUDE** that Concato does not hold the "Teacher of Art" endorsement and therefore, as a matter of law, he has no legitimate claim to teach any of these three courses.

(21) World of Music & Music Technology 7

The District says that this course is a component of the Related Art Department. "World of Music" is a middle school course which introduces students to the fundamentals of music, including scales, chords, and music notation; the basics of recording and editing; and an appreciation of a wide variety of musical genres and composers. The District says that the New Jersey Department of Education, Bergen County office, issued a decision in July 2014 stating that the required endorsement for this position is "Teacher of Music."

Concato says that he was assigned to teach this course in June 2014 for the 2014-2015 school year. Then the course was re-assigned. His argument is that the assigning of this position to him means that he was deemed qualified to teach it.

I **CONCLUDE** that the District was required by N.J.S.A. 18A:26-2 and N.J.A.C. 6A:9B-5.1(a), (b), and (c) to follow the decision of the Department of Education requiring that the position must be filled by a person who holds a "Teacher of Music" endorsement. I **CONCLUDE** that Concato does not hold that endorsement and therefore, as a matter of law, he has no legitimate claim to teach this course.

(22) Painting and Printmaking

The District says that this course is a component of the high school Art Department. "Painting and Printmaking" is a five-credit, full-year course for students in grades 10 thru 12, who have passed Drawing & Sculpture. The goal of the course is to teach students to develop an understanding of aesthetics and principles of art. Students are taught to use acrylics, oil pastel, and ink to create paintings and prints using the techniques of pointillism, monotype, and chine colle.

Concato says that his Industrial Arts and Elementary Education credentials qualify him to teach any of these courses. He claims to have taught in each of these areas as part of the middle school "Computer Literacy 7 & 8" courses.

I **CONCLUDE** that while Concato has taught courses in middle school "Computer Literacy 7 & 8," the subject matter associated with "Painting and Printmaking" involves the use of paint, ink, and materials that are peculiar to the fine art of painting and the fine art of print-making. Concato has not presented any evidence demonstrating his expertise in the use of oils, acrylics, inks, brushes and other types of applicators, canvasses, linens, etc. which are used in the making of paintings and prints. Nor has he demonstrated training and expertise that would enable him to equip his students to use the aforesaid materials to create their own works of art. I **CONCLUDE** that the subject matter set forth for Industrial Arts under the aforesaid statute does not comport with the requirements of the "Painting & Printmaking" course. I **CONCLUDE** that the requirement of a "Teacher of Art" endorsement is correct. I **CONCLUDE** that Concato does not hold that endorsement and therefore, as a matter of law, he has no legitimate claim to teach this course.

I **CONCLUDE** that Concato has not met his burden to prove by a preponderance of the credible evidence that his credentials, as of the June 8, 2014, RIF, entitled him to teach any of the twenty-two disputed courses.

As stated previously, tenure is achieved in a particular position. Eligibility to teach in a newly created position or in another position is possible only when the two positions are "substantially similar". Dennery, supra, 131 N.J. at 639. A mere overlap of duties does not mean that the positions are similar. Id. at 640. Concato's tenure in the positions he has taught (by virtue of his endorsements in Industrial Arts and in Elementary Education Grades 5-8 with Specialization in Science) does not transfer to any of the twenty-two courses that he seeks to teach because he lacks the credentials to teach these courses and because the positions he seeks to teach have many additional duties and different responsibilities than the courses he has taught. The twenty-two courses are not "substantially similar" to the courses which he has previously taught. Because there is such dissimilarity between the positions in which

Concato holds tenure and the credentials required for teaching the twenty-two positions which he seeks to teach, I **CONCLUDE** that the issue of seniority cannot and does not arise in this case.

Because Concato is a tenured teacher affected by a RIF, I **CONCLUDE**, per N.J.S.A. 18A:28-12, that his name must be maintained on a preferred eligible list in a position for which he is qualified.

ORDER

Having considered the moving papers and responding papers filed by the parties, and good cause having been shown, it is hereby **ORDERED** that the Summary Decision Motion filed by Petitioner, Concato, is hereby **DENIED**. It is further **ORDERED** that the Summary Decision Motion filed by the Respondent, River Dell Board of Education, is hereby **GRANTED** and that Summary Decision is hereby entered in favor of Respondent, River Dell Board of Education; and that Petitioner, Concato's name shall be placed and maintained on a preferred eligible list in the order of seniority for reemployment if and when a vacancy occurs in a position for which he is qualified.

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

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

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

December 29, 2016
DATE

John P. Scollo
JOHN P. SCOLLO, ALJ

Date Received at Agency: December 29, 2016

Date Mailed to Parties: December 29, 2016

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APPENDIX

List of Exhibits

For Petitioner:

P-1 Petitioner Christopher Concato's Motion for Summary Decision and Brief dated 3/1/16, including Petitioner's Answers to Interrogatories

P-2 Petitioner's Reply Brief dated 3/17/16 and Certification of Petitioner

P-3 Petitioner's submission dated 11/7/16 in response to the tribunal's letter of 10/31/16

Respondent's Exhibits:

R-1 Respondent's Motion for Summary Decision, Certification of Superintendent Patrick J. Fletcher dated 2/27/16 and Brief dated 3/3/16

R-2 Respondent's Reply Brief dated 3/18/16 and supplemental Certification of Fletcher dated 3/18/16

R-3 Respondent's Response to Petitioner's "Notice to Produce and Request for Supplementary Information"

R-4 Respondent's Supplemental Brief dated 7/1/16 and Second Supplemental Certification of Fletcher dated 6/28/16

R-5 Respondent's submission dated 11/7/16 in response to the tribunal's letter of 10/31/16

R-6 Respondent's submission dated 11/9/16 in reply to Petitioner's submission dated 11/7/16

Joint Exhibit:

J-1 The Parties' Joint Stipulation of Facts (undated copy), received at OAL on March 2, 2016

5 7-17

Michelle M. Schott, Esq.
PURCELL, MULCAHY, HAWKINS, FLANAGAN & LAWLESS, LLC
One Pluckemin Way
P.O. Box 754
Bedminster, NJ 07921
T: 908-658-3800
Attorneys for State-Operated School District of the City of Newark
Our File No. 650.10194

In the Matter of LUNA MISHOE, and STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, IN THE COUNTY OF ESSEX	**SETTLEMENT AGREEMENT**

The Parties involved herein have voluntarily resolved all disputed matters and enter into the following Settlement Agreement (the "Settlement Agreement") that fully disposes of all issues in controversy between teacher LUNA MISHOE ("Mishoe") and the STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK (the "School District"):

WHEREAS Mishoe is a tenured teaching staff member employed by the School District as a teacher;

WHEREAS the State District Superintendent of the School District ("Superintendent") certified tenure charges of alleged conduct unbecoming and alleged excessive absenteeism to the Commissioner of Education of New Jersey, captioned *In the Matter of Luna Mishoe, State-Operated School District of the City of Newark, Essex County* ("Tenure Charges"); and Employee filed an answer opposing the Tenure Charges; and the Commissioner of Education reviewed the Tenure Charges and Employee's answer and referred the matter to Arbitrator Mariann Schick ("Arbitrator") for a hearing;

WHEREAS due to the uncertainty of the outcome of arbitration, as well as the expenditure of resources due to multiple days of hearings with numerous witnesses, and the concern that school personnel may be removed from their educational duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS the proposed settlement is in the best interest of the Parties and the public because it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

WHEREAS Mishoe has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate, and he has been advised of the School District's duty to report the resignation of any teaching staff member accused of unbecoming conduct;

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. This Agreement shall be and is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and shall be effective only upon the School District's receipt of a copy of this Agreement executed by the Arbitrator to indicate her approval of the Agreement. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

2. The effective date of this Settlement Agreement ("Effective Date") shall be the date of the School District's receipt of this Settlement Agreement, approved by the Arbitrator, provided that Employee has not exercised his right to rescind this Settlement Agreement in accordance with Paragraph 15 below. In the event of disapproval by the Arbitrator or any failure to act on such approval, this Settlement Agreement shall be void and of no effect, and both Parties shall have the right to pursue any and all matters relating to the other, including but not limited to the Tenure Charge.

3. Mishoe hereby agrees to resign from his tenured position of employment with the School District, effective June 23, 2016 (the "Resignation Date"). Attached is a copy of Mishoe's signed Letter of Resignation (Exhibit A). Mishoe's separation from employment will be deemed a voluntary resignation in good standing. Upon inquiry from any third Parties, the School District will only confirm Mishoe's employment, position, title, salary and dates of employment. Should Respondent apply for New Jersey State Unemployment Benefits, the School District will not oppose Respondent's application for those benefits.

4. Mishoe also agrees to withdraw with prejudice any and all claims or suits that he may have previously filed against the School District that remain pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims and entitlement to pension benefits. This Settlement is intended to be the final resolution of all outstanding matters between the School District and Mishoe. Should Mishoe fail to submit letters of withdrawal and/or stipulations of dismissal for any such pending claims or suits, this Settlement Agreement will serve as Mishoe's formal written notice of withdrawal of those pending claims or suits, except for workers compensation claims and pension benefits.

5. In exchange, the School District shall pay Mishoe salary and benefits, at his current rate of pay and in accordance with the terms and conditions of its benefit plans and policies, retroactive to March 28, 2016 through the Resignation Date. In addition, Mr. Mishoe's medical benefits will continue through September 1, 2016. Other than the retroactive salary and benefits that he receives pursuant to this paragraph, Mishoe will not receive any further monies or benefits from the School District in exchange for this Settlement Agreement.

6. The District agrees not to independently seek the suspension or revocation of Respondent's teaching certification or license or seek to prevent him from applying for or receiving pension benefits on any grounds related to tenure charges or his resignation pursuant to this Settlement Agreement.

7. Mishoe understands and acknowledges that the School District intends to report the State Board of Examiners the occurrence of Respondent's resignation in accordance with the requirements of N.J.A.C. 6A:9B-4.4. The School District will not take any action or position regarding Mishoe's teaching certification or license. Mishoe acknowledges that the District is required to cooperate with any requests of the State Board of Examiners in relation to his certification and license and agrees that such cooperation will not violate the terms of this Agreement.

8. The School District agrees not to pursue any disciplinary action, including tenure charges or any action seeking termination of Mishoe's employment, so long as this Settlement Agreement remains in effect and is not voided by any court or administrative agency of

competent jurisdiction. However, if this Settlement Agreement is voided, the School District retains the right to pursue disciplinary action or any other action against Mishoe, including termination of his employment.

9. As of the Resignation Date, all of Mishoe's employment rights, including but not limited to salary, tenure and seniority will permanently end with the exception of insurance coverage that is extended as described in Paragraph 5.

10. Mishoe agrees that he will not apply for reemployment, in any capacity, with the School District at any time. Furthermore, Mishoe will specifically be considered to have permanently resigned from his tenured position as teacher as a result of this Settlement Agreement. If Mishoe does apply for reemployment with the School District, in any capacity, and is approved for employment, the terms of this Settlement Agreement shall control and be grounds for immediate termination of Mishoe's employment.

11. This Settlement shall not constitute a precedent in any matters involving other employees.

12. Except as noted above, Mishoe waives all claims of any nature against the School District with regard to his employment with and/or his separation from the School District including fees, or other monetary relief, with the exception of workers' compensation claims and pension benefit claims.

13. By entering into this Settlement Agreement, and in exchange for good consideration as set forth in Paragraphs 4 and 5 above, the sufficiency of which is hereby acknowledged by the Parties, Mishoe releases and discharges the School District, the State District Superintendent, its Advisory Board of Education and its Advisory Board members, and any and all other School District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that he has or may have against the School District regarding his employment with the School District. This includes without limitation any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Mishoe's employment with the School District and separation from the School District. It specifically

includes, without limitation, all claims which Mishoe may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on her employment by and the termination of his employment with the School District, including, but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys fees, costs, and/or future wage loss, except for workers compensation claims and pension benefit claims. Mishoe agrees to save, hold harmless and indemnify the School District for any legal costs and attorneys fees associated with the enforcement of the terms of this Settlement Agreement should enforcement become necessary.

14. Notwithstanding Paragraph 13 of this Settlement Agreement, it is understood and agreed that the Parties are not prohibited from communicating with or participating in any

administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the School District based upon any of the above-released claims in Paragraph 13, Mishoe agrees not to seek or accept any resulting relief whatsoever.

15. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Mishoe of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Settlement Agreement. Accordingly, by executing this Settlement Agreement, Mishoe acknowledges that he: (i) fully understands the terms and conditions of this Settlement Agreement; (ii) has consulted with an attorney to review the Settlement Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Settlement Agreement; and (v) has seven (7) days from the date of the execution of this Settlement Agreement to revoke it. Mishoe understands that he may rescind this Settlement Agreement within seven (7) calendar days of Mishoe of executing it, and that such rescission must be in writing and delivered to counsel for the School District either by hand or by certified mail within the seven-day period.

16. The Parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

17. This Settlement Agreement constitutes the full agreement between the Parties, and shall be construed and enforced in accordance with New Jersey law.

18. If any provision or portion of a provision of this Settlement Agreement is held by a court of competent jurisdiction, or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or remaining portions of a provision will continue and remain in full force and effect.

19. This Settlement Agreement is subject to final approval by the State District Superintendant of the State-Operated School District of the City of Newark and will only become effective, as per its Effective Date as described in Paragraph 2, upon the approval of the Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

Dated: 8-30-16

LUNA MISHOE

Dated: 9/3/16

CHRISTOPHER CERF
State District Superintendent for State-Operated
School District of the City of Newark

Approved:

Dated: 9/6/16

MARIANN SCHICK
Arbitrator

EXHIBIT A

Bernard Mercado, Esq.
Newark Public Schools
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102

RE: LUNA MISHOE
NOTICE OF RESIGNATION – JUNE 23, 2016

Dear Mr. Mercado:

I wish to inform you that I resign from employment with the Newark Public Schools, effective June 23, 2016.

Dated: 06-30-16

LUNA MISHOE

CERTIFICATION

LUNA MISHOE, of full age, hereby certifies as follows:

I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 08-30-16

LUNA MISHOE

CERTIFICATION PURSUANT TO N.J.A.C. 6:3-5.6(b)

MICHELLE M. SCHOTT, of full age, hereby certifies as follows:

I am an attorney at law and Of Counsel in the law firm of Purcell, Mulcahy, Hawkins, Flanagan & Lawless, LLC, attorneys for the State-Operated School District of the City of Newark ("School District") in this matter.

The State District Superintendent of the School District has consented to the terms set forth in the Settlement Agreement between the School District and the Employee.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date: _____

_____
MICHELLE M. SCHOTT

4742105v1

YASMIN HERNADEZ-MANNO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged her reassignment from a supervisor position to a non-supervisory position, contending that the action violated her tenure and seniority rights. Petitioner was notified in June 2013 that her position as Central Office Supervisor in the Office of Bilingual/ESL Education would be eliminated; that she would revert to her prior position of Elementary teacher; and that she would be paid through August 2013, and then placed on a preferred eligible list for future employment with the district. Petitioner filed the within appeal in November 2013, seeking reinstatement to a supervisory position and back pay. Subsequently, in August 2014, petitioner submitted a letter resigning her position with the respondent District. The District filed a motion for summary decision, contending, *inter alia,* that the case was both untimely filed and mooted by petitioner's resignation.

The ALJ found, *inter alia,* that: a case is moot when the determination sought cannot have any practical effect on the existing controversy; an employee who voluntarily resigns has no standing to pursue an appeal; in accordance with *N.J.A.C.* 6A:3-1.3(i), petitioner was required to file her appeal no later than 90 days from the date of receipt of final notice from the respondent that her position was to be eliminated; petitioner failed to file her appeal with the required time limit, and offered no reasons why this requirement should be relaxed; and these issues are dispositive of the case. Accordingly, the ALJ concluded that the petition must be dismissed.

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

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

Issued 2/21/17

OAL DKT. NO. EDU 18713-13
AGENCY DKT. NO. 295-11/13

YASMIN HERNADEZ-MANNO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) determination that the petition of appeal was time-barred under *N.J.A.C.* 6A:3-1.3(i).[1] Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/21/17
Date of Mailing: 2/22/17

[1] Although it was not necessary to reach a determination on the substance of the appeal because the petition was untimely filed, the Commissioner is also in accord with the ALJ's finding – for the reasons articulated in the Initial Decision – that the matter is moot because the petitioner voluntarily resigned from the district.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 18713-13
AGENCY DKT. NO. 295-11/13

YASMIN HERNANDEZ-MANNO,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Yasmin Hernandez-Manno, pro se

Ramon E. Rivera, Esq., **Christina M. Michelson**, Esq., and **Shana T. Don**, Esq., for respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: January 6, 2017 Decided: January 6, 2017

BEFORE **RICHARD McGILL**, ALJ:

Yasmin Hernandez-Manno ("petitioner") challenges her reassignment by the State-Operated School District of the City of Newark ("respondent" or "District") from a supervisor to a non-supervisory position as a violation of her tenure and seniority rights. As relief, petitioner seeks reinstatement with back pay.

PROCEDURAL HISTORY

Petitioner filed her petition with the Commissioner of Education on November 29, 2013, pursuant to the Commissioner's authority under N.J.S.A. 18A:6-9 to hear and determine disputes arising under the education laws. The matter was transmitted to the Office of Administrative Law on December 27, 2013, for determination as a contested case.

On December 29, 2014, respondent filed a motion for summary decision. By letter dated January 22, 2015, respondent requested on behalf of both parties an adjournment of scheduled hearing dates. The letter advises that petitioner's attorney was seriously ill and in the hospital and requested a 30-day extension of the time for petitioner to respond to respondent's motion. Both requests were granted.

After petitioner's attorney could not be reached for a telephone status conference on March 7, 2016, the undersigned sent a letter to petitioner's attorney inquiring as to the status of his representation of petitioner. No response was received from petitioner's attorney.

By letter dated April 29, 2016, to petitioner, the undersigned requested that she clarify her representation in this matter. In a letter dated May 11, 2016, petitioner stated that she also had not been able to contact her attorney and that she was seeking new legal representation. By letter dated June 16, 2016, respondent advised that it had been contacted by two attorneys in regard to petitioner's appeal, but no appearance was entered on her behalf. By letter dated June 30, 2016, the undersigned advised that if an appearance was not entered on behalf of petitioner within 20 days of the date of the letter, the motion for summary decision would be submitted for disposition. Thereafter, no appearance was entered on behalf of petitioner, but the matter was held in abeyance to give her additional time to find legal representation. Letters were received from two attorney's advising that they did not represent petitioner.

MOTION FOR SUMMARY DECISION

A. Legal Standard

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to R. 4:46-2. Summary judgment "is designed to provide a prompt, businesslike and inexpensive method" to dispose of actions which do not present any genuine issue of material fact. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Although the pleadings may raise a factual issue, summary judgment procedure pierces the allegations in the pleadings, where the other papers show the absence of any genuine issue of material fact. Ibid. Excessive caution which would undercut the purposes of a motion for summary judgment should be avoided. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 65 (1980).

In determining whether there exists a genuine issue as to a material fact, the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of America, 142 N.J., 520, 523 (1995).

B. Respondent's Position

Respondent advances four main arguments in support of its motion. First, petitioner resigned from her position with the District, and therefore, the petition should be dismissed as moot. Second, the petition of appeal was not filed in a timely manner. Third, respondent acted in good faith in implementing a reduction in force, which resulted in the elimination of petitioner's position. Fourth, no tenure rights exists in an "Executive Director" position, and therefore, petitioner is not entitled to claim an executive director position based on any alleged seniority rights.

C. Facts

There are no genuine issues of fact in regard to respondent's first and second arguments. During the 2012-2013 school year, petitioner was employed by respondent in the position of Central Office Supervisor in the Office of Bilingual/ESL Education. By letter dated June 21, 2013, sent by overnight delivery and PDF email, respondent advised petitioner that her current position would be eliminated and that she would revert to her prior position of Elementary Teacher. Further, her current salary would end on August 31, 2013, and she would be placed on a preferred eligible list for future employment with the District. Petitioner filed her Petition of Appeal with the Commissioner on November 27, 2013. During the following year, petitioner sent a letter dated August 5, 2014, to respondent's superintendent resigning her position with respondent effective August 25, 2014.

D. Analysis

Respondent's first argument is that the petition in this matter should be dismissed as moot because petitioner resigned from her position with the District. A case is moot when the determination sought cannot have any practical effect on the existing controversy. Greenfield v. New Jersey Dep't of Corrections, 382 N.J. Super. 254, 257-58 (App. Div. 2006).

An employee who voluntarily resigns her position has no standing to pursue an appeal. DeKenipp v. Bd. of Educ. of the Township of Wall, Monmouth County, OAL Dkt. No. EDU 07786-10, Final Decision (July 15, 2011). Here, petitioner voluntarily resigned her employment effective August 25, 2014. Petitioner can no longer pursue her appeal. Therefore, I **CONCLUDE** that the petition in this matter should be dismissed as moot.

Respondent's second argument is that the petition was not filed in a timely manner and that therefore the petition should be dismissed. In accordance with N.J.A.C. 6A:3-1.3(i), petitioner was required to file her petition no later than the 90th day from the date of receipt of the notice from respondent. Here, petitioner filed her petition

well beyond ninety days after receipt of the notice. Under the circumstances, petitioner failed to file her petition within the time limit set forth in N.J.A.C. 6A:3-1.3(i). Further, petitioner has not advanced any reasons to relax this requirement pursuant to N.J.A.C. 6A:3-1.16. Therefore, I **CONCLUDE** that the petition in this matter should be dismissed because it was not filed in a timely manner.

The determinations in regard to respondent's first and second arguments are dispositive of the case. Under the circumstances, it is unnecessary to consider respondent's third and fourth arguments.

Based upon the above, I **CONCLUDE** that the petition in this matter must be dismissed. Accordingly, it is **ORDERED** that the petition in this matter be dismissed.

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

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

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

Jan. 6, 2017
DATE

RICHARD McGILL, ALJ

Date Received at Agency:

Date Mailed to Parties: JAN 9 2017
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

6-1-17

DANIELE STILL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner alleged that the District violated her tenure rights by terminating her employment, contending that she had acquired tenure while working as a technology coordinator for fourteen years. Petitioner's position as technology coordinator was abolished at the end of the 2013-2014 school year, and she was re-assigned to the position of fifth grade teacher for the 2014-2015 school year. Petitioner was then quickly promoted to the title of lead educator, and she obtained the required provisional principal certificate for this new position. In May 2016, petitioner was notified that her employment as lead educator would be terminated effective June 28, 2016; further, she was told that she had no "bumping rights" or entitlements to other positions in the District. Petitioner filed the within appeal in July 2016. The District filed a motion to dismiss in lieu of an answer, arguing that petitioner did not accrue tenure under her instructional certificate through her service in the technology coordinator position because it was a non-instructional position that required no classroom instruction commensurate with her elementary teaching certificate. Alternatively, the District asserted that petitioner relinquished any alleged tenure rights as an elementary teacher when she accepted the manager of school operations position – a non-tenured, non-teaching position that requires no certification – in August 2016.

The ALJ found, *inter alia,* that: the respondent District's motion to dismiss, which raises a matter outside of the petition – *i.e.,* petitioner's acceptance of a non-tenurable position following her dismissal – has therefore been considered a motion for summary decision, and petitioner's response thereto has been treated as a cross-motion for summary judgment; the issues herein are whether petitioner acquired tenure while serving as a technology coordinator and whether she is entitled to summary decision as a matter of law; petitioner met the requirements for tenure under *N.J.S.A.* 18A:28-5 because she worked in a position for which a teaching certificate was required, held the appropriate certificate, and served the requisite period of time; contrary to the District's arguments, *N.J.S.A.* 18A:28-5 does not require that a position be instructional or involve classroom instruction in order to be tenurable, but rather the key to tenure is whether the employee's position requires a valid certificate from the Board of Examiners – not the specific duties of the position; petitioner should have been returned to an elementary school teacher position when the District eliminated the lead educator position to which petitioner had been promoted; and petitioner's acceptance of the manager of school operations position after she had filed her appeal did not erase her tenure entitlement. The ALJ concluded that petitioner's tenure rights were violated and ordered the District to return petitioner to an elementary teaching position, together with lost salary and benefits, less mitigation.

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

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

Issued 2/21/17

OAL DKT. NO. EDU 14246-16
AGENCY DKT. NO. 199-7/16

DANELE STILL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and petitioner's reply thereto – submitted in accordance with *N.J.A.C.* 1:1-18.4 – were also considered by the Commissioner. Upon a comprehensive review of the record in this matter, the Commissioner is in accord with the Administrative Law Judge's (ALJ) decision.

The ALJ found that the petitioner acquired tenure in the District based on her fourteen years of service as a technology coordinator because the position required petitioner to have a standard teaching certificate;[1] therefore, the Board violated petitioner's tenure rights when it failed to place her in a position that she was entitled to by virtue of her tenure. The ALJ further found that petitioner did not relinquish her tenure rights when she accepted a non-tenurable position in the District, because she accepted the non-tenurable position after the Board violated her tenure rights and subsequent to the filing of this petition.

The exceptions substantially reiterate the substance of respondent's submissions at the OAL, recasting the arguments therein to support the Board's contention that the ALJ

[1] Petitioner holds an instructional teaching certification with an elementary school endorsement.

erroneously concluded that petitioner had acquired tenure in the District. Respondent's exceptions unpersuasively argue that the ALJ erred in granting petitioner's cross-motion for summary decision because there was no evidence in the record that the petitioner earned tenure in an unrecognized position, and the petitioner did not earn tenure as a teaching staff member because she never performed instructional duties. In its exceptions, the Board elaborates on its previous argument that the position is unrecognized, adding that the record in this matter is not clear as to whether the position of technology coordinator – an unrecognized position – was properly approved by the Executive County Superintendent (ECS) pursuant to *N.J.A.C.* 6A:9B-5.5. Furthermore, the Board reiterates that the duties performed in a position, not the position itself, is the controlling factor for accrual of tenure; therefore, petitioner did not acquire tenure as a teacher because she did not perform instructional duties in her position as a technology coordinator.

In reply, petitioner also restates the positions advanced in her submissions at the OAL. Petitioner adds, however, that respondent's arguments regarding the unrecognized status of the position and whether it was approved by the ECS serve to invalidate the job description for the position, which the Board is relying on to argue that petitioner could not have acquired tenure. Petitioner argues that ECS approval of the position is the Board's responsibility, and therefore, if the position was not approved by ECS, then principles of justifiable reliance and equitable estoppel apply in this matter. Petitioner further contends that the record pertaining to any approval of the unrecognized position is a matter of public record. Finally, petitioner reiterates that the right to tenure is governed by the plain language of *N.J.S.A.* 18A:28-5, not the duties of the position.

Adopting respondent's contention that the ALJ improperly ruled that petitioner earned tenure in an unrecognized position would require the Commissioner to ignore the plain language of *N.J.S.A.* 18A:28-5 and *N.J.A.C.* 6A:9B-5.5. *N.J.S.A.* 18A:28-5 provides in pertinent part, "[t]he services of all teaching staff members employed . . . in the positions of teacher[] . . . and **such other employees as are in positions which require them to hold appropriate certificates** issued by the board of examiners . . . shall be under tenure" (emphasis added). In other words, if a position – even if not specifically enumerated – requires a board issued certificate in order for the employee to serve in that position, then the employee will acquire tenure following passage of the requisite time period. Therefore, petitioner's service as a technology coordinator – which position is not explicitly listed in *N.J.S.A.* 18A:28-5, but requires a standard teaching certificate – will be under tenure.

Whether the unrecognized position of technology coordinator was approved by the ECS is inconsequential to the determination of tenure rights: neither the tenure statute nor *N.J.A.C.* 6A:9B-5.5 indicate that an employee will be deemed not tenured if an unrecognized position is not approved by the ECS.[2] *See Ciamillo v. Bd. of Educ. of Ridgefield*, OAL Dkt. No. EDU 1805-04, State Board Decision No. 38-05 (January 4, 2006) (clarifying that the position in which tenure is acquired by virtue of service in an unrecognized position title is not limited by the unrecognized title because it is well established that the position in which an individual achieves tenure is either one of those specifically enumerated in the statute or other employment for which a certificate is required); *see also, Manley v. Bd. of Educ. of Old Bridge Twp.*, OAL Dkt. No. EDU 10644-04, Commissioner Decision No. 450-05 (December 19, 2005) (holding, "[i]t is well established that tenure is achieved in a specific position, and the scope of the tenured

[2] The Commissioner is not persuaded by the Board's reliance on unreported decisional law, from over thirty years ago, in support of their contention that petitioner did not obtain tenure because the position was unrecognized and may not have been approved by the ECS.

position is initially limited by the certificate the teaching staff member must hold to satisfy the prerequisite of qualifications for his or her employment . . ." and finding "the scope of tenure protection for unrecognized positions is also determined by the certifications and endorsements required to serve in that position.") Additionally, it is the board's responsibility to obtain approval from the ECS. Assuming, *arguendo*, that approval was necessary for accrual of tenure in the position and the Board had failed to obtain approval from the ECS, holding petitioner accountable in any way for the Board's administrative failure would contravene the principles of fairness and equity.

With regard to respondent's exception that duties performed in a position – not the position itself – control the accrual of tenure, and that petitioner did not obtain tenure as a teaching staff member because she did not perform instructional duties in her position as a technology coordinator, the Board again expects the Commissioner to disregard the language of the tenure statute. In fact, "a teaching staff member has tenure in all positions for which his instructional certificate qualifies him." *Ellicott v. Bd. of Educ. of Frankford Twp.*, 251 *N.J. Super.* 342, 349 (App. Div. 1991). Therefore, petitioner – who was employed as a technology coordinator in the District for fourteen years and had the requisite certificate qualifying her for the position – obtained tenure in that position, as well as in the position of an elementary school teacher.

The tenure statute should be "liberally construed to achieve its beneficent ends." *Spiewak v. Bd. of Educ. of Hamilton Twp., et al.*, 90 *N.J.* 63, 74 (N.J. 1982). Here, petitioner served as a technology coordinator for fourteen years, a position which required a standard teaching certification; therefore, petitioner obtained tenure in the District under her instructional certification both as a technology coordinator and as an elementary school teacher. Accordingly,

the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed without prejudice.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/21/17

Date of Mailing: 2/22/17

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 14246-16
AGENCY DKT. NO. 199-7/16

DANELE STILL,
Petitioner,
v.
CITY OF CAMDEN STATE-OPERATED SCHOOL DISTRICT, CAMDEN COUNTY,
Respondent.

Andrew L. Schwartz, Esq., appearing for petitioner, Danele Still (Schwartz Law Group LLC, attorneys)

Louis R. Lessig, Esq., appearing for respondent, City of Camden State-Operated School District, Camden County (Brown & Connery, LLP, attorneys)

Record Closed: December 5, 2016 Decided: January 4, 2017

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

Petitioner Danele Still alleges that the respondent, the State-Operated School District of the City of Camden (District), violated her tenure rights by terminating her employment. She alleges that she acquired tenure while working for fourteen years as a technology coordinator; she further alleges that she did not relinquish any tenure rights earned as technology coordinator when she accepted the non-tenurable position of manager, school operations, in 2016.

PROCEDURAL HISTORY

On July 21, 2016, petitioner filed a Petition of Appeal (Petition) with the Commissioner of Education. On or about August 9, 2016, petitioner accepted the full-time position of manager, school operations, at the Cream Family School for the 2016–17 academic year, stating that this was without prejudice to her Petition and without waiver or relinquishment of any tenure entitlement.

On September 16, 2016, respondent filed a Motion to Dismiss in Lieu of Answer. On September 20, 2016, the Commissioner transmitted the matter to the Office of Administrative Law as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On October 6, 2016, the petitioner filed a response to the respondent's motion to dismiss in lieu of an answer. The record closed on December 5, 2016.

FACTUAL DISCUSSION

On or about September 1, 1992, petitioner, Danele Still, began her employment for the District. She worked at the Cream Family School as a fourth-grade teacher, and then as a third-grade teacher, until the end of the 1998–99 school term. While serving as a teacher, petitioner held an instructional teaching certificate with an elementary school endorsement.

During the 1999–2000 school year, petitioner served as a K–5 computer teacher in the Mount Laurel School District. Petitioner returned to Camden for the 2000–01

school term to work as a technology coordinator. As technology coordinator, petitioner served "as a liaison between the school and the Technology Department to assist the principal in implementing building and staff technology needs." As indicated in the job description, the position required a "Standard Teaching Certificate." Petitioner served as technology coordinator in the District from the 2000–01 school term through the end of the 2013–14 school term, when the position was abolished.

Petitioner remained employed by the District and was assigned to the position of fifth-grade teacher at the Forest Hill Elementary School at the start of the 2014–2015 school year. After only one week in this position, petitioner was promoted to the title of lead educator. Petitioner obtained a provisional principal certificate, as required for the new position. Petitioner remained in the position of lead educator for the rest of the 2014–15 school year and the entire 2015–16 school year. On May 11, 2016, petitioner received a letter indicating that her employment as lead educator would be terminated effective June 28, 2016, and that she had no "bumping rights" or entitlements to any other positions in the District.

On July 21, 2016, petitioner filed a Petition of Appeal with the Commissioner of Education, arguing that she is a tenured teacher by virtue of her fourteen years of service in the technology coordinator position. Accordingly, petitioner contends that she has a superior claim to any teaching position held by a non-tenured staff member and that respondent's failure to appoint her to a teaching position violates her tenure rights under N.J.S.A. 18A:28-5. On or about August 9, 2016, petitioner accepted the full-time position of manager, school operations, at the Cream Family School for the 2016–17 academic year. The title is an unrecognized, non-tenured position and does not require a teaching certificate. Petitioner's counsel sent correspondence to respondent indicating that petitioner accepted the position without prejudice to her Petition and without waiver or relinquishment of any tenure entitlement.

In its Motion to Dismiss in Lieu of Answer, respondent argues that (1) petitioner did not accrue tenure under her instructional certificate due to her service in the technology coordinator position because it was a non-instructional position that required no classroom instruction commensurate with the certificate and, alternatively,

(2) petitioner relinquished any alleged tenure rights as an elementary school teacher when she accepted the manager, school operations, position, "a distinct non-tenured, non-certificated, non-teaching staff position."

LEGAL ANALYSIS AND CONCLUSION

A. Should the respondent's motion to dismiss in lieu of answer be converted into a motion for summary decision, and the petitioner's response to the motion to dismiss be treated as a cross-motion for summary decision?

While the regulations governing controversies and disputes before the Commissioner allow a respondent to file a motion to dismiss in lieu of answer "on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true," N.J.A.C. 6A:3-1.5(g) and N.J.A.C. 6A:3-1.10, respondent's motion to dismiss may be converted into a motion for summary decision because respondent's dismissal motion includes a matter outside of the pleadings of the original Petition. In such case, the petitioner's response to the motion to dismiss may be treated as a cross-motion for summary decision.

Here, the respondent's motion to dismiss should be converted to a motion for summary decision because respondent therein introduces the fact that petitioner accepted a non-tenurable position following her dismissal, which is not contained in the Petition.[1] The Uniform Administrative Procedure Rules (UAPR), N.J.A.C. 1:1-1.1 to -21.6, which are designed "to achieve just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay," provide that "[i]n the absence of a rule, a judge may proceed in accordance with the New Jersey Court Rules, provided the rules are compatible with these purposes." N.J.A.C. 1:1-1.3(a). According to New Jersey Court Rule 4:6-2, "[i]f, on a motion to dismiss based on the defense [of failure to state a cause of action], matters outside the pleading are presented . . . the motion shall be treated as one for summary judgment." Thus, this matter can proceed in accordance with R. 4:6-2 because it is compatible with the

[1] Petitioner accepted the position after she filed her Petition with the Commissioner.

purposes of the UAPR. The respondent's motion to dismiss, which raises a matter outside of the Petition, is therefore considered a motion for summary decision.

Accordingly, the petitioner's response to the motion to dismiss shall be treated as a cross-motion for summary decision because, in line with the standard for summary decision under N.J.A.C. 1:1-12.5, she argues that there is no genuine issue of material fact and that she is therefore entitled to a decision finding that she acquired tenure as technology coordinator.

In a contested case, the standard for a motion for summary decision is "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). Here, the issue is whether petitioner acquired tenure while serving as a technology coordinator and whether she is entitled to summary decision as a matter of law.

B. Did the petitioner acquire tenure in all positions for which she was qualified under her instructional certificate, while serving as technology coordinator?

The purpose of the teaching staff tenure laws, N.J.S.A. 18A:28-1 to -18, is "to aid in the establishment of a competent and efficient school system by affording teaching staff members 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528–29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)). In order to acquire tenure, a teaching staff member "must comply with the precise conditions articulated in the [tenure] statute." Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 72 (1962). Thus, a teaching staff member "is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time." Spiewak v. Summit Bd. of Educ., 90 N.J. 63, 74 (1982); N.J.S.A. 18A:28-2; N.J.S.A. 18A:28-4; N.J.S.A. 18A:26-5; N.J.S.A. 18A:28-6.

Under N.J.S.A. 18A:28-5,

> [t]he services of all teaching staff members employed . . . in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services, school athletic trainer **and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners** . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:
>
> > (1) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
> >
> > (2) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
> >
> > (3) The equivalent of more than three academic years within a period of any four consecutive academic years.
>
> [Emphasis added.]

A teaching staff member is defined as

> [a] member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate appropriate to his office, position or employment, issued by the State Board of Examiners and includes a school nurse and a school athletic trainer.
>
> [N.J.S.A. 18A:1-1.]

Once tenure is earned, "a teaching staff member has tenure in all positions for which his instructional certificate qualifies him." Ellicott v. Bd. of Educ. of Frankford, 251 N.J. Super. 342, 349 (App. Div. 1991); see also Capodilupo v. Bd. of Educ. of W. Orange, 218 N.J. Super. 510 (App. Div. 1987), certif. denied, 109 N.J. 514 (1987) (holding that a tenured teacher seeking reinstatement within the endorsements on his or her certificate is entitled to preference in a reduction in force as against a non-tenured applicant with the same certification, despite the fact that the tenured teacher had no "demonstrable experience" under the endorsement).

Here, petitioner met the requirements for tenure under N.J.S.A. 18A:28-5 because she worked in a position for which a teaching certificate was required, held the appropriate certificate, and served the requisite period of time. In particular, the job description for the position of technology coordinator explicitly required a Standard New Jersey Teaching Certificate, petitioner held this certificate, and she worked as technology coordinator for approximately fourteen years. Moreover, when petitioner acquired tenure as technology coordinator, she also acquired tenure in all positions for which she was qualified under her instructional certificate. In this case, since petitioner held an elementary school endorsement, she earned tenure in all elementary teaching positions.

Respondent argues that petitioner did not accrue tenure while serving as technology coordinator because it was a "non-instructional position that required no classroom instruction whatsoever commensurate with her teaching certificate." (Respondent's Brief at 4.) Respondent points to the technology coordinator job description and notes that the duties of the position were "purely managerial." (Id. at 7.) Thus, according to respondent, "common sense dictates Petitioner did not accrue tenure under her elementary school teacher certificate due to her service in this position." (Id. at 4.)

However, N.J.S.A. 18A:28-5 does not require that a position be "instructional" or involve "classroom instruction" in order to be tenurable. Under the statute, the key to tenure is whether the employee's position requires him or her to hold a valid certificate

from the Board of Examiners, not the specific duties of the position. The job description for the technology coordinator title unambiguously required a "Standard Teaching Certificate."[2] As petitioner indicates, "[t]he District cannot have it both ways—it cannot require a certain certificate, and then claim the job functions render that requirement ineffectual."

Respondent also unpersuasively argues that petitioner did not accrue tenure in the technology coordinator position because the position is not a separately tenurable position enumerated in N.J.S.A. 18A:28-5. The plain language of the statute suggests that it was not intended to provide an exhaustive list of positions that are eligible for tenure. After naming a number of positions, the statute provides that tenure may be accrued by "such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners." N.J.S.A. 18A:28-5. As technology coordinator, petitioner was required to hold a "Standard Teaching Certificate," or instructional certificate, and therefore falls into this category. For these reasons, the position of technology coordinator was a tenurable position, and petitioner accrued tenure as a result of her fourteen years working under this title.

C. Is the petitioner entitled to an elementary school teaching position?

When respondent eliminated the lead educator position to which petitioner had been promoted, petitioner should have been returned to an elementary school teacher position for which she was qualified. According to N.J.S.A. 18A:28-6,

> in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.
>
> [N.J.S.A. 18A:28-6(b).]

[2] Further, although it is not determinative, the technology coordinator job description explicitly indicates that the position was intended to be a ten-month "tenured position."

Here, petitioner earned tenure as technology coordinator and, once the position was abolished, she briefly worked as a fifth-grade teacher before she was promoted to lead educator.[3] Since petitioner held the lead educator title for only two years before the position was eliminated, she did not acquire tenure by virtue of her service in said position. However, because she had previously acquired tenure in the District, she should have, in accordance with N.J.S.A. 18A:28-6(b), been "returned to [her] former position at the salary which [she] would have received had the transfer or promotion not occurred together with any increase to which [she] would have been entitled during the period of such transfer or promotion." Thus, petitioner should have been returned to an elementary school teacher position for which she was qualified.[4]

The fact that petitioner accepted the manager, school operations, position should not alter this conclusion. Upon the voluntary acceptance of a non-tenurable position, a school-district employee typically relinquishes any protections associated with her previously tenured title. See, e.g., Colon-Serrano v. Plainfield Bd. of Educ., EDU 11588-06, Comm'r (January 28, 2008), <http://njlaw.rutgers.edu/collections/oal/> (finding that an employee who had earned tenure as an attendance aide lost the protections associated with the position when she accepted the non-tenurable position of classroom aide); see also DiNapoli v. Bd. of Educ. of Verona, 434 N.J. Super. 233, 240 (App. Div. 2014) (holding that a secretary relinquished her tenure rights when she voluntarily transferred to the position of assistant school business administrator, thus giving up her right to "bump" a non-tenured secretarial employee when the administrator position was eliminated).

Here, however, petitioner accepted the manager position after respondent violated her tenure rights and failed to place her in a position to which her tenure entitled her. Indeed, petitioner explains that she accepted the non-tenurable manager,

[3] Neither party explicitly addresses whether the lead educator position was a tenurable title. However, petitioner notes that the position required a principal certificate. (Petition of Appeal, ¶13.) Such a requirement suggests that the position was tenurable under N.J.S.A. 18A:28-5. Respondent does not appear to challenge this conclusion.

[4] Petitioner requests a hearing exclusively to determine to which elementary teaching position(s) she is entitled. However, such a hearing is unnecessary.

school operations, position because she had an obligation to mitigate damages. Further, in the event that her Petition was unsuccessful, acceptance of the job "ensured some form of continued employment." (Petitioner's Response to Respondent's Motion to Dismiss at 9.) Petitioner should not be penalized for seeking gainful employment during a time when respondent refused to honor her tenure rights by failing to follow the procedure set forth in N.J.S.A. 18A:28-6, and in her effort to mitigate damages if she were successful. Accordingly, petitioner's acceptance of the manager position did not erase her tenure entitlement as respondent argues.

Conclusion

For the reasons set forth above, the respondent's motion to dismiss in lieu of answer is converted into a motion for summary decision; the petitioner's response to the motion to dismiss is converted into a cross-motion for summary decision. The respondent's motion for summary decision is denied and the petitioner's cross-motion for summary decision is granted. In accordance with N.J.S.A. 18A:28-6, the respondent shall return the petitioner to an elementary school teacher position for which she is qualified, together with lost salary and benefits, less mitigation, from the date of petitioner's termination as lead educator to her reinstatement.

ORDER

I hereby **ORDER** that the respondent's motion for summary decision is **DENIED** and the petitioner's cross-motion for summary decision is **GRANTED**. The respondent, the State-Operated School District of the City of Camden, shall return the petitioner, Danele Still, to an elementary school teacher position for which she is qualified, together with lost salary and benefits, less mitigation, from the date of petitioner's termination as lead educator to her reinstatement.

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

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

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

January 4, 2017
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency: January 5, 2017

Date Mailed to Parties: January 5, 2017

/cb

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

Brief

For respondent:

Brief

6-2-17

IN THE MATTER OF THE TENURE HEARING :

OF DANIELLE LUCAS, SCHOOL DISTRICT OF : COMMISSIONER OF EDUCATION

THE CITY OF BAYONNE, HUDSON COUNTY. : DECISION

SYNOPSIS

Petitioning Board certified tenure charges of excessive absenteeism, conduct unbecoming, and insubordination against respondent – a tenured teacher under the Board's employ – and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the tenure charges following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.3(c), the allegations – which respondent has chosen not to deny – may be deemed admitted and warrant the termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

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

Issued 2/23/17

AGENCY DKT NO. 7-1/17

IN THE MATTER OF THE TENURE HEARING	:	
OF DANIELLE LUCAS, SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CITY OF BAYONNE, HUDSON COUNTY.	:	DECISION

For the Petitioner, Robert J. Merryman, Esq.
No appearance by or on behalf of Respondent, Danielle Lucas

This matter was opened before the Commissioner of Education on January 10, 2017 through tenure charges of excessive absenteeism, conduct unbecoming, and insubordination, certified by Patricia McGeehan, Superintendent of the School District of the City of Bayonne, together with a statement of supporting evidence against respondent, Danielle Lucas, a tenured teacher in the petitioner's employ. The petitioner provided respondent with written notice of such certification at her last known address – via first class mail, certified mail, and electronic mail – on December 20, 2016.

On January 11, 2017, the Commissioner directed respondent – via both certified and regular mail – to file an answer to the charges. This communication provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from, or on behalf of, respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent has engaged in a prolonged absence from her

teaching position in the District and has been absent from work for the entire 2015-16 school year, as well as the 2016-17 school year to date. Respondent took a sick leave during the 2015-16 school year, using sick time, followed by a thirty-day unpaid leave, and then used time from the sick leave bank for the remainder of the year. Respondent continued to use time from the sick leave bank for the 2016-17 school year, but her eligibility for the sick leave program expired on December 22, 2016. Respondent also failed to provide the District with any indication as to when she would be able to return to work – and whether she would have any restrictions or require any accommodations once she did – despite several attempts by the District to obtain this information.

Deeming the allegations to be admitted – and noting that respondent has failed to respond to the charges certified against her – the Commissioner finds that petitioner's charges of excessive absenteeism, conduct unbecoming, and insubordination have been proven and warrant the respondent's dismissal from employment.

Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/23/17
Date of Mailing: 2/23/17

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

6-3-17

IN THE MATTER OF THE SUSPENSION OF :

THE CERTIFICATES OF ESTHER CANELA, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE TOWNSHIP OF : DECISION

IRVINGTON, ESSEX COUNTY. :

SYNOPSIS

In October 2016, the Commissioner of Education issued an Order to Show Cause requiring respondent to show cause why an order should not be entered suspending her teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10, for resigning her position without giving the required 60 day notice. The respondent – a non-tenured teacher – contended that she did not have a contract for the 2016-2017 school year, and was therefore not obligated to provide a 60 day notice. Respondent filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; *N.J.S.A.* 18A:26-10 provides, in pertinent part, that any teaching staff member "who shall, without the consent of the board...cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year"; in this case, respondent was employed under contract by the petitioning Board as a World Languages-Spanish teacher for the 2015-2016 school year; in May 2016, respondent received a letter from the Board informing her that her employment would not be renewed for reasons of economy; in June 2016, respondent received a second letter from the Board stating that her non-renewal was rescinded, but the letter did not contain any terms of employment for the 2016-2017 school year; respondent signed an acknowledgment of receipt of the letter, which stated only that she was in receipt of a letter from the Human Resources Department, dated June 22, 2016; respondent never received an employment contract from the Board subsequent to her receipt of the non-renewal letter in May 2016; three weeks prior to the opening of the 2016-2017 school year – on August 17, 2016 – respondent advised the Board by letter that she had accepted an offer of employment from another school district, and that she was "resigning" her position in Irvington. The ALJ concluded that: the Board's contention that respondent effectively accepted renewal of her position when she signed an acknowledgement that her non-renewal had been rescinded is without merit; the letter rescinding respondent's non-renewal did not include any terms of employment, did not list her position or salary for the 2016-2017 school year, and cannot be considered as a basis for the Board to assume that respondent would return to teach in the 2016-2017 school year. Respondent did not violate *N.J.S.A.* 18A:26-10, because the expiration of her employment term was at the end of the 2015-2016 school year. Accordingly, the ALJ granted respondent's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

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

Issued 2/23/17

OAL DKT. NO. EDU 17209-16
AGENCY DKT NO. 285-11/16

IN THE MATTER OF THE SUSPENSION OF	:	
THE CERTIFICATES OF ESTHER CANELA,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP OF	:	DECISION
IRVINGTON, ESSEX COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Irvington Board of Education (Board) and respondent Esther Canela's reply thereto. In this case, the Board is seeking to have the respondent's certificates suspended pursuant to *N.J.S.A.* 18A:26-10 for resigning from her teaching position before the expiration of the term of her employment. The Administrative Law Judge (ALJ) found that the respondent did not violate *N.J.S.A.* 18A:26-10 because she did not have an employment contract with the Board for the 2016-17 school year; accordingly, the ALJ granted summary decision in favor of the respondent.

Upon a comprehensive review of this matter, the Commissioner concurs with the ALJ – for the reasons outlined in the Initial Decision – that the respondent's certificates should not be suspended under *N.J.S.A.* 18A:26-10 because she is not guilty of unprofessional conduct. Pursuant to *N.J.S.A.* 18A:26-10:

> Any teaching staff member employed by a board of education ... who shall, without the consent of the board ... cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

It is clear from the record in this matter that the respondent and the Board did not enter into an employment contract for the 2016-17 school year; therefore, there was no term of employment that triggered the requirements in *N.J.S.A.* 18A:26-10.[1]

The Commissioner is not persuaded by the Board's sole argument advanced in its exceptions: that there was a genuine issue of material fact that precludes the disposition of this matter on summary decision. Despite the Board's assertion to the contrary, the use of the word "resign" in the respondent's August 2016 letter to the Board, and the respondent's intended meaning, does not amount to a material fact in dispute.[2] The respondent's August 2016 letter and the intent behind the wording is irrelevant because the Board never offered the respondent an employment contract for the 2016-17 school year, and the respondent never accepted an employment contract. In the absence of any genuine issue of material fact in dispute, this matter was appropriately decided on summary decision. *Robin Brill v. Guardian Life Insurance Company of America, et al.* 142 *N.J.* 520, 523 (1995).

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/23/17
Date of Mailing: 2/23/17

[1] It is undisputed that the respondent did not have tenure in the district. Therefore, *N.J.S.A.* 18A:28-8 is not applicable to the circumstances in this case.

[2] The events that transpired between May 2016 – when the Board informed the respondent that her employment would not be renewed – and August 2016 are summarized in the Initial Decision.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 17209-16
AGENCY DKT. NO. 285-11/16

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF ESTHER CANELA, SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

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Yadira Cristal Duran, Esq., for petitioner Irvington Board of Education (Hunt, Hamlin & Ridley, attorney)

William Hannan, Esq., for respondent, Esther Canela (Oxfeld Cohen, attorney)

Record Closed: January 11, 2017 Decided: January 12, 2017

BEFORE: **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The School District of the Township of Irvington (Board or petitioner) seeks to suspend Esther Canela's (respondent or Canela) teaching certificate for one year for failure to provide sixty days' notice at the time of her resignation. The Board filed an Order to Show cause with the New Jersey Department of Education on September 23,

2016. The Order to Show Cause was served upon respondent on October 12, 2016. Canela filed a motion for summary decision on November 10, 2016. The matter was filed with the Office of Administrative Law (OAL) as a contested matter on November 14, 2016. A pre hearing conference was held on December 7, 2016 during which time a hearing date was scheduled. The Board filed opposition to respondent's motion for summary decision on January 4, 2017. Canela filed a response to the opposition on January 11, 2017.

FACTUAL DISCUSSION

Based on the documentary evidence submitted, I **FIND** the following **FACTS**:

Canela was employed by the Board as an untenured World Languages-Spanish teacher at Irvington High School for the 2015-2016 school year. On May 11, 2016, Canela received a letter from the Board informing her that her employment as a non-tenured member of the teaching staff would not be renewed for reasons of economy. Subsequent to receiving this letter Canela began looking for employment in other school districts. On or about June 20, 2016, Canela received a letter from the Board stating that the non-renewal of was rescinded. Canela signed an acknowledgement of receipt of the letter stating that the non-renewal was rescinded on June 22, 2016. The letter rescinding the non-renewal states:

> Please be advised that your non-renewal as a non-tenured or non-bargaining staff member in the Irvington Public Schools effective for the 2016-2017 school year has been rescinded as of the date of this letter.
>
> If you have any questions please call the Department of Resources at 973.399.6800 x2100

The above letter did not contain any terms of employment for the 2016-2017 school year. The acknowledgement signed by Canela states:

> I Esther Canela am in receipt of a confidential letter from the Human Resources Department. It is dated June 22, 2016.

Canela never received an employment contract from the Board subsequent to receiving the non-renewal letter of May 2016.

In August of 2016, respondent received an offer of employment in a staff position from another school district. In mid-August Canela contacted the Board's supervisor of World Languages, Dr. Pedro Ruiz to inform him that she had accepted a position at another school. On August 17, 2016, Canela advised the Board that she was resigning from her position as a World Language-Spanish teacher. This letter was sent three weeks before the opening of the school year.

LEGAL ANALYSIS AND DISCUSSION

Canela seeks to summarily dismiss petitioner's claim. The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of Rule 4:46-2 and the New Jersey Supreme Court's decision in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

In this matter there are no questions of fact. The legal question is whether Canela's signing the acknowledgment of rescinding the non-renewal of employment

and her use of the word resign in her letter of August 17, 2016 constitute that she had an employment contract with the Board. In its petition the Board states that petitioner violated N.J.S.A. 18A:28-8 which provides:

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

The Board's first paragraph of its petition states that Canela is "A non-tenured World Language-Spanish teacher employed at Irvington High School." I **CONCLUDE** that Canela did not violate N.J.S.A. 18A:28-8 because she was not under tenure of service.

The Board did not provide any other basis in its petition as to why Canela's teaching certificate should be suspended for one year other than violation of N.J.S.A. 18:28-8. I will address the regulation regarding non tenured teachers ceasing employment since it was briefed by both parties. N.J.S.A 18A:26-10 provides:

> Any teaching staff member employed by a board of education or an approved private school for the disabled, who shall, without the consent of the board or, in the case of an approved private school for the disabled, the board of directors of the school, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.
>
> As used in this section, "approved private school for the disabled" means a private entity approved by the Department of Education to provide special education and related services to students with disabilities who have been placed by the district board of education or charter school responsible for providing their education.

The issue in this matter is whether Canela ceased to perform his duties before the expiration of the term of her employment. This turns on when was the expiration of Canela's term of employment. The Board argues that Canela signing an acknowledgement that she received the letter rescinding the non-renewal that she

accepted a renewal of the position. The Board relies on In the Matter of the Teaching Certificates of Robert Galgano EDU 03805-10 Final Decision (March 21, 2011) <http://lawlibrary.rutgers.edu/oal/search. In that case Galgano was sent letter with an offer of employment which included the position and salary. Galgano signed the letter and checked the accepted box. He commenced teaching and taught for two months then tendered his resignation. The Galgano case is clearly distinguishable from this matter. Canela signed an acknowledgement that she received a letter rescinding the non-renewal of June 20, 2016. The letter did not include any terms of employment. It did not list her position for the 2016-2017 school year or her salary for the 2016-2017 school year. In addition signing a document stating that you acknowledge receipt of a letter is not accepting terms of employment.

In the Matter of Teaching Certificates of Suzanne Cerreno, Bergen County Vocational School District, Bergen County EDU-12508-10 Final Decision (June 14, 2012) <http://lawlibrary.rutgers.edu/oal/search. html Cerreno was an untenured math teacher for the 2009-2010 school year. She was not offered a contract for the 2010-2011 school year until August 2010. At the end of August 2010 Cerreno advised the Board that she would not be returning. The Commissioner stated:

> In other words, a non-tenured employee may regard the absence of either a contract renewal letter or a nonrenewal letter as tantamount to an "offer" of employment. However, there is nothing in N.J.S.A. 18A:27-11 that requires the non-tenured teacher to accept the offer.

In this matter even if the letter rescinding the non-renewal of her employment is considered an offer of employment, Canela signing an acknowledgement that she received the letter is not acceptance of the offer, it is acknowledgement that she received the letter.

The Board also alleges that since Canela used the word resign in her letter of August 17, 2016 that there had been an implied contract and that she cease to perform her duties before the expiration of the term of her employment. The Board's reliance on the word resign is misplaced. In her certification Canela stated that the letter was a courtesy and she never received an offer of employment for the 2016-2017 school year.

The use of the word resign does not change Canela's acknowledgement of receipt of the rescinding of the non-renewal letter to an acceptance of an offer of employment. Other than sending the letter rescinding the non-renewal on June 20, 2016, the Board did not contact Canela. There was no basis for the Board to assume that Canela would return to teach in the 2016-2017 school year. Canela never indicated to the Board that she would return to teach for the 2016-2017 school year.

CONCLUSION AND ORDER

I **CONCLUDE** that even though it was not the basis of the petition of the Board to rescind respondent's teaching certificate for one year, that Canela did not violate N.J.S.A 18A:26-10 because the expiration of her employment was the end of the 2015-2016 school year.

Accordingly, based upon Canela's moving papers, supporting exhibits and certification, I hereby **GRANT** the motion for Summary Decision. I therefore, **ORDER** the action filed by the Board be **DISMISSED**.

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

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

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

1-12-17
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: January 12, 2017

Date Mailed to Parties: January 13, 2017
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DOCUMENTS RELIED ON

Petitioner and Respondent's, motion, briefs and exhibits.

6417

COMMISSIONER OF EDUCATION, State of New Jersey

IN THE MATTER OF	:	
	:	Docket No. AR-2016-644
Pleasantville Board of Education	:	
Adv.		
	:	**AWARD and OPINION**
Frank Vergara, Tenured Teacher	:	

Appearances by:
Benjamin B. Brenner, Esquire [for the Board]
Jason E. Sokolowski, Esquire [for the Teacher]

Before Jay D. Goldstein, Impartial Arbitrator

FINDINGS and OPINION

Background;

On November 23, 2016, M. Kathleen Duncan, Director of the New Jersey Department of Education Bureau of Controversies and Disputes appointed this Arbitrator to hear and decide the above tenure matter. In accordance with the Arbitrator's authority under P.L. 2015, c. 109, several preliminary matters were addressed.

The underlying record reveals a Pre-Hearing Motion for Dismissal and a Reply that were ripe for consideration, and hence decided.

Thereafter, Discovery challenges and a Motion for Hearing Venue change were addressed, and decided. The above matters all contributed to a delay in scheduling hearings, thus preliminary timelines were met by the occurrence of a Pre-Hearing Conference held on January 31, 2017 at the Board of Education offices.

After multiple attempts, a three (3) day set of Hearings was finally agreed upon. Also, despite a Motion granted for a neutral location, the parties agreed to all hearings being held at the offices of the Board's counsel, Carroll Law Firm, 1 N. New York Road, Galloway, New Jersey.

Hearing:

On February 14, 2017 the Arbitrator began the first hearing, transcribed electronically. Prior to the start of hearing, the following exhibits submitted by each party were reviewed:

By the Petitioner;

EXHIBIT A –	TENURE CHARGES, STATEMENT OF DETERMINATION, STATEMENT OF EVIDENCE
EXHIBIT B -	PBOE POLICY #5200
EXHIBIT C -	45 PAGES OF STUDENTS' ATTENDENCE RECORDS/GENERATED BY AUDIT OF ONCOURSE
EXHIBIT D -	JOB DESCRIPTIONS: SOCIAL WORKER AND DROP OUT PREVENTION CASE MANAGER
EXHIBIT E -	BONEK'S WRITTEN STATEMENT
EXHIBIT F -	COPY OF BONEK'S NOTES FROM 1/4/16 MEETING
EXHIBIT G -	COPY OF BONEK'S NOTES FROM 1/12/16 MEETING
EXHIBIT H -	COPY OF THE SIGN IN SHEET FROM THE 2/1/16 MEETING
EXHIBIT I -	LIST OF STUDENTS – FIRST SEMESTER WITH UNEXCUSED ABSENCES
EXHIBIT J -	DALE SHERIDAN'S WRITTEN STATEMENT
EXHIBIT K -	RELEVANT PAGES FROM VERGARA'S PERSONNEL FILE
EXHIBIT L -	DOCUMENTS RETRIEVED FROM VERGARA'S OFFICE DURING DISCOVERY
EXHIBIT M-	VERGARA'S POSITION STATEMENT
EXHIBIT N -	VERGARA'S ANSWER TO TENURE CHARGES
EXHIBIT O -	VERGARA'S WRITTEN STATEMENT TO THE PBOE

By the Respondent;

EXHIBIT 1 -	SBOE STANARD CERTIFICATE, 6/12
EXHIBIT 2 -	EMPLOYMENT LETTERS FROM DISTRICT '06-13
EXHIBIT 3 -	EMPLOYMENT LETTER 2/2/16-8/30/16
EXHIBIT 4 -	1/23/15 LETTER FROM DELCHER TO VERGARA
EXHIBIT 5 -	OBSERVATION AND PERFORMANCE REVIEWS
EXHIBIT 6 -	JOB DESCRIPTIONS
EXHIBIT 7 -	JANUARY 2016 EMAILS
EXHIBIT 8 -	DROP OUT PREVENTION CREDIT COMPETITION 2015-16
EXHIBIT 9 -	STUDENT LIST OF ATTENDANCE BY TIERS
EXHIBIT 10-	TRANSLATIONS LOG 2015-16
EXHIBIT 11 -	DROP OUT PREVENTION DAILY SCHEDULE 2015-16
EXHIBIT 12 -	ATTENDANCE PROCEDURES – EMAIL DATED 1/15/16
EXHIBIT 13 -	JANUARY, 2016 ATTENDANCE PROCEDURE
EXHIBIT 14 -	IDENTIFYING STUDENTS AT RISK
EXHIBIT 15 -	SLC COMMITTEE MEETING
EXHIBIT 16-	DROP OUT PREVENTION ACTION PLAN
EXHIBIT 17 -	DROP OUT PREVENTION AT RISK SERVICES 2014-15
EXHIBIT 18-	DOCUMENTS FROM VERGARA OFFICE

Settlement Reached:

During the February 14, 2017 hearing the parties conferred repeatedly and negotiated a successful and amicable resolution of the charges pending, found to be in the mutual best interest of ongoing and harmonious relationships in that environment. They jointly reached a proposed settlement of their differences and entered into a compromise drafted between them. It ["Mutual Release and Settlement Agreement"] encompasses all outstanding issues of this matter, pending Board approval and approval of the State Fiscal Monitor. In essence, it confirms that:

1. Vergara agrees he shall immediately tender his written, voluntary and irrevocable resignation from employment with the PBOE, to be effective at the close of business on June 30, 2017. The PBOE agrees it shall accept Vergara's resignation and further, will withdraw the tenure charges immediately upon receipt of the 'resignation' and issuance of this Stipulated Consent Award.

2. Pursuant to these mutual covenants and effective Monday, February 13, 2017, Vergara shall be reinstated on the PBOE payroll and from said date forward will be paid his current salary, including all benefits, until June 30, 2017. This amount equals bi-weekly checks of $2,681.62, which includes all pension and health benefits paid as before. The only exception is that payments from the PBOE will cease if, when and during any period of time Vergara obtains and retains full time employment during the period, February 13, 2017 and June 30, 2017.

3. Subsequent to June 30, 2017; the PBOE agrees to maintain Vergara's current level of health insurance benefits until July 30, 2017, provided that Vergara has not declined and thus agrees to pay his share of health insurance premiums in the amount previously and regularly deducted from his bi-weekly salary. Further, Vergara has the right to elect continuation of health insurance coverage, at his own expense, under any Federal /state statute in existence at that time.

4. In exchange for the above covenants, the parties have executed the "Mutual Release and Settlement Agreement" which operates to release and forever discharge each other from any and all claims, consistent with Paragraph 4, therein.

5. The terms of the "Mutual Release and Settlement Agreement" and the nature of any and all claims previously made, shall remain confidential.

Additional Findings:

The parties did execute the, "Mutual Release and Settlement Agreement" incorporating the terms outlined above. That 'Agreement' document will be considered an ADDENDUM, hereto.

Further at the parties' request, this Arbitrator has reviewed all exhibits and heard from each of the parties' attorneys and the Tenured Teacher regarding the matter. The Arbitrator considered whether their proposed settlement represents an appropriate resolution of the issues, taking into account the relevant law and the best interests of the parties. On the basis of that review the Arbitrator finds the parties' proposed settlement of their differences to be an appropriate compromise of their respective positions.

Additionally, the Arbitrator finds that the settlement reached is acceptable pursuant to the requirements of N.J.S.A. 6A:3-5.6 and satisfies the standards set forth therein including:

1. Accompaniment by documentation as to the nature of the charges;
2. Explication of the circumstances justifying settlement and/or withdrawal of charges;
3. Consent of both the charged and charging parties;
4. Indication the charged party entered into the agreement with a full understanding of his or her rights;
5. A showing the settlement agreement is in the public interest; and
6. If the charged party is a teaching staff member, a showing the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

The Arbitrator further finds that pursuant to the statute, the settlement agreement does not propose terms that would restrict access to information or records deemed public by law or result in misrepresentation of the reason for an employee's separation from service.

By reason of the foregoing, the following decision is issued:

DECISION

Subject to Board approval and the approval of the State Fiscal Monitor, the following shall be placed in effect and serve as the Award in this matter:

1. Vergara shall immediately tender his written, voluntary and irrevocable resignation from employment to be effective at the close of business on June 30, 2017. The PBOE shall accept Vergara's resignation and further, will withdraw the tenure charges immediately upon receipt of the 'resignation' and issuance of this Stipulated Consent Award.

2. Effective Monday, February 13, 2017, Vergara shall be reinstated on the PBOE payroll and from said date forward he will be paid his current salary, including all benefits, until June 30, 2017. This amount equals bi-weekly checks of $2,681.62, which includes all pension and health benefits paid as before. The only exception is that payments from the PBOE will cease if, when and during any period of time Vergara obtains and retains full time employment during the period, February 13, 2017 and June 30, 2017.

3. Subsequent to June 30, 2017; the PBOE agrees to maintain Vergara's current level of health insurance benefits until July 30, 2017; provided that Vergara has not declined and thus agrees to pay his share of health insurance premiums in the amount previously and regularly deducted from his bi-weekly salary. Further, Vergara has the right to elect continuation of health insurance coverage, at his own expense, under any Federal /state statute in existence at that time.

4. In exchange for the above covenants, the parties have executed a "Mutual Release and Settlement Agreement" [an ADDENDUM hereto] which operates to release and forever discharge each other from any and all claims, consistent with Paragraph 4., therein.

5. The terms of the "Mutual Release and Settlement Agreement" and the nature of any and all claims previously made, shall remain confidential.

Dated: 22 February, 2017

Jay D. Goldstein,
Jay David Goldstein, Impartial Arbitrator

MUTUAL RELEASE AND SETTLEMENT AGREEMENT

This Mutual Release and settlement agreement is made on this 14th day of February in the year 2017. The Release is given by PLEASANTVILLE BOARD OF EDUCATION, 801 Mill Road, City of Pleasantville, Atlantic County, New Jersey 08232, (hereinafter "PBOE") and FRANK VERGARA, employee of the City of Pleasantville School District, and his counsel, Jason Sokolowski, Esq., 150 West State St., Trenton, NJ 08608 (hereinafter collectively referred to as "Parties")

WHEREAS, Vergara is currently employed by the PBOE; and

WHEREAS, certain disputes have arrived between Vergara and the PBOE; and

WHEREAS, the parties believe it is in their mutual best interest to resolve their differenced in accordance with the terms and conditions of this Agreement, and

NOW, THEREFORE, in consideration of the covenants, representations and warranties contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. VERGARA RESIGNATION – Vergara shall immediately tender his written, voluntary and irrevocable resignation from employment attached hereto as Exhibit A, to be effective at the close of business on June 30, 2017, contingent upon withdrawal of the tenure charges pending against Vergara filed by the PBOE, and approval of this Agreement by the Arbitrator assigned to arbitrate the tenure charges and the Commissioner of Education to the extent required by law, and contingent upon the PBOE complying with all of the terms of this Agreement. The PBOE shall accept Vergara's resignation. Vergara agrees and acknowledges that his voluntary resignation was not the result of any fraud, force, coercion or duress. Vergara further acknowledges and agrees that he freely and knowingly resigned from the PBOE and that he consulted with legal counsel of his choosing prior to tendering his resignation. Vergara further acknowledges that all compensation from the PBOE shall terminate should he accept any full time employment at any time between February 13, 2017 and June 30, 2017.

2. COMPENSATION – Effective Monday, February 13, 2017, Vergara shall be reinstated on the PBOE payroll and from said date forward, he will be paid his current salary, including all benefits, until June 30, 2017. This amount equals bi-weekly checks in the amount of $2,681.62 and all pension and health benefits. Vergara acknowledges and agrees that he shall not be paid for any accrued sick, personal or vacation days. Vergara waives any and all rights he may have to any other compensation pursuant to any

employment contract, policy, regulations, administrative compensation plan, or any other agreement with the exception of providing Vergara his current level of health insurance benefits per the employment contract applicable to Vergara thirty (30) days after his resignation."

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3. HEALTH INSURANCE – The PBOE agrees to maintain Vergara's current level of health insurance benefits until July 30, 2017, provided that Vergara pays his share of health insurance premiums in the amount that has been previously and regularly deducted from his bi-weekly salary. Health insurance is understood to include prescription, dental and vision coverage. Thereafter, Vergara may elect to continue his health insurance at his sole cost and expense consistent with the terms and conditions, limitation, and exclusions of COBRA and on the condition that he make timely payments in accordance with applicable law.

4. WAIVER OF CLAIMS – In exchange for the covenants contained in this Agreement, Vergara does for himself and his dependents, heirs, executives, administrators, predecessors, successors, and assignees, agree, intending to be legally bound, to hereby release and forever discharge the "Released Parties" (as defined *infra*) from and all "Released Claims" as defined *infra*) from the beginning of time up to and including the effective date of this Agreement. The PBOE for itself, officers, agents, executives, administrators, board members, successors, and assignees, agree, intending to be legally bound, to hereby release and forever discharge the "Release Parties" (as defined *infra*) from and all "Released Claims" as defined *infra*) from the beginning of time up to and including the effective date of this Agreement.

a. "Released Parties" as used in this Agreement shall mean (1) the PBOE, (2) the Pleasantville School District, (3) the PBOE's past, current and future employees, (4) the PBOE's officers, directors, agents, attorneys, consultants, affiliates, and other representatives, (5) the PBOE's insurers, (6) the PBOE's vendors and entities under contract with the PBOE, (7) he PBOE's heirs, successors and assignees, (8) all of the aforementioned individuals in both their official and individual capacities, (9) the State of New Jersey and the New Jersey Department of Education, (10) any other person and/or entity whom/which might be claimed jointly and/or severally liable with any of the aforementioned entities and/or individuals, (11) Vergara and/or his dependents, heirs, executives, administrators, predecessors, successors, and assignees in their official and individual capacities.

b. "Released Claims" as used in this Agremeent shall mean any and all liability, claims, demands, causes of action, suits at law, or in equity, covenants, charges, debts, dues, costs, any sums of money, attorney's fees, accounts, bills, reckonings, extents, judgments, and rights, whether known or unknown, whether accrued or unaccrued, whether contingent or non-contingent, whether or not capable of proof regardless of the theory of recovery, and whether common law or statutory in nature that occurred at any time in the past up until the date of signing of this agreement. Expressly excluded from this release are claims for the breach of the Agreement including, but not limited to, the

failure to pay any of the compensation set forth herein, and any claim for defamation, including libel and slander, related to any act or omission in the future. Neither party shall be precluded from cooperating with legal authorities in any criminal or quasi-criminal law enforcement action. "Released claims" shall also include the following:

i. All claims relating to and/or arising from Vergara's employment with the PBOE.

ii. All claims of discrimination and/or harassment based on any one or combination of the following: sex, race, religion, color, creed, ancestry, national origin, disability, citizenship, age, marital status, military status, gender, sexual or affectional orientation, pregnancy and any other protected class recognized by local, state and/or federal law.

iii. All claims pursuant to Title VII of the Civil Rights Act of 1964, the New Jersey Law Against Discrimination, the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, the National Labor Relations Act, the Employer-Employee Relations Act, the Equal Pay Act, the Americans with Disabilities Act, the Occupational Safety and Health Act, the New Jersey Worker Health and Safety Law, the Fair Labor Standards act, the Immigration Reform Control Act, the Family Medical Leave Act, the New Jersey Family Medical Leave Act, the New Jersey Wage and Hour Law, the New Jersey Conscientious Employee Act, the New Jersey Workers' Compensation Law, ERISA, HIPAA, Title IX of the Education Amendments of 1972, the Rehabilitation Act, Sections 1981 through 1988 of the Title 42 of the US Code, any anti-retaliation provision of any of the foregoing laws, and any other similar local, state and/or federal laws.

iv. All claims for any alleged unpaid and/or withheld wages, severance, bonuses and/or other compensation of any kind;

v. All claims for wrongful discharge and/or breach of any alleged employment contract, whether express or implied;

vi. All claims for alleged breach of any contract whatsoever, whether express or implied;

vii. All claims based on any alleged wrongful act, including but not limited to invasion of privacy, defamation, fraud, infliction of emotional distress that occurred in the past up to the date of execution of this Agreement.

viii. All claims for any compensation and/or punitive damages for any incident, act or omission that occurred in the past up to the date of execution of this Agreement.

ix. All claims for attorney's fees, costs, disbursements, and the like for any incident, act or omission that occurred in the past up to the date of execution of this Agreement.

c. Vergara and the PBOE acknowledge and agree that neither party nor any person or entity action on behalf of either party will file any type of complaint, charge, claim, and/or cause of action, or cause or permit any complaint, charge, claim, and/or cause of action, to be filed, against the other or any Released Party involving any matter whatsoever which occurred in the past up to the date of execution of this Agreement, or involving any continuing effects or any acts or practices which may have arisen or occurred prior to the effective date of this Agreement. It is understood that if a class action if filed, that the mere filing of said action does not place Vergara in breach of this Agreement, provided that Vergara takes reasonable steps with all due speed to remove himself from the class.

d. The parties acknowledge and agree that if either party brings any type of complaint, charge, claim and/or cause of action in any administrative and/or judicial forum against the other, that party will be in breach of this Agreement and will immediately withdrawal any type of complaint, charge, claim and/or cause of action."

e. To the extent that either party has already filed any complaint, charge, claim and/or cause of action in any administrative and/or judicial forum, that party shall immediately notify the other party, in writing, of the nature of the complaint, charge, claim and/or cause of action in any administrative and/or judicial forum and shall provide all copies of the same to the other party. Further, the filing party agrees to immediately withdraw complaint, charge, claim and/or cause of action in any administrative and/or judicial forum documenting the same. To the extent that any administrative and/or judicial agency fails or refuses to permit the filing party to withdraw a complaint, charge, claim and/or cause of action in any administrative and/or judicial forum, the filing party shall advise the other party in writing and the filing party shall refuse to cooperate with any investigation and/or proceeding regarding the complaint, charge, claim and/or cause of action in any administrative and/or judicial forum if the law permits. Should the filing party receive any damages or compensation whatsoever as a result of having brought a complaint, charge, claim and/or cause of action in any administrative and/or judicial forum, he filing party shall immediately remit said damages or compensation to the other party.

f. Nothing in this Agreement shall preclude Vergara from cooperating in any investigation being conducted by the Equal Employment Opportunity Commission or a state or local fair employment practices agency, or in any criminal, quasi-criminal or law enforcement investigation.

g. Excluded from "Release Claims" are any claims that cannot be waived by law between employer and employee.

5. RETURN OF SCHOOL PROPERTY – Vergara warrants and agrees that he shall, at a mutually agreed upon time, return all PBOE property in his possession and/or

control, including but not limited to: keys, cell phones/smart phones, identification cards, computers, documents, electronically stored documents (including documents stored on personal computers and devices), external memory drives, electronic devices, and all similar property.

6. FUTURE EMPLOYMENT – Vergara agrees that he shall not apply or be eligible for employment with the PBOE in any capacity.

7. NEUTRAL REFERENCES – The PBOE agrees that if contacted by any third party for a reference, the PBOE shall only provide Vergara's dates of employment, positions held, and salary information. Any failure by the PBOE to comply with the terms of this paragraph shall give rise to an action to enforce this paragraph. Vergara shall refer all third parties seeking reference checks to the PBOE's Department of Human Resources.

8. NON-DISPARAGEMENT OF PARTIES – Vergara shall not disparage or defame the PBOE of any of its board, officers, directors, employees, officials or attorneys and/or other representatives. Further, Vergara shall not make any comments regarding the PBOE or any of it board, officers, directors, employees, officials or attorneys and/or other representatives that may be construed as critical and/or derogatory. In any public statements regarding Vergara's separation from the District the PBOE shall characterize such separation as a "resignation." The PBOE, Superintendent, Business Administrator/Board Secretary and head of Human Resources shall not make any official statements or authorize anyone to make any official statements that disparage or defame Vergara or make any official statement to anyone that may be construed as critical and/or defamatory.

9. NON-DISCLOSURE. The Parties agree that the terms of this Agreement, and the fact of this settlement, are confidential. In consideration of the promises set forth herein, the Parties and their attorneys agree not to reveal, disclose, or communicate (a) the terms of this Agreement, (b) the consideration paid hereunder, and (c) the nature of any claims, whether actual or contingent, that are resolved by this Agreement. In response to any inquiries regarding the status or resolution of the instant matter, the Parties will respond only as follows: "The matter has been resolved." The Parties further represent they that have not, as of the date of this Agreement, disclosed the terms and/or existence of this Agreement, or any information about the negotiations surrounding this Agreement or the settlement of the action, except as would have been authorized by this Agreement. Notwithstanding the foregoing provisions of this paragraph, the Parties are permitted to disclose the facts and terms of this Agreement: (i) to their attorneys, accountants, insurers, reinsurers, Union Representatives or auditors on a need to know basis; (ii) in response to a properly issued subpoena or court order; (iii) as otherwise required by law; or (v) in connection with a dispute arising out of this Agreement. The Parties agree to inform any such third parties that this confidentiality clause is in effect and, that such third parties are also bound by its terms.

10. OPEN RECORDS – Vergara acknowledges that this Agreement may be subject

to disclosure pursuant to New Jersey Open Public Records Act ("OPRA") and that the PBOE has no legal authority to negotiate or bargain away any of the statutory requirements of the OPRA.

11. COOPERATION IN LITIGATION – Vergara agrees to fully cooperate with the PBOE in its defense or other participation in any administrative, judicial or other proceeding arising from and/or related to any complaint, charge, claim and/or cause of action which has or may be filed.

12. EXIT INTERVIEWS – From the effective date of this Agreement until the effective date of his irrevocable resignation, Vergara agrees to attend any and all meetings that he is directed to attend by the PBOE and/or Business Administrator/Board Secretary provided that he is given at least 48 hours' notice and that the meeting are scheduled at a mutually convenient time. Further, Vergara agrees to fully, completely and truthfully answer any and all questions asked of him by any of the PBOE's representatives.

13. CONSULTATION WITH LEGAL COUNSEL – Both parties acknowledge and agree that they had the opportunity to review this Agremeent with legal counsel of their own choosing and that each party is satisfied with the advice they received.

14. BREACH – If either party fails and/or refuses to comply with any obligation he/it has pursuant to this Agreement, regardless of the reason for said failure and/or refusal to comply, that party shall be in breach of this Agreement and the other party may seek any remedy they are entitled to by law.

15. KNOWING AND VOLUNTARY – Vergara acknowledges and agrees that he is freely and voluntarily agreed to all of the terms and conditions contained in this Agreement after consulting with legal counsel. Vergara further acknowledges and reperesents that he is under no disability or impairment that would prevent him from understanding this Agreement or from knowingly and voluntarily entering into this Agreement.

16. EFFECTIVE DATE – This Agreement shall become effective upon both of when the Agreement has been fully executed by both Vergara and the PBOE and/or the PBOE's representative.

17. NO ADMISSIONS – The parties acknowledge that this Agreement represents a compromise to resolve a dispute. None of the terms of this Agreement shall be construed to be an admission of any wrongdoing by either party, nor shall it be construed to be a validation or invalidation of the allegations.

18. ENTIRE AGREEMENT. This Agreement contains and constitutes the entire understanding and agreement between the Parties hereto respecting the subject matter hereof and supersedes and cancels all previous negotiations, representations, agreements, commitments, and writings in connection herewith. The Parties hereto expressly

acknowledge that in entering this Agreement, they have had the opportunity to consult with counsel of their choice, that they have not relied upon any representation made by or on behalf of the other Party, and that any such representations are not enforceable except to the extent set forth in writing in this Agreement.

19. CONSTRUCTION. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New Jersey, without reference to the applicable conflicts of law principles and rules. This Agreement shall be construed according to its plain language, and not strictly for or against any party hereto.

20. ENFORCEMENT. In the event of any litigation arising from breach of this agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs incurred including staff time, court costs, attorneys' fees, and all other related expenses incurred in such litigation.

21. NO TRANSFER/ASSIGNMENT. The Parties represent that they have not assigned or transferred, or purported to assign or transfer, to any person or entity any claim against one another or any portion of, or interest in, any claim against one another.

22. NO ORAL REPRESENTATIONS. The Parties represent and acknowledge that, in executing this Agreement, they do not rely, and have not relied, upon any oral representation or statement made by the Parties or their agents, representatives, or attorneys with regard to the subject matter, basis, or effect of this Agreement or otherwise.

23. SEVERABILITY. Should any provision of this Agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms, or provisions shall not be affected thereby, and said illegal or invalid part, term, or provision shall be deemed not to be part of this Agreement.

24. AGREEMENT NOT EVIDENTIARY – This Agreement is not intended to be used and shall not be used as evidence in any action or proceeding, other than as evidence of the parties' compromise as set forth herein or to enforce the terms of this Agreement.

25. HEADINGS – Any headings contained herein are for reference purposes only and shall not be in any way affect the meaning or interpretation of this Agreement.

IN WITNESS WHEREOF, all Parties, intending to be legally bound by the foregoing terms, have voluntarily and knowingly set their hands and seals to this Agreement as of the date written above.

PLEASANTVILLE BOARD OF EDUCATION:

Elisha Thompkins, in his capacity as Board Secretary, and on behalf of the PBOE

Date: 1/14/17

Frank Vergara

Date: 2-14-17

Jason Sokolowki, Esq.
Attorney for Frank Vergara

Date: 2/14/17

EXHIBIT A

I, Frank Vergara, hereby submit my voluntary and irrevocable resignation from employment with the Pleasantville Board of Education effective at the close of business on June 30, 2017, in accordance with the terms and conditions of the Settlement and Release Agreement to which this resignation is appended. It is expressly understood tha the School Board's acceptance of my resignation shall constitute the School Board's agreement to all of the terms and conditions in the Settlement and Release Agremeent and shall authorize the appropriate officials to execute the same contingent upon withdrawal of the tenure charges pending against Vergara filed by the PBOE, and approval of this Agreement by the Arbitrator assigned to arbitrate the tenure charges and the Commissioner of Education to the extent required by law, and contingent upon the PBOE complying with all of the terms of this Agreement

.

Date: 2-14-17

Frank Vergara

Witness: Jason Sokolowski

PRINTED NAME

Signature:

L.S., on behalf of minor child, J.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

In April 2016, petitioner filed an appeal seeking to reduce his daughter's four-day out-of-school suspension, imposed by the respondent Board on J.S. for violating the school district's written policy against cheating. School officials alleged that J.S. was among a group of students in an Honors Trigonometry class who took and worked on a test without the teacher present and without her authorization. While admitting that J.S. cheated, petitioner contended that the penalty was excessive and unwarranted. The Board maintained that the penalty was appropriate and that the Commissioner cannot set aside the determination of a local board unless a finding is made that the action was arbitrary, capricious or unreasonable.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:37-2, local boards of education have the authority to impose discipline upon students, including "suspension or expulsion from school"; it is well established that the Commissioner will not substitute her judgment for that of the local board unless it can be shown that the board's decision was arbitrary, capricious or unreasonable; petitioner bears the burden of proof to show that the board acted in bad faith, or in disregard to the circumstances of the case; J.S. admitted verbally and in writing that she cheated on the test; there is no evidence of any coercion of J.S.'s admission; every witness presented was credible and their testimony corroborated that of other witnesses; and petitioner failed to present any evidence to dispute the above findings. The ALJ concluded that the petitioner failed to show that the Board's finding that J.S. cheated was arbitrary, capricious or unreasonable; further, the four-day out of school suspension was a reasonable penalty for petitioner's actions. Accordingly, the ALJ affirmed the Board's penalty imposition, and denied the relief requested by the petitioner.

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

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

Issued 3/02/17

OAL DKT. NO. EDU 6869-16
AGENCY DKT. NO. 124-4/16

L.S., on behalf of minor child, J.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,[1]	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner filed exceptions on February 17, 2017.[2]

Upon such review, the Commissioner adopts the Administrative Law Judge's recommended decision for the reasons expressed therein. Accordingly, the petition is dismissed with prejudice.

IT IS SO ORDERED.[3] Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/02/17

Date of Mailing: 3/02/17

[1] Teresa Rafferty, Jason Lester, and Antione Gayles, were named respondents and were parties to this matter pursuant to petitioner's initial filing. However, on August 11, 2016, the Administrative Law Judge issued an order dismissing the case against the aforementioned respondents; that order is likewise hereby adopted.

[2] Petitioner's exceptions were not timely filed in accordance with *N.J.A.C.* 1:1-18.4. Accordingly, the exceptions were not considered by the Commissioner.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6869-16
AGENCY DKT. NO. 124-4/16

L.S. ON BEHALF OF MINOR CHILD, J.S.,

Petitioner,

v.

TOWNSHIP OF PISCATAWAY BOARD OF EDUCATION, MIDDLESEX COUNTY, AND TERESA RAFFERTY, JASON LESTER, AND ANTOINE GAYLES, TEACHERS,

Respondents.

L.S., petitioner pro se

David B. Rubin, Esq., for respondents (Law Office of David B. Rubin, attorney)

Record Closed: November 30, 2016 Decided: January 17, 2017

BEFORE **DANIELLE PASQUALE**, ALJ:

STATEMENT OF THE CASE

This is an appeal by petitioner, L.S., on behalf of his sixteen-year-old daughter J.S., seeking to reduce as excessive a four-day out-of-school suspension imposed by respondent Board of Education of the Township of Piscataway ("Board") on J.S. for a

violation of its written policy against "cheating." School officials allege that, while in Honors Trigonometry class, J.S. took and worked on a test without the teacher present and without her authorization, changed answers, and worked with other members of the class to change answers on a test previously proctored by the teacher. To be clear, the math teacher proctored the initial part of the test and then allowed additional time at a later date to complete the test.

While admitting that she cheated, the petitioner contends that the penalty is unwarranted. The Board maintains that the penalty was appropriate and that the Commissioner of Education cannot set aside its determination unless a finding is made that the action was arbitrary, capricious, or unreasonable.

PROCEDURAL HISTORY

By notice dated January 22, 2016, the Piscataway High School dean of students for the eleventh grade, Herbert Jermaine Robinson, as per vice principal Dr. Antoine Gayles, notified J.S.'s father that J.S. would receive a four-day out-of-school suspension for cheating. (R-7.) L.S. sought a review of the decision, and on or about April 4, 2016, the Board denied L.S.'s appeal, upheld the suspension assessed to J.S., and refused expungement of same.

L.S. filed an appeal to the Commissioner on April 25, 2016. Subsequently, the matter was transmitted to the Office of Administrative Law ("OAL"), where on May 5, 2016, it was filed for a hearing as a contested case. On or about July 18, 2016, L.S. filed a "Motion to Dismiss Without Prejudice Case Against Less Than All Parties." Counsel for the Board, David B. Rubin, requested similar relief on his clients' behalf. As such, he drafted a form of Order at my request which this tribunal signed on August 11, 2016, dismissing the case against individual respondents Teresa Rafferty, Jason Lester, and Antoine Gayles, leaving the issue of whether the discipline imposed upon J.S. was appropriate. On September 30, 2016, this tribunal signed a Protective Order protecting any personally identifiable information pertaining to students enrolled in the Piscataway Township School District. The OAL held a hearing on October 18, 2016. Upon receipt of post-hearing briefs, the record closed on November 30, 2016.

FACTUAL DISCUSSION AND FINDINGS

The following facts are uncontroverted, and I **FIND**:

L.S. appealed the matter of J.S.'s discipline through the eleventh-grade dean of students, the assistant principal, the principal, and, finally, the superintendent. Superintendent Teresa Rafferty affirmed principal Jason Lester's decision to deny L.S.'s requested expungement of J.S.'s discipline from her academic record.

L.S. appealed again to the full Board, and a hearing was held on April 14, 2016, before the Piscataway Township Board of Education in closed session. L.S. appeared with attorney Ira Ginsburg, Esq., and Mr. Rubin appeared on behalf of the Board. L.S. put on a lengthy presentation before the Board. His attorney was present, but did not take part in the presentation.

Mr. Rubin informed Mr. Ginsburg by letter dated April 18, 2016, that a hearing was conducted on April 14, 2016, on the appeal of the superintendent's decision to uphold J.S.'s suspension and the Board's refusal to expunge same. Mr. Rubin noted that the Board deliberated on the matter in closed session later that evening and directed him to inform L.S. through counsel that the superintendent's ruling was upheld by the Board "substantially for the reasons expressed in her written decision." (See R-11, citing R-10.)

Testimony at the OAL Hearing

At the OAL hearing, L.S. produced no witnesses to attack the accounts or credibility of any of the witnesses that testified at the OAL hearing, and he did not argue that J.S. did not cheat. Rather, he argued that the charge should have been different and the penalty lessened or expunged. He agreed that the school district should put on its case first, and he would cross-examine its witnesses to help expedite the hearing and streamline the case. L.S. agreed that he would have more latitude with the witnesses to ask questions in a leading manner. He never produced J.S. to refute the

accuracy or voluntary nature of the confession. He never insinuated that J.S.'s confession to cheating was persuaded or refuted same. I **FIND**, as the Board did, that J.S. admitted to cheating and that J.S.'s story is consistent with that of the other students who were implicated and ultimately confessed to cheating in an identical manner to J.S.

In support of that finding, the following witnesses testified.

Carolyn Lee

Carolyn Lee, a math teacher at Piscataway High School, testified that she taught J.S. and others in a rigorous Honors Trigonometry and Analytic Geometry class in period 5. The class was comprised mostly of junior and sophomore honors students, known as the "top kids in the school." Ms. Lee explained that they are competitive with themselves and others. On December 18, 2015, while she was administering a test involving solving trigonometry equations, there was a lock-down drill. The class stopped taking the test, and Ms. Lee explained to the students that in a subsequent class she would give them additional time (approximately ten to fifteen minutes) to go over their answers and complete any portions of the test they did not get to on the day the test was interrupted by the drill. Ms. Lee noted that this period 5 math class was held in a classroom shared by several teachers, as it was wheelchair accessible, and one of her students used a wheelchair. She testified that she had a drawer in a file cabinet in this classroom to store the items she needed to effectively teach the class, and that she housed the unfinished tests in that cabinet after the lock-down drill began.

Ms. Lee continued that after that weekend, and due to a rotating schedule, the next possible school day to complete the test was December 22, 2015. However, on that date Ms. Lee was out of school sick. As a result, a lesson plan was given to the substitute teacher. (Exhibit R-1.) Ms. Lee confirmed that nowhere in that lesson plan for period 5 (or any other period) does it mention that the test that was begun on December 18 should be administered. Rather, the note indicates that the students should work on a "Law of Sines packet." Ms. Lee noted that she had no idea who the substitute teacher would be and never corresponded with anyone, other than leaving a

lesson plan in the normal course. Ms. Lee continued that she was out of work sick on December 23, 2015, as well, which went right into winter break. She testified credibly that during winter break, she had no idea that any alleged cheating incident had occurred in her class.

After the winter break, Ms. Lee met with her period 5 math class on the first possible date, which was Monday, January 4, 2016. Ms. Lee discussed that she wanted to give the students the extra time to complete the test that was begun on December 18. Some of the kids resisted, stating that they were not ready because they forgot about completing the test over the long break. She instructed the students that she would give the remaining time for the test during the "next class," and there were no more discussions regarding the test that day. Specifically, no one mentioned that anyone already finished the exam while she was out sick.

The following day, January 5, 2016, a student from another class came to Ms. Lee to explain that something happened on December 22, 2015, in her class, although that student was not a witness to what occurred. Ms. Lee relayed this information to Mr. Ross, the Math Department chair, on January 6, 2016, and he launched an investigation. He addressed Ms. Lee's period 5 math class on January 6, 2016. Mr. Ross spoke to the students about character and honesty. He said that honesty would mean something in subsequent letters of recommendation. He asked any student with knowledge of the alleged cheating incident to come forward with information to either him or Ms. Lee, and explained that consequences would likely follow.

Ms. Lee testified that thereafter she received an email from student L.T., who apologized about the cheating incident. (R-2.) L.T. revealed that she had been looking for a worksheet and she went into Ms. Lee's designated drawer, at which point she noticed the tests. She admitted to taking the exams without permission, and, fearing a lack of time to complete the tests, handed out the test to the majority of the class, who agreed to work on it separately, and then she and others worked on the test for fifteen minutes.

On January 7, 2016, another student, A.L., emailed Ms. Lee admitting to being involved in the cheating, as well. A.L. acknowledged that she worked on the test inappropriately, and she named several other students involved on her "side of the room." A.L. did not implicate the petitioner, J.S. She noted that she had been afraid to come forward due to pressure from other students that were involved.

On cross-examination, L.S. attempted to elicit an admission from Ms. Lee regarding peer review and peer grading, and whether the incident in question could have been seen as allowed activity. Ms. Lee testified credibly that students would sometimes be asked to exchange tests and grade them to learn from and identify their mistakes. However, that was done under her supervision, with color pencils or highlighters. In addition, Ms. Lee noted that such an exercise had been used only approximately two times prior to the date when the alleged cheating occurred, and certainly was not used on December 22, 2015.

Further, L.S.'s cross-examination of Ms. Lee only strengthened the notion that in no way would Ms. Lee have allowed student access to the tests or anything else in the drawer. She noted that possibly she would allow access if a student forgot a textbook and needed to borrow one, but expressly disallowed anything else. Further, Ms. Lee noted that when Mr. Ross addressed the class he did not promise any favored treatment if the students admitted cheating or implicated anyone else in cheating. Lastly, cross-examination of Ms. Lee established that Mr. Ross memorialized his investigation with what students admitted to him. (See R-5.)

Daniel Ross

Daniel Ross is the chair of the Math Department at Piscataway High School, as he was on the date in question. In January 2016 he became aware of an allegation of cheating in Ms. Lee's period 5 math class that occurred in late December 2015. He was notified by Ms. Lee that a student reached out to her about the alleged incident, at which point he addressed her class in order to launch an investigation into the incident.

He memorialized the chronology of his investigation and testified consistently and credibly at the OAL hearing. (See R-13.) He noted that on Friday, December 18, students in Ms. Lee's Trigonometry and Analytic Geometry period 5 class took an assessment where time ran short, and were told that they would be given extra time to finish the exam in the next class. On Monday, December 21, 2015, period 5 did not meet due to the rotating schedule. On Tuesday, December 22, 2015, Ms. Lee was absent from school, and it was rumored that she would be out the following day. Ms. Lee left plans out for the substitute for the class to work on a packet of problems on December 22, 2015, the date of the incident in question. On Wednesday, January 6, 2016, Ms. Lee informed Mr. Ross of the cheating issue after she was tipped off by a student in a different class. Mr. Ross then spoke with period 5 math student L.T. during the last period of the day, at which time L.T. acknowledged working on the exam on December 22, 2015.

As a result of this admission, on January 7, 2016, Mr. Ross spoke with Ms. Lee's period 5 class about character and taking responsibility for their actions. He told them that anyone with information should come forward. He noted that these are the most exemplary academic students, and that he expects the same exemplary character. Students came to see him that afternoon, and he received a parent call that day. He testified that additional students contacted both Ms. Lee and him via email admitting having inappropriately worked on the test. He stated specifically that the admissions noted that they went into Ms. Lee's designated cabinet, removed their exams, and worked on their exams during her absence, and then replaced the exams in the drawer as if it had never happened. On January 8, 2016, J.S. and two other students came to see Mr. Ross in the morning to admit to taking and working on the exam without permission. Mr. Ross and Ms. Lee were contacted by numerous others throughout that day, as well.

In short, Mr. Ross gave detailed testimony without prejudice. He testified credibly that he was interested in a fair investigation, and that most students came to him voluntarily and without any pressure. He impressed upon the students that their actions in period 5 on December 22, 2015, would not be fair to those in the class who did not cheat. His report supports his in-person testimony, as he testified that those

notes were taken contemporaneously as students came forward. He noted that these students were the highest performing kids in their sophomore and junior classes, respectively, and that they were all bound to get into great colleges. They were all involved in academic clubs and activities, and he celebrated them for that, as did the faculty as a whole. In short, his testimony revealed disappointment. It appeared that the crux of that disappointment was that not only did they act in contravention of Ms. Lee's instructions, but some students got the exams and others did not, giving the cheaters an unfair advantage.

As for J.S. specifically, Mr. Ross testified clearly and credibly that she never said that she felt she had permission to work on the exam or to access the cabinet in question. In fact, he stated that J.S. was not trying to make an excuse, except to say that she knew the class would, at some point, get extra time to complete the exam. She never made an argument to Mr. Ross that what she did was right, and in fact admitted that it was wrong. He noted that he never had contact with J.S. after that, and that he sent the documentation of his investigation to the vice principal, Dr. Gayles.

On cross-examination, Mr. Ross further bolstered his credibility by noting that he did not go to speak to any of the students who were exonerated or not implicated. He clearly was not on a fishing expedition to implicate additional students. He also noted that he was not responsible for the discipline, but only the investigation. As such, he moved the matter to the administration to deal with discipline. He stated also that he was not aware of any other student that implicated J.S., if it was not revealed in R-5. This shows that he stuck to facts that he knew firsthand and did not rely on rumor or innuendo as a result of any preparation for this hearing.

Dr. Antoine L. Gayles

Dr. Gayles testified that he is the assistant principal of Piscataway High School. He is responsible for doling out the discipline for cheating and other offenses. He testified that after Mr. Ross concluded his investigation of the December 22, 2015, incident, he issued short-term, or four-day, suspensions to all seven students involved, including J.S., for cheating on the test. Dr. Gayles testified that the offense carried an

exposure of up to ten days. He indicated that Dean Robinson was the individual tasked with advising the students' parents of the suspensions. (See R-6; R-16.) Written discipline referral notices were sent out to each family. (See R-7.)

Cross-examination of Dr. Gayles confirmed that it was his understanding that the students would be given extra time on the test, but that they were not afforded access to the test without the teacher's consent. Dr. Gayles testified that the decision to suspend the students in question was not made after the confessions alone. As an administrator, and as a parent himself, Dr. Gayles wanted the students to be afforded due process, so he wanted to consult with the dean to make sure that the confessions were legitimate and that the chain of command was followed. To that end, after the cheating was reported, the investigation and subsequent report by Mr. Ross were reviewed in tandem with the information obtained by Ms. Lee.

Herbert Jermaine Robinson

In the 2015–2016 school year, Herbert Jermaine Robinson was the dean of students for the eleventh grade at Piscataway High School, and was responsible for handling matters involving infractions or incidents and for issuing discipline. He testified that in January 2016 Dr. Gayles brought to his attention allegations of cheating in Ms. Lee's period 5 math class.

An investigation was done by Mr. Ross, and Dr. Gayles issued a four-day out-of-school suspension for each of the students involved. If the punishment were less than a suspension, Robinson could make the penalty decisions on his own. In this case, the decision to impose a suspension and length of same appropriately came from the vice principal, Dr. Gayles. The dean's job was to notify the parents of the discipline. Mr. Robinson had L.S.'s primary contact information (R-16), but he was only able to leave a voice mail. He then decided to try L.S.'s cell phone. He noted that on January 22, 2016, the same day, the numbers show an incoming call from L.S.'s home phone. Mr. Robinson testified credibly that he usually reaches out to parents via cell number, as they are usually most available there. It should be noted that Mr. Robinson presented

well in court and obviously had no axe to grind with L.S., J.S. or any of the other individuals involved.

Jason Lester

Mr. Lester is, and was at the time of the incident, the principal of Piscataway High School. He testified credibly that the cheating came to his attention through Vice Principal Gayles as an appeal to the principal from L.S. on J.S.'s behalf. His March 4, 2016, meeting with L.S. was memorialized in a letter. (R-9.) Most notably, Principal Lester noted that L.S. never denied that J.S. cheated or asserted that she was given permission to take the exam without Ms. Lee's authorization. He stated convincingly that his letter accurately reflects the issue.

When questioned by L.S. on cross-examination, about why the substitute teacher was not questioned regarding the incident in question, Mr. Lester stated simply that all the students involved admitted to it, so there would be no reason to involve the substitute. He also testified convincingly that he had no knowledge of a child of a prior teacher being in Ms. Lee's period 5 math class, as insinuated by L.S. on cross-examination. Principal Lester testified convincingly that he does not know if J.S. changed any answers, or if J.S. shared answers with other students, or if J.S. went over the allotted time for the test. All of these answers speak to Principal Lester's credibility, in that he conducted a fair appeal and was detailed in addressing L.S.'s concerns and was not on a fishing expedition to mount a stronger case against J.S. Lastly, he noted that his level of involvement in an investigation and doling out of discipline amounts to "no involvement," unless there is an appeal from the parent, as there was in the instant matter.

Teresa Rafferty

Superintendent of Piscataway Public Schools Teresa Rafferty testified that as part of her duties she attends the Board of Education meetings, which are held approximately twice a month. At the January 28, 2016, meeting, members of the public came forward, including L.S., who gave a lengthy presentation regarding his daughter

J.S. Prior to that Board of Education meeting, Ms. Rafferty had no knowledge of either L.S. or J.S. At the meeting, she told L.S. to go up the chain of command regarding an appeal at the school level.

The second Board of Education meeting that involved L.S. and J.S. was on April 4, 2016. After closed session, L.S. was denied his appeal to expunge J.S.'s suspension. L.S. had an attorney, Ira Ginsburg, and L.S. recorded the session. Superintendent Rafferty's findings, memorialized on April 6, 2016, included that J.S. worked on the test and made at least one change to her exam before returning it. Ms. Rafferty credibly testified that the substitute teacher was not questioned because J.S. came forward with her own account of what occurred, which was consistent with statements given by the other students involved. Superintendent Rafferty noted that L.S. never said that his daughter was not guilty of any offense, but asserted that the action should be taken "in context." It was clear that J.S. knew that what she had done was wrong, and she never claimed that she relied on any permission from the substitute. Most notably, Ms. Rafferty stated, and wrote in her Appeal Determination, that "the investigation also disclosed evidence of the students' conscious awareness of wrongdoing as the behavior was occurring in the classroom." (R-10.) Ms. Rafferty bolstered her determination by noting that on May 24, 2016, she received an email from J.S. (R-12) acknowledging that J.S. made a "stupid decision" and a "stupid mistake," albeit disagreeing with the characterization of "cheating."

On cross-examination, Superintendent Rafferty testified that seven students were suspended, and all got the same penalty. Superintendent Rafferty said that she did not know whether J.S. colluded with other students or used any study aids when she took the test and worked on it. J.S. did indicate that it was her opinion that no sophomores were involved. Superintendent Rafferty was prepared and professional, and also did not have any personal issue with L.S. or J.S., and thus was highly credible.

Findings of Fact

I **FIND** the following to be **FACTS**:

1. J.S. was in Carolyn Lee's Trigonometry and Analytic Geometry class, comprised of junior and sophomore honors students, during the 2015–2016 school year.

2. J.S. was a junior in the 2015–2016 school year.

3. On December 18, 2015, Ms. Lee administered a test involving trigonometry equations which was not completed due to a lock-down drill.

4. Ms. Lee informed the students that they would be able to complete the final ten to fifteen minutes of the test on another date that would be selected by the teacher.

5. The class in question is on a rotating schedule, and thus does not meet every day.

6. The next available day for the exam was December 22, 2015.

7. Ms. Lee was out sick on December 22, 2015, and left a lesson plan for a substitute teacher. (R-1.)

8. Ms. Lee was also out sick on December 23, 2015.

9. Ms. Lee's lesson plan made no mention of completing the test in question, but rather instructed the period 5 students to work on a "Law of Sines packet."

10. Ms. Lee had a wheelchair-bound student in the class in question, so the class was taught in a different classroom than her homeroom, and she kept the tests in a locked file cabinet in that classroom with her name on it.

11. Ms. Lee did not authorize the students to access the file cabinet unless expressly instructed.

12. Ms. Lee never instructed the substitute to administer the final portion of the exam, nor did she have any contact with the substitute teacher or know who the substitute would be that day.

13. Ms. Lee had no knowledge of any cheating incident over the winter break.

14. Upon returning from break on Monday January 4, 2016, Ms. Lee went to give the students the exam back. Some students explained that they forgot about the test over break and were not prepared. Ms. Lee told the students that she would give it to them on the next available class day.

15. On January 5, 2016, Ms. Lee was notified by another student that cheating allegedly occurred in her class on December 22, 2015, while she was out sick.

16. On January 6, 2015, Ms. Lee notified the Math Department chair, Mr. Ross, who launched an investigation.

17. On January 6, 2016, after school, Ms. Lee received an email from a student, L.T., who admitted to taking the tests without permission.

18. On January 7, 2016, other students involved in the taking of the exams from the file cabinet and working on the exams came forward implicating themselves and others.

19. On January 8, 2016, J.S. came forward with several friends to admit to taking and working on the tests without permission on December 22, 2015.

20. All students involved were given the same penalty of a four-day out-of-school suspension, and notified of same on January 22, 2016.

CONCLUSIONS OF LAW

Local boards of education are charged with protecting the health and welfare of the students entrusted to their care, and with ensuring that a thorough and efficient education is provided every day to every student in an environment that is safe, orderly and free from disruption. N.J.S.A. 18A:37-2 establishes the authority of local boards to impose discipline, and provides that "[a]ny pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, . . . shall be liable to punishment and to suspension or expulsion from school."

Disciplined students retain extensive due-process rights. Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); N.J.S.A. 18A:37-2.4; N.J.A.C. 6A:16-7.3. Where a long-term suspension or an expulsion is recommended by the administration, the student is entitled to a board-level hearing, and the ultimate determination whether to impose the recommended discipline rests in the discretion of the board. An appeal of the board's decision may be made to the Commissioner of Education. N.J.S.A. 18A:37-2.4(c).

It is well established that the Commissioner will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious, or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008), adopted, Comm'r (April 7, 2008), <http://njlaw.rutgers.edu/collections/oal/> (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)). The Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due

consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Accordingly, the petitioner carries a weighty burden. The petitioner must demonstrate that the board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M. v. Moorestown, supra, EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal/>.

Here, J.S. admitted verbally and in writing to the actions that the school and the Board subsequently found were substantiated. There is no evidence of any coercion of J.S.'s admission, and every witness presented was credible and their testimony corroborated the other. In fact, L.S., in his meeting with the superintendent, acknowledged that J.S. engaged in discipline-worthy behavior; however, he argued that her conduct did not rise to the level of "cheating," but rather should have been considered "tampering." However, L.S. did not present any evidence to dispute any of the findings above. I **CONCLUDE** that the petitioner has not shown that the Board's finding that J.S. cheated was arbitrary, capricious, or unreasonable.

The next issue is the appropriateness of the penalty. The charge of cheating could carry an out-of-school suspension of up to ten days. The Board, rather than imposing the maximum penalty, imposed what Vice Principal Gayles accurately called a "short-term" four-day suspension.

A balancing must be undertaken, with the knowledge that the Board is required to maintain discipline in its schools. Further, the Board's discretionary powers must be given deference, as long as the Board did not act in an arbitrary, unreasonable, or capricious manner. I **CONCLUDE** that the petitioner has not shown that the Board's imposition of a four-day out-of-school suspension was arbitrary, capricious, or unreasonable. On the contrary, the Board reasonably imposed a much lesser discipline than the maximum suspension.

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board's imposition of a four-day out-of-school-suspension for J.S. for a violation of its policy against cheating should be **AFFIRMED**.

ORDER

It is **ORDERED** that the relief requested by petitioner is **DENIED**.

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

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

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

January 17, 2016
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: January 17, 2017

Date Mailed to Parties: JAN 19 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For petitioner:

L.S.

For respondents:

Carolyn Lee
Antoine Gayles
Daniel Ross
Herbert Jermaine Robinson
Jason Lester
Teresa Rafferty

EXHIBITS

For petitioner:

None

For respondents:

R-1 Instructions for Substitute, dated 12/22/15
R-2 E-mail from L.T. to C. Lee, dated 1/6/16
R-3 E-mails to/from A.L. and C. Lee, dated 1/7/16
R-4 E-mails to/from C.W. and L. Lee, dated 1/7/16
R-5 Carolyn Lee, Cheating Issue, December 22, prepared by D. Ross
R-6 Call Search Log
R-7 Student Discipline Referral Form
R-8 E-mails to/from A. Gayles and L.S., dated 1/27/16–1/28/16
R-9 Letter from J. Lester to L.S., dated 3/4/16
R-10 J.S. Student Records Appeal Determination, by T. Rafferty, dated 3/4/16

R-11 Letter from D. Rubin, Esq., to I. Ginsburg, Esq., dated 4/18/16

R-12 Emails to/from J.S. and T. Rafferty, dated 5/24/16

R-13 Chronology prepared by D. Ross, dated 6/27/16

R-14 No exhibit

R-15 No exhibit

R-16 Family Contact Information

6.8-17

M.A., ON BEHALF OF MINOR CHILD, J.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

On June 28, 2016, petitioner M.A. filed an appeal seeking an order directing the respondent Board to allow his daughter J.A. – who completed her junior year in high school in June 2016 – to attend a summer recovery program to improve her low passing grades during her sophomore year, including a D in one subject and a D- in three other subjects. A motion for emergent relief in this matter was denied in July 2016, subsequent to the July 8 start date of the summer recovery program in question. On October 24, 2016, the Board filed a motion to dismiss the petition as moot.

The ALJ found, *inter alia*, that: in the instant case, emergent relief was necessary to allow J.A. to attend the summer recovery program, but the application for this relief was denied in July 2016; a case is moot when the determination sought cannot have any practical effect on the existing controversy; the summer program sought by petitioner for her daughter is now in the past, and a decision at this point would have not practical purpose. Accordingly, the ALJ concluded that the case is now moot, and the petition should be dismissed.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter for the reasons stated therein. The petition was dismissed.

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

March 2, 2017

OAL DKT. NO. EDU 09554-16
AGENCY DKT. NO. 179-6/16

M.A., ON BEHALF OF MINOR CHILD, J.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner is in accord with the ALJ's conclusion – for the reasons set forth in the Initial Decision – that the issues raised by the petitioner are moot. This matter involves a request for petitioner's daughter to attend a summer recovery program during the summer of 2016. As the program has since ended, the relief sought by petitioner is no longer available.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed as moot.

IT IS SO ORDERED.[1]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/02/17
Date of Mailing: 3/02/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09554-16
AGENCY DKT. NO. 179-6/16

M.A. ON BEHALF OF MINOR CHILD J.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY,
Respondent.

M.A., father of J.A., pro se

Michael J. Gross, Esq., for respondent (Kenny Gross Kovats & Parton, attorneys)

Record Closed: January 18, 2017 Decided: January 18, 2017

BEFORE **RICHARD McGILL**, ALJ:

M.A. ("petitioner") filed a petition with the Commissioner of Education seeking an order directing the Board of Education of the Township of Verona ("respondent") to allow his daughter, J.A., who completed her junior year in high school in June 2016, to attend a summer recovery program to improve her low passing grades including a D in one subject and D- in three others during her sophomore year. Respondent now moves to dismiss the petition as moot.

PROCEDURAL HISTORY

Petitioner filed the petition with the Commissioner of Education on June 28, 2016, pursuant to the Commissioner's authority to hear and determine controversies and disputes arising under the school laws. In conjunction with the petition, petitioner filed a motion for emergent relief.

The matter was transmitted to the Office of Administrative Law on June 29, 2016, for determination as a contested case. An oral argument in regard to petitioner's motion for emergent relief was conducted on July 6, 2016, at the Office of Administrative Law in Newark, New Jersey. An Order issued by the undersigned on July 7, 2016, denying petitioner's request for emergent relief, was adopted by the Commissioner in a Decision on Application for Emergent Relief dated July 14, 2016.

On October 24, 2016, respondent filed a motion to dismiss the petition as moot. Petitioner did not submit a response to the motion.

MOTION TO DISMISS

In support of the motion to dismiss the petition, respondent set forth the following undisputed facts. J.A. is currently enrolled in the Verona Public Schools for her senior year. During the 2014-2015 school year, J.A. received grades of D or D- in multiple subjects in her sophomore year. In the petition filed on June 28, 2016, at the end of J.A.'s junior year, petitioner sought to give J.A. an opportunity to improve her grades from her sophomore year.

Respondent does not offer a summer credit recovery program in the District. Students seeking to participate in such classes (i.e., supplemental, remedial, advancement or enrichment classes) must do so outside the District. Summer school courses, even if taken, do not alter a student's grade. They simply allow the student to satisfy a core curriculum requirement. The summer credit recovery program in question was scheduled to begin on July 8, 2016. Petitioner's motion for emergent

relief was denied initially on July 7, 2016, and a Final Decision was issued on July 14, 2016.

Respondent contends that the petition in this matter should be dismissed as moot. A case is moot when the determination sought cannot have any practical effect on the existing controversy. Greenfield v. New Jersey Dep't of Corrections, 382 N.J. Super. 254, 257-58 (App. Div. 2006).

Here, petitioner sought an order compelling respondent to allow his daughter, who has completed her junior year in high school, to attend a summer recovery program to improve low passing grades that she received during her sophomore year. For his daughter to attend a summer program, petitioner would have needed emergent relief, but his application therefore was denied in July 2016. The summer program is now in the past, and a decision at this point would not have any practical effect in relation to petitioner's request. Therefore, I **CONCLUDE** that the case is now moot and that the petition in this matter should be dismissed.

Accordingly, it is **ORDERED** that the petition in this matter be dismissed.

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

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

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

January 18, 2017

DATE

RICHARD McGILL, ALJ

Date Received at Agency: January 18, 2017

Date Mailed to Parties:

ljb

69-17

KEVIN GOETZ,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF FREEHOLD, MONMOUTH COUNTY	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – who was hired by the respondent Board in March 2005 as a Technology Education teacher – alleged that his termination as the result of a reduction in force (RIF) was a violation of his tenure and seniority rights pursuant to *N.J.A.C.* 6A:32-5.1. The respondent Board contended that the petitioner resigned prior to the RIF and therefore relinquished his tenure and seniority rights in the school district. The Board filed a motion for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue, and the matter is ripe for summary decision; petitioner was notified on December 15, 2013 that his position would be abolished for the 2014-2015 school year; petitioner was encouraged by the Board to seek employment elsewhere; petitioner secured employment in another school district that was to begin immediately, which resulted in his submission of a letter of resignation on March 19, 2014; this letter was accepted by the Board on March 25, 2014; after the petitioner's resignation – on April 8, 2014 – the Board passed a resolution to conduct a RIF; ultimately, petitioner was unable to take the position he had secured because of a change in his circumstances; petitioner contended that he attempted to rescind his resignation, and was told to submit an email requesting that his resignation to be extended until June 30, 2014; the Board approved this extension; and it is undisputed that petitioner never made a formal request to the Board to rescind his resignation. The ALJ concluded that the law is clear that an employee's resignation extinguishes any tenure rights that employee may have had. Accordingly, the ALJ granted summary decision in favor of the Board, and dismissed the petition.

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

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

March 2, 2017

OAL DKT. NO. EDU 7546-16
AGENCY DKT. NO. 120-4/16

KEVIN GOETZ,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF FREEHOLD, MONMOUTH COUNTY	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Administrative Law Judge's recommended decision for the reasons expressed therein. Accordingly, the petition is dismissed with prejudice.

IT IS SO ORDERED.* Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/02/17
Date of Mailing: 3/02/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 7546-16
AGENCY DKT. NO. 120-4/16

KEVIN GOETZ,
Petitioner,
v.
TOWNSHIP OF FREEHOLD BOARD OF EDUCATION, MONMOUTH COUNTY,
Respondent.

James J. Uliano, Esq., for petitioner (Chamlin, Rosen, Uliano and Witherington, attorneys)

Daniel R. Roberts, Esq., for respondent (Kenney, Gross, Kovats and Parton, attorneys)

Record Closed: December 5, 2016 Decided: January 17, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

Petitioner Kevin Goetz (petitioner) alleges his termination by respondent Freehold Township Board of Education (Board) as a result of a reduction in force (RIF)

was in violation of his tenure and seniority rights pursuant to N.J.A.C. 6A:32-5.1. The Board counters that petitioner resigned prior to the RIF and therefore relinquished his tenure and seniority rights.

PROCEDURAL HISTORY

On April 29, 2016, petitioner filed a petition of appeal against the Board with the New Jersey Department of Education Office of Controversies and Disputes. On May 18, 2016, the Board filed an answer. The Office of Controversies and Disputes transmitted the petition and answer to the Office of Administrative Law where they were filed on May 20, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, for determination as a contested case.

I issued a prehearing order on August 26, 2016, setting a hearing date of December 20, 2016, and setting a motion schedule requiring that dispositive motions be filed by November 4, 2016. On November 4, 2016, the Board filed a motion for summary decision arguing there were no material facts in dispute and the Board was entitled to judgment as a matter of law. On November 22, 2016, petitioner filed opposition to the motion. On December 5, 2016, the Board filed a reply to the opposition and the record closed. The hearing date was adjourned in light of the motions. I now grant the Board's motion for summary decision.

FACTUAL DISCUSSION

Petitioner Kevin Goetz was hired by the Board on or about March 14, 2005, as a Technology Education teacher. Petitioner's Statement of Material Facts, ¶2. At all applicable times, petitioner held a teaching certificate with a Teacher of Industrial Arts endorsement. Id. at ¶3. Petitioner served as a Technology Education teacher from the time he was hired until June 30, 2014. Id. at ¶4.

On or about December 15, 2013, petitioner met with Dianne Brethauer, Principal of the Dwight D. Eisenhower Middle School, located in the Board's district. Board's Counterstatement of Material Facts, ¶1. At that meeting, Principal Brethauer informed

petitioner that his position would be abolished for the 2014-2015 school year and encouraged petitioner to seek employment elsewhere. Ibid. Petitioner indicated that he was interested in replacing the retiring digital arts teacher. Id. at ¶3. In January 2014, petitioner met with Assistant Superintendent Neil Dickstein, who informed petitioner that he was ineligible to teach the digital arts class because he did not hold an art degree. Id. at ¶4. The Assistant Superintendent further advised petitioner that there were no available jobs for him in the district. Ibid.

As the result of this news, petitioner secured employment in North Plainfield, New Jersey. Id. at ¶6. The position was to begin immediately. Ibid. On or about March 19, 2014, petitioner submitted an e-mail to Superintendent Ross Kasun, with a carbon copy to Principal Brethauer and Human Resources Department Manager Ann Lenahan, stating: "Please be advised that I am resigning my teaching position as of today March 19, 2014. I anticipate my last day to be May 16, 2014." Exhibit A. On March 25, 2014, at its regular meeting, the Board accepted petitioner's letter of resignation. Exhibit B, p. 3, 5. On or about April 8, 2014, the Board formally approved a reduction in force (RIF), citing declining enrollment and budgetary constraints. Exhibit D, pp. 6-7.

During the period of time between March 19, 2014 and May 16, 2014, petitioner's circumstances changed and he was unable to take the position that he had secured in North Plainfield. Board's Counterstatement of Material Facts, ¶7. Petitioner contends that he approached the administration to rescind his resignation and was told to submit an e-mail asking for his resignation to be extended until June 30, 2014. Id. at ¶8. On or about May 13, 2014, petitioner sent an e-mail to HR Manager Lenahan, with a carbon copy to Assistant Superintendent Dickstein, writing: "I would like to request that my resignation slated for May 16 be extended to June 30. Thank you for all your help in this matter." Exhibit E. At its regular meeting on May 14, 2014, the Board approved petitioner's request to extend his resignation date. Exhibit F, p. 10. Although petitioner alleges that he advised school administration of his desire to rescind his resignation, it is undisputed that petitioner never made a request to the Board to rescind his resignation. Petitioner's Statement of Material Facts, ¶11; Board's Response to Material Statement of Facts, ¶11. Petitioner worked through June 30, 2014, and subsequently accepted a

position with the Lacey Township Board of Education. Petitioner's Counterstatement of Material Facts, ¶9.

LEGAL DISCUSSION

In a contested case, a motion for summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). Under this regulation, which is akin to the judiciary's motion for summary judgment, see R. 4:46-1, "the determination [of] whether there exists a genuine issue with respect to a material fact challenged requires . . . a consideration of whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995). In making this determination, the analysis is "'whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533-34. Summary decision is also proper when the opposing party "points only to disputed issues of fact that are 'of an insubstantial nature.'" Id. at 529.

Previous administrative decisions have made clear that an employee's tenure rights are extinguished upon his resignation. Janik v. Camden Bd. of Educ., OAL Dkt. No. EDU 6608-97, initial decision (July 22, 1998), adopted, Comm'r (September 4, 1998) <https://njlaw.rutgers.edu/collections/oal/html/initial/edu6608-97.html>. Further, "[w]hen a teacher submits a voluntary and unconditional letter of resignation, which is accepted by the Board, the individual has no automatic right to rescind the resignation." Murray v. N. Highlands Reg'l Bd. of Educ., 92 N.J.A.R.2d (EDU) 335, aff'd, State Board, 96 N.J.A.R.2d (EDU) 351, at 15. "A teaching staff member may withdraw her resignation before it is accepted by the school board . . . However, a school board's acceptance of a teaching staff member's offer of resignation terminates the teaching staff member's employment, and a subsequent withdrawal is ineffectual after its

acceptance." Eberwein-O'Donnell v. Winslow Twp. Bd. of Educ., OAL Dkt. No. EDU 9323-10 (May 1, 2012), adopted, Comm'r, (July 16, 2012) <https://njlaw.rutgers.edu/collections/oal/final/edu9323-10_1.pdf> (internal citations omitted).

In Janik, supra, the petitioner, a tenured Director of Vocational Education, was informed on May 7, 1997 that his position would be eliminated effective June 30, 1997. The petitioner claimed that he was entitled to tenure as a principal, and the board denied the claim on June 16, 1997. On June 18, 1997, the petitioner sent a letter to the board advising that he would be retiring on July 1, 1997, and the board accepted the letter on June 30. On July 18, 1997, the petitioner filed a petition of appeal, arguing that he was entitled to a principal position following the RIF.

The ALJ granted summary decision to the board, holding that the petitioner's resignation terminated his tenure rights. The ALJ noted that when the petitioner filed his petition of appeal, he

> had no employment relationship or tenure rights with respondent to preserve. His employment with respondent and all rights concomitant thereto, were severed on June 30, 1997, when he completed his employment and retired. The fact that petitioner expressed his disagreement with respondent's legal conclusions concerning his tenure entitlements prior to conclusion of his employment, is irrelevant; when petitioner filed the petition of appeal he had no standing to make any of the claims set forth therein because he no longer had any employment relationship with respondent.
>
> [Id. at 7.]

For these reasons, the ALJ concluded that the petitioner lacked standing to raise the tenure claims set forth in the petition of appeal and granted summary decision in the school board's favor.

In the present matter, there is no dispute as to any of the material facts; accordingly, the matter is ripe for summary decision. The following facts are

undisputed: Petitioner submitted a letter of resignation on March 19, 2014, and the Board accepted his resignation on March 25, 2014. Petitioner subsequently requested that his resignation be extended to June 30, 2014, and the Board approved this extension. Petitioner never made any request to the Board to rescind his resignation. Based on these facts, petitioner's employment relationship was severed upon the Board's acceptance of his resignation, and he has no tenure rights to preserve. Thus, summary decision in the Board's favor is appropriate.

Petitioner argues that there are disputes as to "the circumstances surrounding the RIF and both parties' actions from the period of time from December 2013 through June 2014." Petitioner's Opposition Brief, p. 1. According to petitioner, he was notified on December 15, 2013 that his position would be eliminated for the following school year, and the principal of the school encouraged petitioner to seek employment elsewhere. Petitioner had indicated that he wanted to replace the retiring digital arts teacher, but the Assistant Superintendent informed petitioner that he was ineligible to teach the class because he did not hold an art degree. The Assistant Superintendent further indicated that there were no available jobs for petitioner in the district. After receiving this information, petitioner secured employment with another district, and thus tendered his resignation with the Board. Petitioner was ultimately unable to take the new position. Petitioner states that he approached the administration to rescind his resignation and was told to submit an e-mail asking for the resignation to be extended until June 30, 2014. It is undisputed, however, that petitioner never made a request to the Board to rescind his resignation.

Even if the facts as presented by petitioner are true, they do not alter the effect of petitioner's resignation under the law. Like in Janik, supra, it is irrelevant that petitioner expressed interest in another teaching position prior to the conclusion of his employment. When petitioner filed his Petition of Appeal, he had already ended his employment relationship with the Board and had no standing to make tenure claims. Petitioner denies ¶7 of the Board's Statement of Material Facts, which reads, "On or about April 8, 2014, the Board determined to conduct a reduction in force. The RIF eliminated one teacher of Health and Physical Education, and one teacher of Industrial Arts/Technology Education. The RIF was effective June 30, 2014. Dickstein Cert., ¶8."

The minutes from the Board's April 8, 2014 regular meeting reflect the Board's approval of a reduction in force, eliminating one teaching position in Health and Physical Education and one position in Industrial Arts/Technology Education. Exhibit D, p. 6. There is one discrepancy -- while the minutes indicate that the RIF would become effective on July 1, 2014, the Board's Statement of Material Facts indicates that it would become effective on June 30, 2014. Id. at 7. Nevertheless, the undisputed facts show that petitioner's resignation was accepted by the Board, thus cutting off any tenure rights that petitioner may have had.

Petitioner also denies ¶9 of the Board's Statement of Material Facts, which reads, "Petitioner was not provided with any notice of the RIF, as he had already resigned his position. Dickstein Cert., ¶8." The record makes clear that petitioner resigned his teaching position as of March 19, 2014. The Board approved his resignation on March 25, 2014. Thus, by the time the Board passed the resolution to conduct a RIF on April 8, 2014, petitioner had already resigned. Petitioner argues that he was told orally that there would be a RIF prior to his resignation. Petitioner's Opposition Brief, p. 2. However, regardless of when petitioner first learned that there would be a RIF, petitioner's resignation severed his employment relationship with the Board. Petitioner cannot invoke tenure rights that no longer exist.

CONCLUSION

I **CONCLUDE** that the facts, as presented by petitioner, do not demonstrate a material factual dispute. It is undisputed that petitioner submitted a letter of resignation, and the Board accepted his resignation. The law makes clear that an employee's resignation extinguishes any tenure rights he may have had. For these reasons, summary decision is appropriately granted in the Board's favor.

ORDER

Based on the foregoing, I **ORDER** that the Board's motion for summary decision is hereby **GRANTED** and petitioner's appeal **DISMISSED**.

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

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

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

January 17, 2017
DATE

Lisa James-Beavers
LISA JAMES-BEAVERS, ALJ

Date Received at Agency: January 17, 2017

Date Mailed to Parties: January 17, 2017

cmo

70-17

K.H., on behalf of minor children, A.H. AND V.H., :

PETITIONER, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY, :

RESPONDENT. :

SYNOPSIS

In August 2016, *pro se* petitioner appealed the determination of the respondent Board that his children, A.H. and V.H., are ineligible to attend school in respondent's school district. Petitioner contended that he resides in Butler and has shared custody of his children, arguing that A.H. and V.H. stay with him 48% of the time. Petitioner maintained that he and his ex-wife wished to maintain continuity in their children's education, as they had been enrolled in Butler schools prior to the 2016-2017 school year. Petitioner submitted a copy of a Consent Order from the Chancery Division of the Superior Court – filed on August 22, 2016 – in which he and his ex-wife agreed, pursuant to *N.J.A.C.* 6A:22-3.1, that the children would continue to attend Butler schools. The Board contended that the children were no longer entitled to a free education in Butler schools because of their post-divorce living arrangement, wherein they spend the majority of time with their mother; accordingly, the Board maintained that the children are domiciled in Bloomingdale, and sought tuition reimbursal.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a) and *N.J.A.C.* 6A:22-3.1, children between the ages of five and twenty years are entitled to a free public education in the district in which he or she resides; since their parents' divorce, A.H. and V.H. live less than half the year in the Butler school district with their father – a fact that the parents admitted to in a letter to the Commissioner; petitioner and his ex-wife entered into a Consent Order in the context of their divorce litigation wherein they agreed that the children would continue to attend school in the Butler school district; pursuant to *N.J.S.A.* 18A:38-1(b)(2) and *N.J.A.C.* 6A:22-4.3, if a school district discovers that a non-resident child is attending one of its schools, it may act to remove the child; here, the petitioner conceded that the children do not reside in Butler; the Board waived tuition reimbursement in this matter, and has agreed that V.H. and A.H. have until the end of the third quarter marking period to enroll in the school district in which they reside. Accordingly, the ALJ denied the petitioner's residency appeal and ordered that the children must be enrolled in Bloomingdale schools.

The Commissioner rejected the Initial Decision, finding, *inter alia,* that – under *N.J.A.C.* 6A:22-3.1(a)1.i – as of the date of the court order, A.H. and V.H. were entitled to attend Butler schools. Contrary to the conclusion reached by the ALJ herein, when there is a consent order or a written agreement between the parents that designates the school district of attendance, the amount of time spent with either parent does not dictate where the children must attend school. Because the petitioner's divorce occurred prior to the entry of the consent order, the matter was remanded to the OAL for determination of whether the Board is owed tuition for any period prior to the August 22, 2016 consent order.

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

Issued 3/02/17

OAL DKT. NO. EDU 14258-16
AGENCY DKT. NO. 226-8/16

K.H., on behalf of minor children, A.H. AND V.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. This matter was initiated by the petitioner, K.H., as a *pro se* residency appeal, and the Butler Board of Education (Board) filed a counterclaim for tuition. The Administrative Law Judge (ALJ) found that A.H. and V.H. are no longer entitled to attend school in the Butler school district because of their new living arrangement resulting from their parents' divorce, *i.e.*, the children spend less than half of the year living with their father in the Butler school district. The ALJ ordered the petitioner to enroll the students in the Bloomingdale school district – where they reside with their mother – by the end of the third marking period. The ALJ also dismissed the Board's counterclaim for tuition.

Upon a comprehensive review of the record the Commissioner finds that the ALJ erroneously found that A.H. and V.H. were ineligible to attend school in the Butler school district. Pursuant to *N.J.A.C.* 6A:22-3.1(a)1.i:

> When a student's parents or guardians are domiciled within different school districts and **there is no court order or written agreement between the parents designating the school district of attendance**, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year.

[*N.J.A.C.* 6A:22-3.1(a)1.i (emphasis added)]. It is undisputed that the petitioner resides in the Butler school district, and that the students' mother resides in the Bloomingdale school district. It is also undisputed that there was a consent order – entered into on August 22, 2016, as a part of the divorce proceedings – under which it was designated that A.H. and V.H. would attend school in the Butler school district. Therefore – under *N.J.A.C.* 6A:22-3.1(a)1.i – as of August 22, 2016, A.H. and V.H. were entitled to attend school in the Butler school district. Despite the conclusion reached in the Initial Decision, when there is a consent order or a written agreement between the parents that designates the school district of attendance, the amount of time spent with either parent does not dictate where the children must attend school.

The Board filed a counterclaim for tuition in this matter, which was apparently waived at the hearing.[1] The Commissioner recognizes, however, that the Board may not have waived its counterclaim if the petitioner appeared at the hearing. Although the parents entered into the consent order in August 2016, designating the Butler school district as the district of attendance, it appears from the record that the parents were divorced in April 2016. Therefore, in the absence of a consent order or written agreement between the parents, it is possible that A.H. and V.H. were not eligible to attend school in the Butler school district between April 2016 and August 2016. The current record, coupled with the petitioner's failure to appear at the hearing, make it impossible for the Commissioner to ascertain whether or not there was a period of ineligibility during which the Board is entitled to tuition reimbursement.

Accordingly the Initial Decision is rejected in its entirety. Pursuant to the August 22, 2016 consent order, A.H. and V.H. are entitled to attend school in the Butler school

[1] The petitioner did not appear at the hearing nor did he advise the OAL as to why he did not attend. Additionally, there is no transcript of the hearing, so the circumstances surrounding the Board's waiver of the counterclaim are not clear from the record.

district. The Board's counterclaim for tuition is remanded to the OAL for a determination as to whether the Board is entitled to tuition for any potential period of ineligibility prior to the entry of the August 22, 2016 consent order.[2]

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/02/17

Date of Mailing: 3/02/17

[2] If the Board still wants to waive its counterclaim for tuition after this matter has been remanded to the OAL, the case can be deemed withdrawn and the file returned to the agency.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 14258-16
AGENCY REF. NO. 226-8/16

K.H. ON BEHALF OF MINOR CHILDREN A.H. AND V.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,

Respondent.

No appearance for Petitioner K.H.on behalf of A.H. and V.H.

Jeffrey Merlino, Esq., for Respondent, (Sciarillo Cornell Merlino, Mckeever & Osborne, LLC, attorneys)

Record Closed: January 19, 2017 Decided: January 19, 2017

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals a Notice of Final Ineligibility from Respondent school district, dated August 10, 2016, wherein Respondent determined that the minor children are ineligible to attend school in Respondent school district.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 14258-16
AGENCY REF. NO. 226-8/16

K.H. O/B/O MINOR CHILDREN A.H. AND V.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,

Respondent.

No appearance for Petitioner K.H.

Jeffrey Merlino, Esq., for Respondent, (Sciarillo Cornell Merlino, Mckeever & Osborne, LLC, attorneys)

Record Closed: January 19, 2017 Decided: January 19, 2017

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals a Notice of Final Ineligibility from Respondent school district, dated August 10, 2016, wherein Respondent determined that the minor children are ineligible to attend school in Respondent school district.

Petitioner filed as pro se with the Bureau of Controversies and Disputes in the New Jersey Department of Education on August 29, 2016.

Respondent filed its Answer and Counterclaim thereto on September 16, 2016.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on September 21, 2016, as a contested case. N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to –13.

The matter was listed for a hearing on January 19, 2017. Petitioner failed to appear, or otherwise contact the OAL regarding the non-appearance. A proof hearing was held on January 19, 2017.

ISSUE

Are the minor children eligible to attend school in the Butler school district.

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

Prior to the 2016/2017 school year the minor children were enrolled in the Butler school district. The parents of the minor children were divorced, with the minor children living less than half the year in the Butler school district. The parents admit to this pursuant to a letter, dated August 26, 2016, addressed the Commissioner of Education. (R-2).

Respondent school district determined that the minor children were no longer entitled to a free education in the Butler school district due to their new living arrangement resulting from Petitioner and former spouse being divorced. (R-3)

Petitioner and former spouse had entered into a Consent Order in the context of their divorce litigation wherein they agreed that their minor children would continue to attend school in the Butler school district. (R-1)

The minor children are not domiciled in the Butler school district.

LEGAL ANALYSIS AND CONCLUSION

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident.[3] N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

If a school district discovers that a non-resident child is attending one of its schools, the district may act to remove the child. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.3. If so, the chief school administrator must first issue a notice of ineligibility.N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.2, -4.3. The notice shall inform the parent of the right to a hearing before the school district and the right to appeal the school district's decision to the Commissioner of Education. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-5.1. The notice shall also inform the parent whether the district's policy allows for continued attendance, with or without tuition, for students who move out of the district during the course of the school year. N.J.A.C. 6A:22-4.2(b)(7)(i). If, on appeal to the Commissioner, the parent fails to demonstrate his child's entitlement to attend the schools of the district, the parent may be liable for tuition for any period of ineligible attendance. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.2; N.J.A.C.6A:22-6.2, -6.3.

In the instant matter Petitioner concedes that the minor children do not reside within the Butler school district.

According to N.J.A.C. 6A:22-6.3(a), "[t]uition assessed pursuant to the provisions of this section shall be calculated on a per student basis for the period of a student's ineligible enrollment, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23-3.1. The individual student's record of daily attendance shall not impact on such calculation." However, "[n]othing in this chapter shall preclude an equitable determination, by the district board of education or the Commissioner, that, when the particular circumstances of a matter so warrant, tuition shall not be assessed for all or part of any period of a student's ineligible attendance in the school district." N.J.A.C. 6A:22-6.3(b).

Respondent school district has waived tuition reimbursement in this matter. Respondent school district has additionally agreed that the minor students have until the end of the third quarter marking period to enroll in the school district where they reside.

ORDER

It is hereby **ORDERED** that Petitioner's residency appeal is **DENIED;** and;

It is further **ORDERED** that Petitioner has until the end of the third quarter marking period to enroll the minor children in the school district where they reside; and

It is further **ORDERED** that Respondent's Counterclaim seeking assessment of tuition costs is **DISMISSED** as Respondent has waived the same.

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

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

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

Jan. 19, 2017
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

January 19, 2017

Date Mailed to Parties: JAN 23 2017

Ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

List of Witnesses:

For Petitioner:

None

For Respondent:

None

List of Exhibits:

For Petitioner:

None

For Respondent:

R-1 Consent Order dated Aug. 22, 2016

R-2 letter from Petitioner and former spouse dated Aug. 26, 2016

R-3 Notice of Final Eligibility dated August 10, 2016

71-17

A.B., ON BEHALF OF MINOR CHILD, T.B.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her daughter, T.B., seeking a determination that T.B. is entitled to a free public education in the Red Bank Regional High School District. The respondent Board alleged that a residency investigation completed in February 2016 showed that A.B. and T.B. are domiciled in the Tinton Falls School District, and not the Red Bank Regional High School District. The petitioner failed to appear at a scheduled hearing on August 29, 2016. Subsequently, correspondence from petitioner explaining her absence was received by the Commissioner and was forwarded to the ALJ on August 30, 2016. The OAL sent a notice of petitioner's failure to appear to the Commissioner on the same day. Consequently, the Commissioner remanded the matter to the OAL, finding that the ALJ's dismissal of the matter for failure to appear was contrary to the requirements of *N.J.A.C.* 1:1-14.4(a); further, the ALJ's failure to issue an Initial Decision at the time of dismissal was improper pursuant to *N.J.A.C.* 1:1-14.4(c)2.

On remand, the ALJ found, *inter* alia, that: pursuant to *N.J.S.A.* 18A:38-1, a petitioner has the burden of proof in a determination of residency ineligibility; in this matter, a hearing was scheduled for November 22, 2016, and petitioner received appropriate notice thereof; petitioner failed to appear at the hearing; representatives of the Board did appear, and provided testimony with respect to the tuition amounts due; subsequently, the OAL received a copy of a letter from petitioner, dated November 22, 2016, which alleged "health issues" as the reason for petitioner's non-appearance and requested an adjournment of the matter for a minimum of twelve weeks; despite petitioner's untimely request to delay the hearing, petitioner was given another opportunity to present evidence in opposition to the request for tuition reimbursement as well as the determination of ineligibility for T.B., if the request was made in writing within ten days; petitioner again failed to provide any opposition. The ALJ concluded that T.B. was ineligible for a free public education in the Red Bank for the period of enrollment in the district from March 2014 through June 2015, and from November 2015 through June 2016. Accordingly, the Board's counterclaim for tuition in the total amount of $18,433.60 was granted, and the petition was dismissed.

Upon review, the Commissioner concurred with the ALJ that T.B. was not domiciled in Red Bank during the period in question, and was therefore not entitled to a free public education in the district's schools. Accordingly, the Initial Decision was adopted as the final decision in this case. Petitioner was ordered to reimburse the Board in the amount of $18,433.60, and the petition was dismissed.

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

Issued 3/02/17

OAL DKT. NO. EDU 16381-16
(EDU 04961-16 ON REMAND)
AGENCY DKT. NO. 87-3/16

A.B., ON BEHALF OF MINOR CHILD, T.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that T.B. was not domiciled in Red Bank for the 2014-2015 and 2015-2016 school years, and therefore, was not entitled to a free education in the District.

Pursuant to *N.J.S.A.* 18A:38-1b and *N.J.A.C.* 6A:22-6.3, the Commissioner shall assess tuition against petitioner for the time period during which T.B. was ineligible to attend school in the District. During the 2014-2015 school year, T.B. attended school in the District for sixty days – from March 18, 2015 to June 30, 2016. The tuition assessed for the 2014-2015 school year is $4,533.60 ($75.56[2] per day for sixty days). During the 2015-2016 school year, T.B. attended school in the District for the entire year. The tuition assessed for the 2015-2016 school year is $13,900.00 (annual per pupil cost). Therefore, the total tuition due to the Board

[1] The Commissioner was not provided with a transcript of the August 29, 2016 hearing at the OAL.

[2] The Initial Decision incorrected cited the District's daily tuition cost for the 2014-2015 school year as $75.65. The correct amount is $75.56.

for T.B.'s ineligible attendance in the District during the 2014-2015 and 2015-2016 school years is $18,433.60.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $18,433.60 for tuition costs incurred for the 2014-2015 and 2015-2016 school years, during which time T.B. was ineligible to attend school in Red Bank. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/02/17

Date of Mailing: 3/02/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSING PETITION AND
GRANTING COUNTERCLAIM
FOR TUITION
OAL DKT. NO. EDU16381–16[1]
AGENCY DKT. NO. 87-3/16

A.B.,

Petitioner,

v.

RED BANK REGIONAL HIGH SCHOOL BOARD OF EDUCATION, MONMOUTH COUNTY,

Respondent.

No appearance by or on behalf of **A.B.**, petitioner, pro se

Anthony Sciarrillo, Esq., for respondent (Sciarrillo Cornell Merlino McKeever & Osborne, attorneys)

Record Closed: January 24, 2017 Decided: January 24, 2017

BEFORE **SARAH G. CROWLEY,** ALJ:

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[1] A prior petition was filed under docket number EDU 04961-16.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On February 17, 2016, petitioner was served with a notice of ineligibility for their minor child, T.B. Petitioner opposed the respondent's claim, and after a hearing before the Red Bank School Board, a Final Notice of Ineligibility was sent to petitioner advising that the Board determined that T.B. was ineligible to attend school in the district. On March 21, 2016, petitioner filed an appeal of the Board determination with the Department of Education on April 1, 2016. The New Jersey State Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) as a contested matter. N.J.A.C. 1:1-8.2 and N.J.A.C. 1:1-18.7(a) to ascertain residency of petitioner and tuition due, if any.

After petitioner failed to participate in three separate pre-hearing conference calls, and on August 29, 2016 failed to appear at the scheduled hearing date, the respondent's request to dismiss the petition for failure to appear was granted. After no explanation was provided by petitioner for the failure to appear within the designated time frame under N.J.A.C. 1:1-14.4(a) the initial petition bearing docket number EDU 04961-2016, was dismissed and sent back to the transmitting agency. The matter was remanded by the Commissioner on October 26, 2016, under the above captioned docket number. A hearing was scheduled for November 22, 2016. The petitioner failed to appear for the hearing. A hearing was conducted on November 22, 2016, and testimony was provided by Christina Galvao, the Red Bank Regional Board of Education School Business Administrator with respect to tuition amounts due.

Following the hearing, a letter, which had been addressed to the Director of Bureau of Controversies and Disputes, Kathleen Duncan, was received in this office. Neither the undersigned nor the attorney for the petitioner was copied on this letter dated November 22, 2016. The letter acknowledges receipt of the hearing notice and alleges "health issues" without any further elaboration or excuse for yet another non-appearance. On November 30, 2016, the undersigned wrote to the petitioner and advised that no good cause for the non-appearance was provided and that the petitioner's request to adjourn the matter, "for at least twelve weeks" was denied. The undersigned advised petitioner that notwithstanding the untimeliness of the request and

the failure to provide any good cause for another non-appearance, that petitioner would be afforded an opportunity to present evidence in opposition to the request for tuition reimbursement as well as the determination of ineligibility for T.B. if such a request was made in writing within ten days. No such request was made, and the record closed after submission of a letters from the respondent's attorney regarding tuition reimbursement dated January 16, 2017, and January 23, 2016.

FINDINGS OF FACTS

Based upon the petitioner's failure to provide any opposition and the undisputed testimony of the respondent's witnesses and their documentary evidence, I **FIND** the following as **FACT**:

1. T.B. attended Red Bank Regional High school for the 2014-2015 and the 2015 2016 school years, and did not reside in the district. Notice of ineligibility was sent to the petitioner in February 2016.

2. Tuition for the 2014-2015 school year was $13,600.00.

3. Per day tuition for the 2014-2015 school year was $75.65.

4. T.B. attended school in the district for 60 days in the 2014-2015 school year, from March 18, 2015 through June 30, 2016. Total tuition due for this period is $4,533.60.

5. Tuition for the 2015-2016 school year was $13,900. T.B. attended school for the entire school year.

6. Total tuition due for T.B. is $18,433.60.

LEGAL DISCUSSION AND CONCLUSION

Petitioner has the burden of proof in a determination of residency ineligibility N.J.S.A. 18A:38-1. Petitioner failed to participate in said proceeding and has presented no defense to the claim. The respondent appeared and provided testimony and evidence on the issues of residency and the tuition reimbursement sought.

Accordingly, I **CONCLUDE** that T.B. was ineligible for education in Red Bank and based on T.B.'s enrollment in the district from March 18, 2015 through June 30, 2016, and from November 15, 2015, through June 30, 2016. I further **CONCLUDE,** that respondent is entitled to reimbursement in the amount of $18,433.60, reflecting the per diam tuition for the foregoing time period in accordance with N.J.A.C. 6A:22-6.2.

ORDER

It is hereby **ORDERED** that the petition is hereby **DISMISSED;** and it is further **ORDERED** that respondent's counterclaim for tuition reimbursement in the amount of $18,433.60 is **GRANTED** in all respects.

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

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

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

January 24, 2017
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: January 24, 2017 (emailed)

Date Mailed to Parties: 1/25/17

SGC/mel

APPENDIX

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

Christina Galvo, School Business Administrator

LIST OF EXHIBITS

For Respondent:

R-1 Tuition Rates 2014-2015

R-2 Correspondence dated July 31, 2014

R-3 Tuition Rates 2015-2016

72-17

OAL DKT. NO. EDU 15865-16 AND 16192-16 (CONSOLIDATED)
(EDU 11392-16 ON REMAND)
AGENCY DKT. NO. 204-7/16

M.F. AND J.F., on behalf of minor child, J.F.,	
PETITIONERS,	COMMISSIONER OF EDUCATION
V.	DECISION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	
RESPONDENT.	

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

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

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/09/17

Date of Mailing: 3/09/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
CONSOLIDATED
OAL DKT. NOS. EDU 15865-16 and
EDU 16192-16 (Remand EDU 11392-16)
AGENCY DKT. NOS. 204-7/16

M.F. AND J.F. ON BEHALF OF J.F.,
Petitioners,
v.
MORRIS SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

Thomas A. Cataldo, Esq., for petitioners

Janelle Edwards-Stewart, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: January 18, 2017 Decided: January 25, 2017

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

On or about July 27, 2016, petitioners filed a Petition, along with a motion for emergent relief, with the Commissioner of Education and the Office of Special

Education Programs (OSEP). Petitioners sought an order regarding J.F.'s placement at, and transportation to, the Somerset County Vocational and Technical Schools.

The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on October 11, 2016, under OAL Dkt. No. EDU 15865-16 and assigned to the undersigned. The Department also remanded to Leland McGee, ALJ, the matter that had been the subject of petitioner's emergent relief application, which was filed under OAL Dkt. No. EDU 16192-16 (remand of EDU 11392-16).[1] The OSEP transmitted the companion case, which was filed on August 31, 2016 and docketed under EDS 13135-16.[2] Subsequently, the parties reached an amicable resolution of the matter and forwarded the attached Settlement Agreement and Release on January 18, 2017, and the Board's resolution approving the settlement.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

[1] The Settlement Agreement and Release submitted by the parties resolves both matters. I, therefore, **ORDER** that the matters be and hereby are consolidated.

[2] The Settlement Agreement and Release also resolves the matter docketed under EDS 13135-16 and a separate Final Decision Approving Settlement has been issued on this date.

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

January 25, 2017
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: 1-26-17

JAN 26 2017
Date Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

jb

SETTLEMENT AGREEMENT AND RELEASE

2017 JUL 18 A 10:53

This Settlement Agreement and General Release (this "Agreement") is made and entered into by and between the MORRIS SCHOOL DISTRICT BOARD OF EDUCATION (hereinafter "the Board") and M.F. and J.F. o/b/o J.F. (hereinafter collectively the "Parents"), (collectively with the Board the "parties") for full settlement of claims that were alleged and/or could have been alleged by the Parents.

WITNESSETH:

WHEREAS, the Board operates the Morris School District; and

WHEREAS, J.F. currently resides within the Morris School District; and

WHEREAS, J.F. re-enrolled in the Morris School District for the 2016-17 school year;

WHEREAS, the Parents desired for J.F. to attend an automotive program in a vocational school at Morris' expense; and

WHEREAS, the parties disagree as to which vocational school J.F. may attend; and

WHEREAS, J.F.'s educational placement for the 2016-17 school year has become the subject matter of a Petitions before the New Jersey Office of Administrative Law, bearing Agency Reference Numbers 2017-24975 and 204-7/16 and OAL Docket Nos. EDS 11383-16, EDU 11392-16, EDU 15865-16, EDU 16192-16 (remand of EDU 11392-16), and EDS 13135-16; and

MPF JMF

WHEREAS, the parties desire to resolve their differences and avoid the additional expenses of litigating this dispute.

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, it is hereby agreed by and between the parties as follows:

MPF JMF

1. **Non-Admission By the Board**. This Agreement shall not be construed as an admission by the Board of any of the acts or omissions alleged or those that could have been alleged by the Parents, or of any acts or omissions alleged or which could have been alleged against the Board. The Board specifically denies any liability whatsoever for any damages, injuries or other claims by the Parents or those which were alleged or could be claimed by the Parents, including, but not limited to, the allegation that J.F. is entitled to placement at and transportation to Somerset County Vocational and Technical Schools ("SCVTS").

2. **Placement and Reimbursement**.

A. The Parents represent that they have enrolled J.F. at, and J.F. will attend, SCTVS or an equivalent out-of-county or out-of-district school for the 2016-17 school year at the Parents' sole expense. The Parents anticipate that J.F. will attend SCTVS or an equivalent out-of-county or out-of-district school for the entirety of his high school career and agree that they will assume all education-related costs in connection with J.F.'s attendance at any school outside of the Morris School District. These costs include, but are not limited to, tuition and transportation.

B. The Parents shall be responsible for direct payment of J.F.'s tuition, transportation, and other educational expenses in connection with his attendance at SCTVS or an equivalent out-of-county or out-of-district school for the 2016-17, 2017-18, 2018-19, and 2019-20 school years. The Board shall reimburse the Parents up to ten thousand, one hundred and eighty four dollars ($10,184.00), which represents the current estimated cost of tuition and transportation if J.F. were to attend the two-year automotive program at Morris County Vocational School District ("MCVSD") for the duration of the program. The reimbursement shall occur in installments or lump sum prior to June 2017-18. The Parents accept and agree that

MPF

only those funds expended towards J.F.'s tuition and/or transportation for his attendance at SCTVS or another equivalent out-of-county or out-of-district school may be reimbursed. The reimbursement shall also be conditioned on the Parents' submission of proofs of payment. It is, therefore, agreed that the only bases upon which the Board may deny reimbursement to the Parents are if (1) requisite payment proofs are lacking; (2) the funds sought for reimbursement have not been expended for tuition and/or transportation; or (3) the funds sought for reimbursement exceed the agreed upon maximum of $10,184.00.

E. The Parents understand and acknowledge that in order to receive their reimbursement, each reimbursement request must be approved by the Board at a regularly scheduled Board of Education meeting. When seeking reimbursement, the Parents must submit the proof of payment at least two weeks prior to a regularly scheduled Board of Education meeting. The reimbursement will then be issued within ten (10) days of approval by the Board. A schedule of Board of Education meetings is posted on the District's web site at http://www.morrisschooldistrict.org/.

F. The Parents will ensure that the Board receives proof of J.F.'s school enrollment along with their first reimbursement request. The Parents will also ensure that quarterly reports of J.F.'s regular school attendance are provided to the Board for as long as J.F. attends SCTVS or an equivalent out-of-county or out-of-district school. The Parents' obligation to provide quarterly reports to the Board shall terminate upon their receipt of the maximum reimbursement.

4. **Release**. In exchange for the consideration set forth herein, the Parents release and give up any and all claims and rights they may have against the Board for any damages or injuries in connection with J.F.'s education, including any claim for compensatory

MJF JMF

education, compensatory damages, punitive damages, or any damages or injuries to J.F., arising out of alleged acts or omissions, whether known or unknown, that have taken place through the date of this Agreement. As used in this Agreement, the term "Board" means: the Morris School District Board of Education, its current or former elected or appointed officials, administrators, employees, attorneys, agents, servants, representatives, predecessors and successors, insurance carriers, and all other persons or entities for whom any of the above have been or may be legally responsible. The Parents specifically release the following claims as to the Board:

(a) Any and all claims that were brought and that could have been brought in the Petitions for Due Process, bearing Agency Reference Numbers 2017-24975 bearing Agency Reference Numbers 2017-24975 and 204-7/16 and OAL Docket Nos. EDS 11383-16, EDU 11392-16, EDU 15865-16, EDU 16192-16 (remand of EDU 11392-16), EDS 13135-16, and any other civil or administrative claims that they could assert now, or in the future, resulting from any action or failure to act occurring prior to the time they sign this Agreement, under any provision of any law, common or statutory, of the United States, New Jersey or any other state, city, county, or locality, including but not limited to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* and *N.J.A.C.* 6A:14-1 *et seq.*; and

(b) Any and all available claims for attorney's fees and expert costs, and any other fees and costs, under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. or any other law or regulation.

(c) Any claims for tuition, transportation, or any other cost in connection with J.F.'s future placement at an out-of-county vocational school.

5. **Agreement Not to Sue**. Parents agree not to file any lawsuit or claim against the Board, based on any events, whether known or unknown, occurring prior to the date of the execution of this Agreement, in any court or tribunal of the United States, New Jersey or any other state, city, county, or locality, for any claims released in this Agreement.

6. **Confidentiality**. The parties agree that neither they nor their attorneys, nor representatives shall reveal to anyone, other than their accountant, attorney or as otherwise required by law, verbally or in writing, other than as may be mutually agreed to in writing, any of the terms of this Agreement or any sums payable to the extent permitted by law. The Parents acknowledge that this confidentiality requirement is a material term to this Agreement. The Parents specifically agree that in the event of a discussion regarding this matter with someone other than their accountant, attorney or as otherwise required by law as set forth above, they shall state that only "it was amicably resolved without an admission of liability on either part" or language to this effect.

7. **Non-Domicile**. The Board's obligations under this Agreement shall end immediately, should J.F. cease to be domiciled in Morris Township. The Parents acknowledge that they understand the meaning of the term "domicile."

8. **No Precedent**. The parties agree that this Agreement may not be used to establish precedent in any future proceeding of any type whatsoever involving the Board and that it shall be inadmissible in any proceeding, other than a proceeding to prove the existence of or enforce same. This Agreement shall not be construed as an admission by the Board of any wrongdoing. The parties agree that the Parents are not prevailing parties entitled to recovery of attorneys' fees and costs in connection with this matter.

9. **Who is Bound**. The parties and their agents are bound by this Agreement. Those who succeed to their rights and responsibilities, such as heirs, the executors of their estate, or their personal or legal representatives, are also bound.

10. **Entire Agreement.** This document reflects the entire agreement between the Parents and the Board, and fully supersedes any and all prior agreements and understandings

MPF

between the Parents and the Board pertaining to the subject matter of this Agreement. The Parents represent and acknowledge that they have not relied upon any representation or statement by the Board, or their counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth in this Agreement. No other promises or agreements shall be binding unless in writing, signed by the Parents and the Board, and expressly stated to be a modification of this Agreement.

11. **Representation**. The parties acknowledge that they are fully satisfied with their respective legal representation in this matter and that they have reviewed the terms of this Agreement with their respective counsel. The Parents acknowledge that they have read this Agreement, have had the opportunity to discuss it with counsel and are signing it knowingly and voluntarily.

12. **Interpretation and Construction**. The parties acknowledge that each party has engaged counsel in connection with the negotiation and completion of this Agreement, and, consequently, agree that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party will not be used in the interpretation of this Agreement or any amendment or exhibit hereto.

13. **Board Approval**. This Agreement is subject to Board approval before taking effect. Upon approval by the Board, it will subsequently approve all payments as discussed above.

14. **Signatures**.

Parents

M.F.

Morris School District Board of Education

By: Leonard Posey

MPF

this Agreement, which is not set forth in this Agreement. No other promises or agreements shall be binding unless in writing, signed by the Parents and the Board, and expressly stated to be a modification of this Agreement.

11. **Representation**. The parties acknowledge that they are fully satisfied with their respective legal representation in this matter and that they have reviewed the terms of this Agreement with their respective counsel. The Parents acknowledge that they have read this Agreement, have had the opportunity to discuss it with counsel and are signing it knowingly and voluntarily.

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14. **Signatures**.

Parents

M.F.

Dated: 10/5/2016

Morris School District Board of Education

By: Leonard Posey
Board President

Dated: 10/20/16

Board President

Dated:

Dated:

J.F.

Dated:

Anthony LoFranco,
Business Administrator/Board Secretary

Dated:_____

MPF

J.F.

Dated: 10/5/2016

Anthony LoFranco,
Business Administrator/Board Secretary

Dated: 10/20/16

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF MORRIS SCHOOL DISTRICT, MORRIS COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK.

The Board of Education of Morris School District, in the County of Morris, New Jersey, convened in Regular Session on **Monday September 26, 2016 at 6:30 p.m.** in the Learning Commons of Morristown High School, Morristown, New Jersey.

The following members of the Board of Education were present: **Mrs. Nancy Bangiola, Ms. Lucia Galdi, Dr. Peter Gallerstein, Ms. Prim Minchello, Mrs. Teresa Murphy, Mr. Leonard Posey, Mrs. Ann Rhines, Ms. Jeanette Thomas, Dr. Jennifer van Frank**

The following members of the Board of Education were absent: **Ms. Lisa Pollak**

The following Resolution was offered by **Ms. Bangiola** seconded by **Ms. Thomas** and adopted by the Board of Education by the following roll call vote:

Roll Call:

AYES:	Mrs. Bangiola, Ms. Galdi, Dr. Gallerstein, Ms. Minchello, Mrs. Murphy, Mr. Posey, Mrs. Rhines, Ms. Thomas, Dr. van Frank
NOES:	None
ABSENT:	Ms. Pollak

RESOLVED: ***STIPULATION OF SETTLEMENT***

Motion #7 that, upon the recommendation of the Superintendent, the Board of Education approve the confidential Stipulation of Settlement resolving all claims alleged in an appeal of educational placement for the 2016-2017 filed by student 611196. The Settlement Agreement is on file in the office of the Superintendent.

STATE OF NEW JERSEY)
)ss
COUNTY OF MORRIS)

I, **Anthony Lo Franco, Business Administrator/Board Secretary** of Morris School District, in the County of Morris, State of New Jersey, hereby certify that the foregoing Extract from the Minutes of the Meeting of the Board of Education of said district, duly called and held on **Monday, September 26, 2016,** compared by me with the original Minutes as officially recorded in my office in the Minute Book of said Morris School District Board of Education, and is a true complete copy thereof and of the whole of said original Minutes so far as the same relate to the subject matter referred to in said Extract.

In witness, I have hereunto set my hand and affixed the corporate seal of said Board of Education this **28th day of October 2016**

(Seal)

Business Administrator/Board Secretary

73-17

STATE BOARD OF EXAMINERS DOCKET NO. 1314-208
AGENCY DOCKET NO. 2-5/16A

IN THE MATTER OF THE	:	
CERTIFICATES OF MARY PURCELL	:	COMMISSIONER OF EDUCATION
BY THE STATE BOARD OF	:	DECISION
EXAMINERS.	:	

Order of Suspension by the State Board of Examiners, April 20, 2016

For the Respondent-Appellant, Michael J. Rogers, Esq.

For the Petitioner-Respondent State Board of Examiners, Nicole T. Castiglione, Deputy Attorney General (Christopher S. Porrino, Attorney General of New Jersey)

Appellant challenges the determination of the New Jersey State Board of Examiners (Board) that her actions warranted the suspension of her School Business Administrator and Principal Certificates of Eligibility, her Teacher of Elementary School Certificate of Eligibility with Advanced Standing, and her Teacher of Elementary School and Supervisor certificates for three years.

On appeal, the appellant maintains that the Board's decision to suspend her certificates was arbitrary, capricious and unreasonable. Specifically, appellant contends that her certificates should not be suspended because she was not convicted of a criminal offense; instead, she pled guilty to the motor vehicle offense of driving while intoxicated. Additionally, she successfully completed the Pretrial Intervention Program (PTI), so the criminal charge against her – of assault by auto – was dismissed, and all relating records are now expunged. Appellant emphasizes that the Commissioner should not be permitted to consider any information that is now expunged because the arrest and related proceedings have been deemed

not to have occurred. Further, appellant contends that the incident was in no way related to her teaching profession, and in fact did not even occur while she was employed in a school district. Appellant has also sought treatment for her alcohol use. Appellant maintains that the incident was isolated in nature and did not involve moral turpitude, and a suspension of her certificates will serve no useful purpose. As such, appellant argues that her certificates should not be suspended, or in the alternative, the suspension should be retroactive to the August 24, 2013, the date of the incident.

In reply, the Board maintains that the decision to suspend appellant's certificates for three years was not arbitrary, capricious or unreasonable, and should be affirmed by the Commissioner. The Board points out that actions outside of the classroom are relevant in determining whether a teacher is fit to teach. Further, unbecoming conduct is not dependent on a criminal conviction, but rather on the standards that govern teachers. Relying on two cases in which individuals were found to have engaged in unbecoming conduct after driving while intoxicated and causing accidents and property damage, the Board contends that its finding was not arbitrary, capricious, or unreasonable, as conduct similar to appellant's has previously been found to constitute unbecoming conduct. The Board emphasizes that appellant's unbecoming conduct warrants a three-year suspension of her certificates because individuals who engaged in similar conduct have been subjected to significant penalties, such as suspensions and even revocation. Finally, the Board maintains that appellant's entry into a PTI program does not preclude a finding of unbecoming conduct; she admitted to driving while intoxicated – with a BAC of more than three times the legal limit – and causing a three-car accident that resulted in several injuries.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

Initially, the record reflects that the appellant was afforded the necessary due process throughout the proceedings before the Board prior to the suspension of her certificates. Although the matter was not transmitted to the Office of Administrative Law in accordance with *N.J.A.C.* 6A:9B-4.6(e) as no material facts were in dispute, the appellant was given an opportunity to submit a written brief for the Board's consideration. Appellant did not submit legal argument.

After full consideration of the record and all submissions, the Commissioner concurs with the Board that the appellant engaged in unbecoming conduct. It is undisputed that the appellant drove while intoxicated, caused a three-car accident and injuries to three people, and was accepted into a PTI program after being charged with assault by auto and driving while intoxicated. The Board's determination in connection with the characterization of appellant's behavior as unbecoming conduct is fully supported by the record and consistent with applicable law. *See, e.g., In the Matter of the Tenure Hearing of Dawn Lewis, School District of the City of East Orange, Essex County*, EDU 11406-09, Initial Decision (Feb. 11, 2010), adopted, Commissioner Decision No. 100-10, decided March 26, 2010 (finding that a teacher had engaged in unbecoming conduct after she drove while intoxicated, hit a utility pole, refused to take a breathalyzer test, and was in the possession of a controlled dangerous substance).

Additionally, the Commissioner finds that the record adequately supports the Board's determination that a three-year suspension of appellant's certificates was the appropriate penalty. Given appellant's serious lapse in judgment, but considering that it was an isolated incident and that appellant had successfully completed PTI, the Board determined that only a suspension of her certificates is warranted. Such a penalty is consistent with penalties issued by the Board in similar matters. *See, e.g., Erin Markakis v. New Jersey State Department of Education, Office of Criminal History Review*, Commissioner Decision No. 369-11, dated September 1, 2011 (disqualifying a teacher from school employment after she drove with a BAC of more than twice the legal limit and caused a three-car accident, which resulted to injuries to five people).

The Commissioner does not find appellant's arguments on appeal to be persuasive. Whether or not the incident was connected to appellant's teaching profession is of no moment; disciplinary action may still be taken for conduct that occurs entirely outside of school or involves people entirely unrelated to school operations. *In the Matter of the Tenure Hearing of Randall Dunham, School District of Point Pleasant Borough, Ocean County*, EDU 4937-99, Commissioner Decision No. 124-00, dated April 17, 2000. Additionally, contrary to appellant's contentions, completion of a PTI program does not prevent the Board from suspending appellant's certificates for unbecoming conduct. *See In the Matter of the Tenure Hearing of Thomas Wachendorf, New Jersey State Department of Corrections, Mountainview Youth Correctional Facility*, EDU 6860-04, Initial Decision (May 3, 2005), adopted, Commissioner Decision No. 253-05, dated July 15, 2005 (stating that "completing of a pre-trial intervention (PTI) program – does not automatically eliminate a disciplinary charge of conduct unbecoming"). The Commissioner notes that, although appellant argues against the propriety of

relying on now-expunged information regarding her arrest and related proceedings, appellant has admitted to the actions that form the basis of the unbecoming conduct determination. Although appellant obviously disagrees with the suspension of her certificates, there is nothing in the record to suggest that the Board's decision was arbitrary, capricious or unreasonable, and as a result the Commissioner finds no basis upon which to disturb the decision of the State Board of Examiners.

Accordingly, the decision of the State Board of Examiners is affirmed for the reasons expressed therein.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/09/17

Date of Mailing: 3/09/17

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

75-17

75-17L

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

March 17, 2017

M[redacted] R[redacted]
[redacted]
Trenton, New Jersey 08611

Christopher B. Parton, Esq.
Kenny, Gross, Kovats & Parton
The Courts of Red Bank
130 Maple Avenue, Building 8
Red Bank, New Jersey 07701

Re: *Board of Education of the Township of Hamilton, Mercer County v. M.R., on behalf of minor children, D.R. and D.R., Agency Dkt. No. 45-2/16.*

Dear Parties:

Upon review of the Petition of Appeal filed in connection with the above captioned matter, and based upon the respondent's failure to submit an Answer to the petition that complies with *N.J.A.C.* 6A:3-1.5, I have determined to grant summary decision in favor of petitioner.

On February 22, 2016, petitioner filed a Petition of Appeal pursuant to *N.J.A.C.* 6A:3-8.1 *et seq.*, claiming that minor children D.R. and D.R. were not entitled to attend school in the District from October 21, 2015 to January 29, 2016, in accordance with *N.J.S.A.* 18A:38-1 *et seq.* A copy of the Petition of Appeal was served upon M.R. on February 19, 2016. On February 22, 2016, an acknowledgment of filing was sent to the Respondent, along with a notice that an Answer to the petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

Because M.R. failed to respond to the initial notice, on March 15, 2016, a second notice was sent to M.R. – via certified and regular mail – clearly indicating that, absent receipt of an Answer to the Petition of Appeal within 10 days, each count in the petition would be deemed admitted and this matter may be decided on a summary decision basis pursuant to *N.J.A.C.* 6A:3-1.5(e). Although the copy sent via certified mail was returned indicating that the notice was unclaimed, the notice sent via regular delivery was not returned as undeliverable.

Because M.R. failed to respond to the March 15, 2016 notice, on April 2, 2016, a third notice was sent to M.R. – via certified and regular mail – clearly indicating that, absent receipt of an Answer to the Petition of Appeal within 10 days, each count in the petition would be deemed

admitted and this matter may be decided on a summary decision basis pursuant to *N.J.A.C.* 6A:3-1.5(e). Although the copy sent via certified mail was returned indicating that the notice was unclaimed, the notice sent via regular delivery was not returned as undeliverable.

To date, no Answer has been filed on behalf of M.R. Accordingly, petitioner's claim that D.R. and D.R. were not entitled to attend school in the District in accordance with *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted. It is hereby ordered that M.R. reimburse the petitioner $8,558.48 in tuition costs for D.R. and D.R.'s ineligible attendance in the District from October 21, 2015 to January 29, 2016.[1]

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

KH/MKD/JKH

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

76-17

OAL DKT. NO. EDU 18507-15
AGENCY DKT. NO. 334-10/15

THREE STAGES LEARNING CENTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. According to the Agreement the first settlement payment is due on or before September 5, 2016. This date has preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

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

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/17/17
Date of Mailing: 3/17/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 18507-15
AGENCY DKT. NO. 334-10/15

THREE STAGES LEARNING CENTER,
Petitioner,
v.
BOARD OF EDUCAITON OF THE CITY OF EAST ORANGE, ESSEX COUNTY,
Respondent.

Wolodymyr P. Tyshchenko, Esq., for petitioner (Caruso Smith Picini, attorneys)

Avis Bishop-Thompson, Esq., for respondent (DeCotiis FitzPatrick Cole & Giblin, attorneys)

Record Closed: January 23, 2017 Decided: February 1, 2017

BEFORE **RICHARD McGILL**, ALJ:

Three Stages Learning Center filed a petition with the Commissioner of Education seeking an order reinstating its contract with the Board of Education of the City of East Orange. The matter was transmitted to the Office of Administrative Law on November 17, 2015, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a written Stipulation of Dismissal with Prejudice along with a Settlement Agreement and General Release. Having reviewed the record and the settlement terms, I **FIND** as follows:

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

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

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

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

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

Feb 1, 2017
DATE

RICHARD McGILL, ALJ

Date Received at Agency:

Date Mailed to Parties: FEB 3 2017
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Avis Bishop-Thompson, Esq. – 042132000
DeCotiis, FitzPatrick & Cole, LLP
Glenpointe Centre West
500 Frank W. Burr Blvd.
Teaneck, New Jersey 07666
(201) 928-1100
Attorneys for Respondent,
City of East Orange Board of Education

Three Stages Learning Center, **Petitioner,** **and** **East Orange Board of Education,** **Respondent.**	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DEPARTMENT OF EDUCATION Dkt. No.: EDU 18507-2015N Agency Ref. No.: 334-10/15 **STIPULATION OF DISMISSAL WITH PREJUDICE**

WHEREAS, Petitioner Three Stages Learning Center ("Petitioner) and Respondent City of East Orange Board of Education, Essex County ("Respondent") (together, the "Parties") have entered into a Settlement Agreement and General Release which includes a general release of all of Petitioner's claims in the above-captioned matter.

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED by the Parties and ORDERED, that the Petition filed is herein withdrawn with prejudice and that this matter shall be dismissed with prejudice and on the merits, without costs to either Party.

CARUSO, SMITH, PICINI, P.C.

By: _____
Wolodymyr P. Tyshchenko, Esq.

Date: August 18, 2016

DECOTIIS, FITZPATRICK & COLE, LLP

By: _____
Avis Bishop-Thompson, Esq.

Date: August ___, 2016

So Ordered:

_____
J.S.C.

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (the "Agreement"), is entered into this ____ day of August, 2016, by and between **Three Stages Learning Center, Inc.** ("**Three Stages**") and the **City of East Orange Board of Education, Essex County** (the ("**Board**") (collectively, the "Parties"). For purposes of this Agreement, the term the "Board" shall mean and include the East Orange Board of Education, its elected representatives, agents, employees, insurers and attorneys, and all of their predecessors and successors (all in both their official and individual capacities). The term "Three Stages" shall mean and include any and all of administrators, agents and representatives. This Agreement constitutes the complete and final settlement of any and all disputes arising from or relating to Three Stages early childhood provider agreements with the Board during FY2012-13, FY2014-15 and FY2015-16, and any claims or actions it has brought or could have brought against the Board.

WITNESSETH:

WHEREAS, Three Stages filed an administrative action against the in the Department of Education, entitled Three Stages Learning Center, Inc. v. City of East Orange Board of Education, Essex County, Agency Reference No.: 334-10/15 which was transmitted to the Office of Administrative Law, Docket No. EDU 18507-2015N (the "Administrative Action"); and

WHEREAS, the Parties desire to enter into this Agreement to fully and finally resolve and dismiss with prejudice Three Stages' Administrative Action and to fully and finally settle and resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which Three Stages may have against the Board; and

WHEREAS, Three Stages acknowledges and agrees that by entering into an early childhood provider contract for FY2016-17 and the repayment plan provided for herein is good and sufficient consideration for this Agreement to voluntarily dismiss, waive and withdraw the Administrative Action and any and all claims, complaints, charges, administrative actions and civil actions of any kind against the Board except relating to the enforcement of this Agreement; and

WHEREAS, The Board acknowledges and agrees that the instant agreement including the repayment plan provided herein shall be good and sufficient consideration for the release and waiver of any and all claims, disputes, complaints, and actions of any kind whatsoever that the Board may have against Three Stages;

NOW, THEREFORE, in consideration of the promises and mutual covenants contained in this Agreement, the Parties hereby agree as follows:

1. In consideration for Three Stages' execution of this Agreement and the promises and covenants contained herein, the Board commits to the following:

(a) Subject to ratification by the Board, the Board and Three Stage shall enter into an early childhood provider agreement for the FY2016-17.

(b) The Board commits to a two (2) year repayment plan from Three Stages for an outstanding sum in the amount of $230,887.58. The Board further commits that it will review and consider any additional documentation related to expenditures submitted by Three Stages which may reduce the amount owed to the Board as allowed by N.J.A.C. 6A:13A and the New Jersey Department of Education ("DOE") Division of Early Childhood Education Private Provider Expenditure Guidelines. This Agreement is executed and the Stipulation of Dismissal without Prejudice attached to this Agreement as Exhibit A is signed by the Parties and filed with the Court and (ii) the seven-day revocation period referred to in paragraph 11 has expired.

(c) The Board further agrees to adhere to the protocols set forth in the Corrective Action Plan established in OFAC Case #ECE-008-13. The protocols are as follows:

i. Monitor cash flow and report to Fiscal Specialist, DHS shortfall or changes that negatively impact budget to ensure sufficient DOE funding of all payables in a timely fashion and to determine if additional DOE funds are necessary to compensate provider for reduced income from DHS.

ii. Hold biweekly meetings to ensure good fiscal practices.

2. Three Stages, for the consideration given by the Board as set forth above, which it acknowledges is adequate and satisfactory to it, hereby commits as follows:

(a) Three Stages agrees that by signing this Agreement it agrees to repay the sum of $230,887.58 to the Board in twenty-four (24) monthly installments against Three Stages monthly compensation during the FY2016-17 and FY2017-18. Effective on or before September 5, 2016 Three Stages will pay remit one (1) payment in the amount of $28,860.95, and thereafter no later than the 5th of each month remit twenty-one (21) payments in the amount of $9,620.32. Upon receipt of the final payment, Three Stages accounts will be considered paid in full and closed for FY2012-13. FY2014-15 and FY2015-16.

(b) Three Stages further agrees to adhere to the protocols set forth in the Corrective Action Plan established in OFAC Case #ECE-008-13. The protocols are as follows:

i. Update monthly payables and reestablish monthly payments consisted with DOE monthly allocation.

ii. Monitor cash flow and report to Fiscal Specialist, DHS shortfall or changes that negatively impact budget to ensure sufficient DOE funding of all payables in a timely fashion and to determine if additional DOE funds are necessary to compensate provider for reduced income from DHS.

iii. Perform an annual audit of the fiscal year.

iv. Increase fiscal oversight by Three Stages fiscal consultant.

v. State funds shall not be advanced to employees.

vi. Provide written notification to the Board of any changes in staff within ten (10) days. Substitute teachers cannot remain in classrooms longer than sixty (60) days.

vii. Lynda Wright shall be the primary contact with the Board.

(c) They parties understands that they are releasing any claims they may have to enforce the provisions of this Agreement. This release covers both claims that the parties know about and those it may not know about, except for claims (i) that may arise after the date the parties executes this Agreement for a breach of this Agreement. The parties further agree not to file a lawsuit or administrative claim or demand for arbitration to assert any of the claims it has given up, released or waived. Any substantial or material breach of this Agreement shall entitle the non-breaching party to an injunction to remedy the breach and an award of reasonable attorney's fees, other professional fees, costs and expenses incurred to remedy and defend against said breach. This mutual release will be held in escrow by the Board and shall only be released subsequent to receipt of the final payment from Three Stages.

(d) Three Stages agrees to dismiss with prejudice the Administrative Action. In that regard, Three Stages' Counsel, in accordance with the New Jersey Rules of Administrative Practice, shall, simultaneous with the execution of this Agreement, execute the Stipulation and Order of Dismissal with Prejudice attached to this Agreement as Exhibit A, dismissing the case with prejudice for the reason of the settlement reached by the Parties. It is acknowledged and understood by Three Stages that any and all rights and obligations set forth in this Agreement are conditioned completely and entirely upon the Court's dismissal of the Administrative Action with prejudice.

(e) Three Stages acknowledges and agrees that other than the consideration provided for herein, *i.e.* FY2016-17 early childhood provider contract, it is not entitled to and will not receive any additional compensation or benefits of any kind from the Board and that no representations have been made to its representative, agents or attorneys regarding any such additional compensation or benefits.

3. This Agreement is not and shall not in any way be deemed to constitute an admission or evidence of any wrongdoing or liability on the part of either party nor of any violation of any federal, state or local statute, rule, regulation or principle of common law or equity. Rather, this Agreement constitutes the good faith settlement and release of disputed claims, and it is acknowledged and agreed by the Parties that this Agreement is being entered into by the Parties solely to avoid the burden, expense, delay and uncertainties of further litigation and to fully and finally resolve, settle and dismiss with prejudice, any and all claims of any kind whatsoever, whether known or unknown, which Three Stages or the Board has ever had or now has against the each other arising out of or relating to its contractual relationship with each other as an early childhood provider.

4. This Agreement may not be changed orally and no modification, amendment or waiver of any provision contained in this Agreement, or any future representation, promise or

condition in connection with the subject matter of this Agreement shall be binding upon any party hereto unless made in writing and signed by such party.

5. This Agreement contains the entire agreement and complete settlement between the Parties and supersedes any and all previous agreements of any kind whatsoever between them, whether written or oral. All prior and contemporaneous discussions and negotiations have been and are merged and integrated into, and are superseded by, this Agreement. This is an integrated document.

6. In the event that any provision of this Agreement or the application thereof should be held to be void, voidable, unlawful or, for any reason, unenforceable, the remaining portion shall remain in full force and effect, and, to that end, the provisions of this Agreement are declared to be severable. However, in the event this Agreement is declared severable and severance of a material term or condition is required, this Agreement is null and void and the parties shall endeavor in good faith to reform this Agreement.

7. This Agreement is made and entered into, and shall be subject to, governed by and interpreted in accordance with the laws of the state of New Jersey and shall be fully enforceable in the courts of that state, without regard to principles of conflict of laws. The Parties agree that any suit, action or other legal proceeding arising out of this Agreement shall be brought in Superior Court for the State of New Jersey, County of Essex.

8. Three Stages agree that it is responsible for its own attorneys' fees and costs incurred in connection with the Administrative Action and its claims against the Board and warrant that both Three Stages attorneys waives and release any claims against the Board for attorneys' fees and costs, statutory or otherwise, related in any way to the matters covered by this Agreement, and covenant not to sue or otherwise proceed against the Board with respect to any such claims for attorneys' fees and/or costs. By signing this Agreement, Three Stages affirms that it is waiving and releasing any claims it may have against the Board for attorneys' fees.

9. Three Stages agrees that neither this Agreement nor any portion hereof is assignable.

10. Three Stages' administrators, agents, and representatives certify that they have read the terms of this Agreement, they have been explained to them by an attorney of their choice and that they understands them in full. The execution hereof by Three Stages administrators, agents, and representatives shall indicate that this Agreement conforms to their understanding and is acceptable to them as a final agreement. It is further understood and agreed that Three Stages' administrators, agents. and representatives have been advised of the opportunity to consult with counsel of their choice and that they have been given a reasonable and sufficient period of time in which to consider and return this document. It is further agreed and understood that, upon Three Stages' administrators, agents, and representatives execution and return of this Agreement, Three Stages is thereafter permitted to revoke the Agreement at any time during a period of seven (7) days. To be effective, the revocation must be in writing and hand-delivered or telecopied to counsel for the Board within the seven (7) day period.

WHEREFORE, intending to be legally bound, the Parties have agreed to the aforesaid terms and indicate their agreement by signing below.

AGREED AND ACCEPTED:

THREE STAGES LEARNING CENTER, INC.

Lynda Wright

Lynda Wright

Date: 8/19/2016

EAST ORANGE BOARD OF EDUCATION

Bergson Lenetis, Board ~~President~~

Date: _____

Victor R. Demming

Victor Demming,
Business Administrator/ Board Secretary

Date: 8/25/2016

77-17

OAL DKT. NO. EDU 04962-16
AGENCY DKT. NO. 77-3/16

V.I., on behalf of minor child, K.I.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/17/17

Date of Mailing: 3/17/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 04962-16
AGENCY DKT. NO. 77-3/16

V.I., ON BEHALF OF MINOR CHILD, K.I.,
Petitioner,
v.
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,
Respondent.

Richard J. Kaplow, Esq., for petitioner

Nathanya G. Simon, Esq., for respondent (Schwartz, Simon, Edelstein & Celso, LLC, attorneys)

Record Closed: January 13, 2017 Decided: January 27, 2017

BEFORE LESLIE Z. CELENTANO, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on April 1, 2016, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The attached Settlement Agreement and Board Resolution were submitted on January 13, 2017, indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

January 27, 2017
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency:

2-1-17

Date Mailed to Parties: FEB 1 2017

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SCHWARTZ SIMON
EDELSTEIN & CELSO LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
T: (973) 301-0001; F: (973) 993-3152
Attorneys for Respondent,
Morris Hills Regional School District
Board of Education

V.I. o/b/o minor child K.I., Petitioner, v. MORRIS HILLS REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION. Respondent.	BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION OAL DOCKET NO.: EDU 04962-2016 N AGENCY REF. NO.: 77-3/16 **SETTLEMENT AGREEMENT AND RELEASE**

WHEREAS, Respondent, the Morris Hills Regional Board of Education (hereinafter referred to as the "Board", is a body politic and corporate, organized and existing by virtue of the law of the State of New Jersey, pursuant to N.J.S.A. 18A:11-1, and which is invested with the authority for maintaining and operating the public school district for the Morris Hills Regional School District (hereinafter referred to as the "District"); and

WHEREAS, V.I. (hereafter referred to as "Petitioner") is the parent of K.I., who, at all times relevant herein, has been a high school student attending the Morris Knolls High School, which is operated by the Board; and

WHEREAS, it is the position of the Board that it has fully complied with all of the laws and regulations regarding the investigation and determination of an incident of Harassment, Intimidation and Bullying (hereinafter referred to as "HIB") involving K.I.; and

WHEREAS, it is the position of Petitioner that following the District's HIB investigation, K.I. was wrongfully determined to have engaged in an act of HIB against one or more other students, which K.I. denied and disputed, which resulted in the filing of a Petition of Appeal with the Commissioner of Education (hereinafter referred to as "Commissioner") that was assigned Agency Reference Number 77-3/16 and OAL Docket Number EDU 04962-2016N; and

WHEREAS, the parties are interested in resolving the within matter amicably without further protracted litigation while achieving the goals of both parties;

NOW, THEREFORE, in consideration of the following valuable consideration, both parties agree to settle this matter, subject to the terms and conditions set forth herein, and subject to the approval by the Board as follows:

1. The Board agrees that upon final execution and approval of this Settlement Agreement and Release (hereinafter referred to as "Agreement"), all records pertaining to the underlying HIB incident, including all HIB investigations and charges, shall be removed from K.I.'s school file and secured in a separate file maintained in the Superintendent of School's office where they shall be held until such time as they may be destroyed pursuant to N.J.A.C. 6A:32-7.8. In order to effectuate this process, Petitioner consents to the Principal of the Morris Knolls High School with the Director of Special Services reviewing K.I.'s student records in order to ensure that all of his records in the District pertaining to the underlying HIB incident are placed in the Superintendent of School's office with a notation that it is non-accessible other than as outlined in this Agreement.

2. The parties further agree that, in the event K.I. is accused of an act of HIB at any time from the final execution and approval of this Agreement up to and including December 31, 2016

those documents pertaining to this underlying HIB incident may be used by District personnel in order to assess and determine if there is a pattern of behavior on the part of K.I.

3. As long as K.I. is not found to have committed another act of HIB at any time from the final execution and approval of this Agreement up to and including December 31, 2018: (a) all information/records pertaining to the underlying HIB incident shall not be disclosed to any third party and shall not be forwarded in the event K.I. transfers to another public school district; (b) postsecondary schools (i.e., colleges and universities) will not be provided with information related to the underlying HIB incident; and (c) K.I. can respond "no" to any inquiry made by postsecondary schools as to whether or not he was ever involved in an incident that resulted in a major suspension. Furthermore, any inquiries made to the District as to whether K.I. was involved in an act of HIB shall be forwarded to the Principal of Morris Knolls High School for a proper response in accordance with this Agreement.

4. This Agreement is entered into solely for the purpose of resolving certain issues raised in the underlying Petition of Appeal. Neither the execution, delivery, nor performance of this Agreement shall constitute or be construed at any time or for any purpose to be an admission of liability or wrongdoing by the parties; and the parties further agree that this Agreement shall not be used as evidence in any judicial, administrative, or quasi-judicial proceeding, except to enforce the terms of said Agreement.

5. In consideration for the making of this Agreement and for other consideration provided under the terms herein, Petitioner individually and o/b/o K.I., for himself and his heirs, administrators, beneficiaries, assigns, executors, and attorneys, knowingly, voluntarily and unconditionally releases and forever discharges the Board from any and all rights, claims, causes of action, without limitation, any and all other liabilities of any nature or amount, whether known

or unknown, in law or equity, including but not limited to claims for compensatory damages, punitive damages, any other federal, state, or local, civil or human rights law, rule, regulation or ordinance, any public policy, tort, contract or other common law; or on any other unlawful basis, that he may have or ever had against the Board up until the execution of this Agreement.

6. This Agreement and all of its terms are and will remain confidential to the maximum extent permitted by law. Further, there is a mutual agreement not to disparage the Board, its past and/or present board members, officers, administrators, agents, employees and their successors, nor make any comments, statements or the like to the media or to others that may be considered to be derogatory or detrimental in nature.

7. This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. This Agreement shall not be amended, changed or modified except in a writing signed by all parties. Each party acknowledges that the other party, nor any agent or attorney of the other party, have made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce them to execute the same.

8. This Agreement shall not be amended, modified or revised except by a written instrument duly signed by all of the parties hereto or their respective successors or assigns. No oral statement of any person shall in any manner or degree, modify the terms and provisions of this Agreement.

9. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion, and with the opportunity for the parties to consult with representation of their choosing and at their option. Petitioner has been represented by

Richard J. Kaplow, Esq. and is satisfied with his representation. The Board has been represented by Nathanya G. Simon, Esq., and Stephen M. Bacigalupo, Esq. of Schwartz Simon Edelstein & Celso LLC, and is satisfied with their representation. The parties acknowledge that they understand the contents of this Agreement and that they were given the opportunity to review it with their respective representatives.

10. It is agreed that neither party is a prevailing party for any purpose, and that each party is fully responsible for any and all costs and expenses incurred in this matter, including but not limited to attorneys' fees.

11. This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original and all of which, when taken together, constitute one and the same document. The signature of any party to any counterpart shall be deemed a signature to, and may be appended to, any other counterpart.

12. This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board. This Agreement is without prejudice to either party if the terms are not ratified by the Board. When ratifying this Agreement, the Board shall not identify K.I. or his family and the Board Resolution ratifying this Agreement shall not contain any personally identifying information before or after ratification.

13. This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

14. This Agreement shall be construed in accordance with and governed by the laws of the State of New Jersey without reference to its conflict of laws provisions.

15. This Agreement, once approved by the Board; signed by the Board President; and signed by Petitioner, is final as to all of its terms. The pending Petition of Appeal before the

Commissioner of Education, Agency Reference Number 77-3/16 and OAL Docket Number EDU 04962-2016N, shall be withdrawn with prejudice as a material part of this settlement.

MORRIS HILLS REGIONAL SCHOOL DISTRICT

Dated: 12/19/16

MARK Di GENNARO, Board President

PETITIONER

Dated: 12/5/16

V.I. individually and o/b/o K.I.

STATE OF NEW JERSEY)
SS:
COUNTY OF Morris)

I CERTIFY that on Dec 5, 2016, V.I., Individually and o/b/o K.I., personally came before me and acknowledged under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his act and deed.

ANNEMARIE M. PASCUCCI
Attorney At Law
Notary Public, State of New Jersey
My Commission Expires
November 19, 2019

MORRIS HILLS REGIONAL BOARD OF EDUCATION
RESOLUTION APPROVING SETTLEMENT

BE IT RESOLVED that the Morris Hills Regional Board of Education hereby accepts and approves the negotiated Settlement Agreement and Release (the "Agreement") by and between the parties in the matter entitled V.I. o/b/o K.I. v. Morris Hills Regional School District Board of Education, OAL Docket No. EDU 04962-2016 N; Agency Reference No.: 77-3/16, subject to the terms and conditions set forth therein; and

BE IT FURTHER RESOLVED that the Morris Hills Regional Board of Education authorizes the Board President to execute the Agreement on behalf of the Board; and to take such further steps as may be necessary to effectuate the within settlement and carry out this action of the Board.

78-17

OAL DKT. NO. EDU 14271-16
AGENCY DKT. NO. 188-7/16

A.V., ON BEHALF OF MINOR CHILD, L.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS, BERGEN COUNTY	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the agreement has not been signed on behalf of the Board. Furthermore, the file does not contain a copy of the Board's resolution approving the settlement – as required by *N.J.A.C.* 6A:3-1.13 under these circumstances – nor is the resolution attached to the settlement agreement itself. In the alternative, the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution approving the settlement agreement, the Commissioner cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the settlement agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/17/17

Date of Mailing: 3/17/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 14271-16
AGY REF NO. 188-7/16

A.V. ON BEHALF OF MINOR CHILD L.P.,
Petitioner,
vs.
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS, BERGEN COUNTY,
Respondent.

Jerry L. Tanenbaum, Esq., for Petitioner (Mattleman, Weinroth & Miller, P.C., attorneys)

William C. Soukas, Esq., for Respondent (Nowell, P.A., attorneys)

Record Closed: February 1, 2017 Decided: February 2, 2017

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

Petitioner challenges the Board decisions to suspend her child for possession of a controlled danger substance.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on September 23, 2016.

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

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

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

ORDER

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

It is further **ORDERED** that petitioner's appeal is withdrawn with prejudice.

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

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

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

2/2/17
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: 2-7-17

Date Mailed to Parties: FEB 7 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

NOWELL, P.A.
155 Polifly Road
Hackensack, New Jersey 07601
By: William C. Soukas, Esq. (ID No. 034761994)
(201) 343-5001
Attorneys for Respondent,
Board of Education of the Vocational Schools in the County of Bergen i/p/a Bergen County Specials Services School District, Board of Education

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

MS. ANNA VLADI, ON BEHALF OF HER MINOR DAUGHTER, LEENA PRAKHINA, **Petitioner,** **v.** **THE BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS IN THE COUNTY OF BERGEN,** **Respondent.**	**AGENCY DKT. NO. 188-7/16** **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release ("Agreement") is entered into by and between Ms. Anna Vladi on behalf of her minor daughter, Leena Prakhina (hereinafter "Petitioners" or "Student") and the Board of Education of Vocational Schools in the County of Bergen (hereinafter "District").

WHEREAS the Student has filed a Petition for review with the Commissioner of Education against District, with the Petition bearing Agency Docket No. 188-7/16; and

WHEREAS, the Parties desire to resolve their differences rather than proceeding forward with any further litigation, or incurring any further attendant costs of any litigation as well as any hearing and appeal, and without any admissions of wrongdoing by either Party; and

WHEREAS the parties have consulted with their respective attorneys prior to executing this Agreement and have had an adequate opportunity within which to consider the Agreement; and

WHEREAS, in consideration of the mutual covenants and promises contained herein and intending to be legally bound, the parties mutually agree as follows:

(1) The District shall within 15 days of the date of this Agreement revise the appropriate entry in the District's Powerschool system so that the sole reference therein to the alleged disciplinary infraction in any file or document relating to the Student will state as follows: "The student received a 2 day out-of-school suspension because she admitted to momentary possession of a piece of marijuana brownie handed to her by another student on school premises. No evidence of distribution or use of the substance was found."

(2) The District shall provide Petitioners with a written copy of the revised Powerschool entry within 15 days of the date of this Agreement. The District agrees that in the event that it is contacted by, or receives any request for student records from, any college or post-secondary institution, it shall provide only the statement set forth in Paragraph 1 herein.

(3) Subject to the limitations set forth in this Paragraph, the Petitioners hereby waive release any and all claims they had or may have had against the District on the date of this Settlement Agreement and Release, known or unknown, arising from the beginning of time to the date of this Agreement, under Federal or State statutory or common law. This Release inures to the benefit of, and is binding on, all agents, subsidiaries, successors, heirs or any other related entity of the Parties and shall specifically apply only to claims resulting from the following:

> Any and all claims, demands, damages, etc. that Petitioners asserted or could have asserted against the District in the matter of Anna Vladi o/b/o L.P. v. Board of Education of the Vocational Schools in the County of Bergen filed with the Commissioner of Education and bearing Agency Dkt. No. 188-7/16

(4) Each Party is responsible for their own costs and attorney's fees. Each party waives any and all claims for attorneys' fees, costs and expenses against District which Petitoners or their counsel have/has incurred in connection with this action or in connection with any claim against the District.

(5) The Parties have consulted with counsel with respect to this Settlement Agreement and Release and enter into this Agreement under their free will without duress of any kind.

(6) This Settlement Agreement and Release represents the full understanding of the Parties and supersedes any other written or oral understandings. This Agreement can only be modified by a writing that is executed by both Parties.

(7) This Agreement can be signed in counterparts, with each counterpart having the full force and effect of a fully executed original.

(8) The District warrants that the individual designated to sign this Agreement on behalf of the District has full authority to sign for and bind the District to this Agreement.

(9) Petitioners acknowledge that the settlement of this matter is contingent upon foregoing any litigation relating to this claim and upon the execution, by Petitioner(s), of a Withdrawal of Petition in the form attached herewith as Exhibit "A."

(10) The individuals executing this Agreement represent and warrant that each is authorized to make, execute and deliver this Agreement, that each has been represented by counsel and has been fully apprised of and understands all of the terms of this Agreement and the legal ramifications of the entry into the same.

Execution of this document constitutes agreement with all of the terms and conditions above:

Board of Education of Vocational Schools in the County of Bergen

By: _____ Date: _____

Print name and Title-

Ms. Anna Vladi, O/B/O her minor daughter, Leena Prakhina

_____ Date: 1/4/2016

Anna Vladi

79-17

AGENCY DKT. NO. 207-7/16

S.M., ON BEHALF OF MINOR CHILD, A.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	ORDER
RESPONDENT.	:	

On January 12, 2017, a final agency decision was rendered in this matter, wherein the Commissioner found S.M. liable for tuition in the amount of Three Thousand Five Hundred Twenty Two Dollars and Sixty Cents ($3,522.60), representing tuition for a period of ineligible attendance by her son, A.T., in the Board's school district between September 6, 2016 and November 16, 2016. The Board subsequently notified the Commissioner that S.M. had failed to comply with the decision and it requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. In response to the Board's request, S.M. asserts that the Board should drop its request for tuition because she now lives within the district. She included a copy of her residential lease, car insurance, vehicle registration, and driver's license. As the assessment of tuition has been fully and fairly adjudicated, S.M. can no longer challenge the amount of monies owed. As such, S.M. has offered no reasons that have not been fully and fairly adjudicated as to why the judgment against her should not be so docketed.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Sharon Morris is now subject to entry of a judgment by the court in the amount of $3,522.60, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/17/17

Date of Mailing: 3/17/17

S1-17

C.K. and M.K., on behalf of minor child, M.K.	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES, CAMDEN COUNTY	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents, C.K. and M.K., appealed the decision of the respondent District that their daughter, M.K., was not the victim of Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* Petitioners' allegations stem from an isolated incident in which a special education student – later identified as I.L. – reached under a partition separating two bathroom stalls in the girls' restroom, grabbed M.K.'s leg, and said "high five". The Board contended that this incident did not rise to the level of HIB, and filed a motion for summary decision. The petitioners filed a cross motion for summary decision, contending that the Board failed to: timely investigate and report the incident; timely provide petitioners with information about the investigation; and failed to hold a timely hearing in accordance with *N.J.S.A.* 18A:37-15(b)(6).

The ALJ found, *inter alia*, that: there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; the Act defines HIB as an act that is reasonably perceived as being motivated by an actual or perceived distinguishing characteristic, including race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity, or mental, physical or sensory disability; in the instant case, I.L. – a special needs student – had a habit of indiscriminately seeking out high fives from classmates; there is no evidence to suggest that I.L. knew who M.K. was when she reached under the partition, grabbed M.K.'s leg, and asked her for a high five; and M.K. was not targeted by I.L. based on any perceived characteristic; the Board did not fail to timely investigate or report the incident between I.L. and M.K., or fail to timely provide petitioners with information about the investigation; but the Board did violate the procedural requirements of the Act by failing to hold a hearing within ten days of petitioners' June 26, 2015 request for same; however, no action to remedy this failure is necessary because the Camden County Office of Education (CCOE) conducted a complaint investigation of the matter and issued a report in August 2016 directing the Board to take corrective action in regard to its handling of HIB complaints. The ALJ concluded that the alleged conduct here did not meet the statutory definition of HIB under the Act, and therefore the Board properly concluded that I.L. did not commit an act of HIB against M.K. Accordingly, the ALJ granted the Board's motion for summary decision, and granted the petitioners' motion for summary decision on the issue of the Board's violation of the statutory requirement for a timely hearing, corrective action for which was implemented by the CCOE.

The Commissioner adopted the OAL's Initial Decision with an additional finding that the Board failed to follow its HIB policy when it did not initially investigate this matter in March 2015. However, the remedial measures imposed by the CCOE are appropriate, as the Board's actions did not deprive petitioners or M.K. of their due process rights under the Act. The petition was dismissed with prejudice.

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

Issued 3/23/17

OAL DKT. NO. EDU 20510-10
AGENCY DKT. NO. 353-11/15

C.K. and M.K., on behalf of minor child, M.K.:		
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES, CAMDEN COUNTY	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law ("OAL") have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the parties, and the replies thereto. In this matter, petitioners allege that the Board acted in an arbitrary, capricious and unreasonable manner when it failed to conduct a proper investigation in compliance with the procedures under the Anti-Bullying Bill of Rights Act ("the Act") and determined that M.K. was not subject to harassment, intimidation and bullying ("HIB"). Respondent contends that the Board did not violate the procedural requirements of the Act, and that it conducted a proper investigation of the petitioner's complaint. Respondent further contends that M.K. was not subject to HIB as defined under the Act.

The ALJ found that I.L.'s conduct did not meet the definition of an act of HIB against M.K. Specifically, I.L.'s actions could not reasonably be perceived as being motivated by a distinguishing characteristic of M.K., and that I.L.'s conduct did not have the effect of insulting or demeaning M.K. The ALJ further found that the Board followed all but one procedural requirement of the Act, *i.e.*, the Board failed to hold a hearing within the statutory time period. The ALJ concluded that: the Board properly found that the conduct alleged did not meet the statutory definition of a HIB violation under the Act; the Board violated the Act's

procedural requirement that a Board hearing shall be held within ten days of the petitioner's request; the Board did not violate any other procedural requirements of the Act; and it is not necessary to order the Board to take any other remedial action in this matter because the corrective action directed by the Camden County Office of Education ("CCOE") was appropriate to address the Board's violation.

Petitioners take exception[1] to the ALJ's conclusion that the Board properly found that I.L.'s conduct was not an act of HIB. Petitioners argue that the Anti-Bullying Specialist ("ABS") testified that I.L. was known for touching other students in a similar manner and her conduct was determined to be a violation of the student code of conduct, and therefore, the ALJ erred in concluding that I.L.'s conduct was not an act of HIB. Petitioners also argue that in determining whether there was an act of HIB, the ALJ erred in concluding that only I.L.'s intent and not the impact on M.K., was relevant. Petitioners also take exception to the ALJ's conclusion that the Board violated only one procedural requirement of the Act, and not any other procedural requirements. Specifically, petitioners argue: the HIB complaint was not timely investigated, as commencement and completion were beyond the statutory timeframe; the Board hearing was not timely conducted;[2] the initial failure of the District to conduct an investigation following the parent's reporting of the incident was a violation of the Act; and the investigation was not thorough and complete, because the ABS did not interview I.L. Finally, petitioners disagree with the ALJ's reasoning that the Board should not be ordered to take further remedial action because the CCOE already imposed a corrective action plan. Respondent has filed a reply to petitioner's exceptions, arguing that: the ALJ correctly concluded that the Board did not

[1] Petitioners have submitted sixteen numbered exceptions; however, it is clear from the content of the enumerated exceptions that petitioners have repeated the same objections throughout the document, and represented them as separate objections. Therefore, petitioners' exceptions have been appropriately summarized in this decision.

[2] It is unclear as to why the petitioners included the untimely Board hearing in its exceptions when the ALJ properly found (essentially, agreed with the petitioners) that the Board hearing was held beyond the statutory timeframe.

violate any procedural requirements of the Act; the finding of no HIB was proper as I.L.'s conduct did not meet all the factors required of an act of HIB; and the CCOE's directive to the Board serves as an appropriate remedy for any potential future violations.

Respondent has also filed an exception to the ALJ's decision – specifically, that the ALJ erred in finding that the Board failed to hold a timely hearing. Respondent argues that the parties mutually agreed to hold the Board hearing beyond the ten day time period to accommodate the District as the hearing was requested during summer recess. Respondent notes that the parties agreed to this fact at a hearing, dated October 5, 2016.[3] Petitioners have – *albeit* untimely – filed a reply to the exception, arguing that the parties did not agree on a hearing date beyond the statutory timeframe.

Upon a comprehensive review of the record, the Commissioner is in accord with the ALJ's decision, as modified herein. Specifically, the Commissioner agrees with the ALJ that the Board properly determined that I.L. did not commit an act of HIB against M.K. The Commissioner further agrees that the Board failed to conduct a timely hearing;[4] however, the Commissioner also finds that the Board did not follow its HIB policy when the District initially failed to investigate the matter in March 2015. Finally, the Commissioner agrees that the remedial measures imposed by the CCOE are appropriate, as the Board's actions did not deprive petitioners or M.K. of their due process rights under the Act.

With regard to petitioners' contention that the ALJ erred in concluding that the conduct alleged did not meet the statutory definition of an HIB violation, *N.J.S.A.* 18A:37-14 provides in pertinent part:

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[3] The Commissioner has not been provided a copy of the transcript of the October 5, 2016 hearing.

[4] Nothing in the record supports the Board's argument that the parties mutually agreed to extend the time period for the Board hearing. Although, the logistical quagmire of coordinating a Board hearing within ten days of the request – especially during the summer – can be appreciated, without evidence that the petitioners explicitly agreed to extension of the statutory timeframe, respondent's exception in this matter is without merit.

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is **reasonably perceived as being motivated either by any actual or perceived characteristic**, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic . . . .
>
> (emphasis added).

It appears from petitioners' exceptions that they have completely ignored the threshold requirement outlined in the Act, *i.e.*: the conduct must be "reasonably perceived as being motivated either by any actual or perceived characteristic." In this matter, I.L.'s actions do not satisfy the requirement because there is no evidence in the record that I.L.'s actions – reaching under the bathroom stall and asking M.K. for a "high five" – were motivated by any actual or perceived characteristic of M.K. Notably, I.L. – a special needs student – indiscriminately seeks "high fives" from her peers. I.L.'s actions were certainly not appropriate, but her unfortunate request for a "high five" under the bathroom stall – and any consequential violation of the student code of conduct – simply do not meet the standard for an act of HIB: at minimum, the conduct must be reasonably perceived as motivated by an actual or perceived characteristic. Absence of this factor, alone, is sufficient to render a finding of no HIB. Notwithstanding, the ALJ considered and discussed the remaining factors in her decision and properly concluded that the Board's determination was correct.[5]

Petitioners' exceptions to the ALJ's decision regarding the Board's procedural violations requires brief discussion. Petitioners contend that: the HIB complaint was not timely investigated, as the commencement and completion of the investigation were beyond the

[5] In this regard, petitioners' allegation that the ALJ erroneously concluded "that the intent of the actor (who was not interviewed here) is relevant and not the impact upon the victim as the ALJ makes no analysis as to the impact upon minor plaintiff," is simply inaccurate and without merit. The ALJ did not reach such a conclusion or apply an improper standard. The ALJ appropriately utilized the factors outlined in the Act in her analysis of the HIB matter.

statutory timeframe; the initial failure of the District to conduct an investigation following the parent's reporting of the incident was a violation of the Act; and the investigation was not thorough and complete because the ABS did not interview I.L. It is clear from the record that the District's initial failure to investigate was a result of its misapplication of the "principal's discretion."[6] In this matter, the Board's HIB policy does not provide for the principal to exercise his/her discretion, and therefore, the principal erroneously applied "principal's discretion" and failed to adhere to the Board's policy. The District remedied this mistake when it initiated a timely HIB investigation in May, immediately following receipt of the CCOE's report.[7] During the course of the investigation, however, the ABS neglected to interview I.L.[8] Generally, such an omission would not constitute a thorough and complete investigation of the matter.[9] In ordinary circumstances, an appropriate remedy would be to direct the Board to conduct another investigation anew; however, in this case – where the conduct does not meet the standard for HIB – returning the matter to the District for a renewed investigation would not be in the best interest of the students involved and would be inconsequential, as the outcome would remain the same: I.L.'s conduct was not reasonably perceived as being motivated either by any actual or perceived characteristic.

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[6] Guidance issued by the Department provides that the principal or his/her designee may exercise his/her discretion in determining whether the allegations meet the threshold definition of HIB *before* initiating an investigation. However, whether a principal or his/her designee will initiate an investigation upon receipt of *all* reports of alleged HIB, or will initiate an investigation *only* in those cases where the allegations meet the criteria in the Act, depends on the HIB policy adopted by the local board of education.

[7] The District commenced and completed the HIB investigation pursuant to proper statutory timelines from the date that it received the CCOE's directive to conduct an investigation.

[8] The record reflects that the incident was addressed with I.L., but outside of the HIB investigation process.

[9] There is cause for concern that a determination was made by the ABS, the Superintendent of Schools, and the Board relating to I.L., without the accused being involved in the HIB investigation process or having an opportunity to be heard. The Board's failure to involve I.L. in the investigation process implicates her due process rights as the alleged perpetrator of the HIB.

As such, the corrective action ordered by the CCOE serves as an appropriate remedy to monitor the Board's compliance with the Act and Board policies. Further, going forward, the corrective action ensures that the Board: conducts HIB investigations in accordance with the Board's policy and the Act; initiates and completes investigations in accordance with the provisions of the Act; and safeguards the due process rights of all parties involved.

Accordingly, the recommended decision of the ALJ is adopted – as modified herein – as the final decision, and the petition is hereby dismissed with prejudice.

IT IS SO ORDERED.[10]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/23/17
Date of Mailing: 3/23/17

[10] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 20510-15
AGENCY REF. NO. 353-11/15

C.K. AND M.K. ON BEHALF OF M.K.,
Petitioners,
v.
TOWNSHIP OF VOORHEES
BOARD OF EDUCATION,
CAMDEN COUNTY,
Respondent.

Joseph P. Grimes, Esq., appearing for petitioners

Howard S. Mendelson, Esq., appearing for respondent (Davis & Mendelson, LLC, attorneys)

Record Closed: December 31, 2016 Decided: February 8, 2017

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

The petitioners, C.K. and M.K., on behalf of their minor daughter, M.K., appeal the determination of the respondent Voorhees Township Board of Education (Board)

that their daughter was not subject to "harassment, intimidation or bullying" (HIB) as defined under the Anti-Bullying Bill of Rights Act (ABRA), N.J.S.A. 18A:37-13, et seq., while an eighth-grade student at Voorhees Middle School.

PROCEDURAL HISTORY

On November 16, 2015, the petitioners filed a petition with the Commissioner of Education (Commissioner). Respondents filed a timely answer. On December 21, 2015, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On July 6, 2016, the Board filed a motion for summary decision. On August 11, 2016, the petitioners cross-moved for summary decision, contending that the Board failed to timely investigate and report the incident; failed to timely provide petitioners with information about the investigation; and failed to hold a timely hearing in accordance with N.J.S.A. 18A:37-15(b)(6). The hearing on the motion was held on October 5, 2016, and the matter was continued pending a possible resolution between the parties. They later advised that the matter was not settled.

FACTUAL DISCUSSION

Most of the facts are not in dispute:

1. On an isolated occasion occurring in either December 2014 or on March 1, 2015,[1] a special education student, later identified as I.L., reached under a partition separating two bathroom stalls in the girls' restroom, grabbed M.K.'s leg, and said "high five."[2]

[1] The exact date of the occurrence is in dispute: the petitioners assert that the incident took place on March 1, 2015, while the Board maintains that the incident occurred in December 2014. (Petition, Certification of C.K., ¶ 2; Certification of Diane Young, ¶ 1.) The date is not critical to the disposition of these motions.

[2] It appeared that I.L.'s regularly-assigned aide may have been absent from school that date, and the male aide accompanying her could not enter the restroom with her to supervise.

2. The day after the incident, M.K.'s mother, C.K., reported the incident to the vice principal of the middle school and also met with the principal of the school, Dr. Robert Rossi, to request an HIB investigation of the incident. (C.K. Cert., ¶¶ 3–5.) Under the Board's HIB policy, "[t]he Board requires a thorough and complete investigation to be conducted for each report of violations and complaints which either identify harassment, intimidation, or bullying or describe behaviors that indicate harassment, intimidation, or bullying." (Board Policy No. 5512, Section G.) According to C.K., her daughter was "upset and intimidated by the incident," but "Dr. Rossi advised that due to the student being a 'special needs' student, that 'extenuating circumstances' did not justify a[n] HIB investigation." (C.K. Cert., ¶¶ 5–6.)

3. Subsequently, C.K. contacted superintendent Raymond Brosel to request an investigation of the incident and appeared before the Board at its March 18, 2015, meeting to request the same. (Id. at ¶¶ 8–11.) Despite C.K.'s requests, no formal investigation was conducted. (Id. at ¶¶ 12–15.) Then, on April 13, 2015, C.K. reached out to the Department of Education's Camden County Office of Education (CCOE) to report the lack of an investigation. (Id. at ¶ 16.)

4. On May 6, 2015, a CCOE education specialist, Dr. Lovell Pugh-Bassett, emailed the Board's assistant superintendent, Diane Young. Dr. Pugh-Bassett wrote,

> [a]s a matter of record and in an effort to protect the district, the department is asking that the district conduct an HIB investigation into the incident with which [C.K.] is complaining. Please follow the appropriate protocols in investigating the situation and should the parent decide that she does not want her child interviewed, please identify it as a matter of record.
>
> [Young Cert., Ex. C.]

5. On May 7, 2015, an anti-bullying specialist for the middle school, Lawrence Osborne, completed his investigation of the incident and issued a report to Dr. Rossi. (Id. at Ex. B & Ex. D.) As part of his investigation, Mr. Osborne interviewed M.K. (Id. at Ex. B.) According to Mr. Osborne's summary of that interview,

> [w]hile [M.K. was in a bathroom stall], a special needs girl reached under the stall wall (the special needs girl was in the adjacent stall), grabbed her leg and said "high five." [M.K.] was able to shake her leg to break the hold this girl had on her leg. [M.K.] then left the restroom without any further incidents. [M.K.] expressed she felt "uncomfortable" about this encounter.
>
> [Ibid.]

6. According to Mr. Osborne's report, "[M.K.] did not know the name of this student." (Ibid.) While it is unclear from the report how I.L. was identified, the report, in fact, identifies I.L. as the accused. However, Mr. Osborne did not interview I.L. as part of his investigation. (Ibid.)

7. Mr. Osborne concluded that I.L. did not commit an act of HIB as defined by the ABRA. (Id. at Ex. D.) On May 8, 2015, Dr. Rossi signed and forwarded the report to Superintendent Brosel, who reported the results of the investigation to the Board at its next meeting on June 15, 2015. (Ibid.; Petition, Ex. 7.)

8. On or about June 21, 2015, the petitioners received a copy of the HIB report and on June 26, 2015, requested a hearing before the Board. (C.K. Cert., ¶ 30.) On July 30, 2015, the Board held a hearing on the incident. (Id. at ¶ 35.) According to petitioners, Mr. Osborne testified at the hearing that "he knew [I.L.] very well and touching others was the usual behavior for this child." (Id. at ¶ 41.)

9. On August 26, 2015, the Board met and determined that I.L. did not commit an act of HIB against M.K. (Young Cert., Ex. F.)

10. On November 24, 2015, petitioners filed an appeal with the Commissioner of Education challenging the Board's decision as arbitrary and capricious and alleging that the Board failed to timely investigate the incident and failed to satisfy other procedural requirements under the ABRA.

11. On December 21, 2015, the Commissioner received an answer from the Board and transmitted the matter to the OAL as a contested case. (Id. at Ex. G.)

CCOE Report

12. On August 4, 2016, the CCOE issued a Complaint Investigation Report in accordance with N.J.S.A. 18A:37-25.[3] (Petitioners' Reply Brief, Ex. 1.) In the report, the CCOE noted that, on July 21, 2015, petitioners filed a complaint regarding the adequacy of the Board's response to the alleged HIB incident. (Ibid.) As part of the CCOE's investigation, the Board provided a copy of its HIB policy and documentation regarding the Board's response to the incident. (Ibid.) According to the report, "[t]he district indicated that when the initial complaint was made (sometime between September and December 2014), M.K. was unable to identify [I.L.]" and that, as a result, "the district was unable to perform any formal investigation." (Ibid.) The report further stated that at its March 18, 2015, meeting, the Board "for the first time, ascertained the name of the student

[3] Under N.J.S.A. 18A:37-25,

> [t]he Commissioner of Education shall establish a formal protocol pursuant to which the office of the executive county superintendent of schools shall investigate a complaint that documents an allegation of a violation of P.L.2002, c.83 (C.18A:37-13 et seq.) by a school district located within the county, when the complaint has not been adequately addressed on the local level. The office of the executive county superintendent shall report its findings, and if appropriate, issue an order for the school district to develop and implement corrective actions that are specific to the facts of the case.

involved in the incident based on the information reported by the complainants (the child is known for giving/asking for '[high] fives' which is similar to what occurred in the lavatory)." (Ibid.)

13. The CCOE determined that there was a lack of information regarding the date of the incident or the date on which petitioners first reported the incident to the middle school; that the Board initiated an investigation into the incident upon the CCOE's recommendation; and, that the investigation "followed the district's HIB policies and procedures which are consistent with the [ABRA]," but that "the district did not adhere to the timeline to provide a hearing with the BOE within ten (10) days as required by the [ABRA]." (Ibid.)

14. As a result of the CCOE's investigation, the executive county superintendent ordered the Board to "ensure that a prompt HIB investigation is initiated and conducted at any point that it is reported to the school principal regardless if an offender has been identified" and to "submit its policy regarding HIB investigations to the county office for review to confirm that a procedure for reporting and a prompt investigation is included in the policy." (Ibid.) The county superintendent also ordered the Board to hold timely hearings in accordance with the ABRA and to send the CCOE documentation of its adherence to this requirement "for the next five (5) incidences of HIB investigated by the district with which a hearing is requested." (Ibid.)

LEGAL DISCUSSION

Cross-Motions for Summary Decision

The parties have filed cross-motions for summary decision regarding the Board's HIB decision and its compliance with the procedural requirements of the ABRA. The Board contends that it properly determined that no HIB had occurred; the petitioners contend that the Board failed to timely investigate and report the incident between I.L.

and M.K., failed to timely provide petitioners with information about the investigation, and failed to hold a timely hearing in accordance with N.J.S.A. 18A:37-15(b)(6).

The ABRA is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises." N.J.S.A. 18A:37-13.1(f). Under the ABRA, "harassment, intimidation or bullying" (HIB) is defined as:

> any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14 (emphasis added).]

As such, an incident must satisfy three separate elements in order to meet the definition of HIB under the ABRA.

Each school district must adopt an HIB policy that meets minimum statutory requirements, but generally has "control over the content of the policy." N.J.S.A. 18A:37-15(a) and (b). The statutory requirements for an HIB policy include "a procedure for prompt investigation of reports of violations and complaints." N.J.S.A. 18A:37-15(b)(6).

Under this procedure, "the investigation shall be initiated by the principal or the principal's designee within one school day of the report of the incident and shall be conducted by a school anti-bullying specialist," and "[t]he investigation shall be completed as soon as possible, but not later than 10 school days from the date of the written report of the incident of [HIB]." N.J.S.A. 18A:37-15(b)(6)(a). The results of the investigation shall then be quickly reported to the superintendent who, in turn, shall report the results to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." N.J.S.A. 18A:37-15(b)(6)(b) and (c).

Within five days of the board's receipt of the report, the parents of the students involved in any alleged HIB incident are entitled to receive information about the nature and result of the investigation. N.J.S.A. 18A:37-15(b)(6)(d). Upon receipt of this information, the parents may request a hearing before the board, and the hearing must be held within ten days of the request. Ibid. The board must issue a decision at the first meeting after its receipt of the investigation report. N.J.S.A. 18A:37-15(b)(6)(e). The board may affirm, reject, or modify the superintendent's decision. Ibid. The board's decision may be appealed to the Commissioner. Ibid.

An action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Thus, in order to prevail, those challenging an HIB decision made by a board of education "must demonstrate that the Board acted in bad faith, or in utter

disregard of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014), (citation omitted), adopted, Comm'r (April 10, 2014), <www.njlaw.rutgers.edu/collections/oal/>. Also, a board's decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, Comm'r (April 25, 2013), <http://njlaw.rutgers.edu/collections/oal/>.

Standards for Motions for Summary Decision

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, which govern the conduct of contested cases before the OAL, a party may file a motion for summary decision on substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion "shall be served with briefs and with or without supporting affidavits." N.J.A.C. 1:1-12.5(b). A party's motion may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Ibid.

I. Did the Board properly determine that I.L. did not commit an act of HIB against M.K?

The ABRA defines HIB in pertinent part as a "physical act . . . whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property." N.J.S.A. 18A:37-14. A review of administrative decisions confirms that an incident does not constitute an act of HIB unless reasonably perceived as being motivated by a distinguishing characteristic.

In R.G.B. v. Ridgewood Board of Education, EDU 14213-12, Initial Decision (May 15, 2013), adopted, Comm'r (June 24, 2013), <www.njlaw.rutgers.edu/collections/oal/>, an ALJ concluded, and the Commissioner agreed, that a male student calling a female student "'horse,' 'a horse,' 'fat,' and/or 'fat ass' . . . can be reasonably perceived as being motivated by her perceived distinguishing characteristics of appearance and body type." However, in J.A.H. ex rel. C.H. v. Township of Pittsgrove Board of Education, EDU 10826-12, Initial Decision (March 11, 2013), adopted, Comm'r (April 25, 2013), <http://njlaw.rutgers.edu/collections/oal/>, the school board's finding that an incident in which one student stuffed a crumbled piece of paper down the shirt of another student constituted bullying was overturned because the incident was merely a prank that was part of an ongoing, mutual conflict between the two boys and not improperly motivated by a distinguishing characteristic.

Here, as in J.A.H. but unlike in R.G.B., I.L.'s actions cannot reasonably be perceived as being motivated by a distinguishing characteristic of M.K. Instead, the facts presented indicated that I.L. had a habit of indiscriminately seeking out high fives from classmates and that, on this occasion, she was not improperly motivated when making physical contact with M.K. and asking her for a high five. The papers show that M.K. did not know I.L.'s name at the time of the incident and there was no suggestion that I.L. knew who M.K. was when she reached under the partition, grabbed M.K.'s leg, and asked her for a high five. M.K. was not targeted by I.L. based on any personal characteristic. Since the incident between I.L. and M.K. did not meet the first definitional requirement under N.J.S.A. 18A:37-14, the Board properly concluded that I.L. did not commit an act of HIB against M.K. Still, a review of the other definitional elements as applied to the circumstances of this matter would be appropriate.

In addition to giving rise to a reasonable perception of improper motivation, an act of HIB is one that "a reasonable person should know, under the circumstances, will have the effect of . . . placing a student in reasonable fear of physical or emotional harm to his person." N.J.S.A. 18A:37-14. Here, I.L.'s actions satisfy this element of HIB. A reasonable person should know that suddenly grabbing a classmate's leg while she sits on the toilet will place the student in reasonable fear of physical or emotional harm. To be sure, I.L. did not grab M.K.'s leg and demand her lunch money; instead, I.L. followed

the leg grab with a request for a high five, which could also be construed as inviting friendly good-fellowship. Nonetheless, by first grabbing M.K.'s leg while she sat on the toilet, I.L.'s actions satisfied the second statutory element of an act of HIB.

Finally, however, the incident between I.L. and M.K. did not have "the effect of insulting or demeaning" M.K., nor did it create a hostile educational environment for M.K. According to M.K.'s own account of the incident, I.L.'s actions made her "uncomfortable." There is no evidence that M.K. was insulted or demeaned by I.L.'s actions or that I.L. created a hostile educational environment for M.K.

Special education students are not exempt from liability under the ABRA. However, in this instance, the conduct of I.L. did not fit within the definition of an act of HIB against M.K., as the Board properly found. The petitioners have failed to affirmatively demonstrate that the Board's HIB determination was arbitrary, capricious, or unreasonable. On the contrary, the papers show that there was no genuine issue of material fact with respect to whether I.L. committed an act of HIB against M.K., and that the Board properly concluded that the incident between I.L. and M.K. did not meet the statutory definition of HIB.

II. Did the Board follow the procedural requirements of the ABRA with respect to the incident between I.L. and M.K.?

While the Board did not fail to timely investigate or report the incident between I.L. and M.K. or fail to timely provide petitioners with information about the investigation, the Board violated the procedural requirements of the ABRA by failing to hold a hearing within ten days of petitioners' request for a hearing. First, the Board did not fail to timely investigate or report the incident up the chain of command. There are conflicting accounts of not only the date of the incident, but also of Dr. Rossi's initial decision to not investigate the incident. In their briefs, the parties agree that Dr. Rossi decided the day after the incident that the circumstances did not warrant an HIB investigation, yet the CCOE found that "[a]s a result of M.K.'s failure to identify the student, the district was unable to perform any formal investigation." However, since petitioners allege here that "[o]n the day after the incident . . . Dr. Rossi advised that due to the student being a

'special needs' student, that 'extenuating circumstances' did not justify a[n] HIB investigation," the Board's actions should be adjudged accordingly.

A school district's investigation procedure must meet the minimum requirements under N.J.S.A. 18A:37-15(b), but school districts "shall have local control over the content of the policy." For instance, as noted in informal guidance issued by the Department of Education, "[w]hether a principal . . . will initiate an investigation upon receipt of all reports of alleged HIB, or will initiate an investigation only in those cases where he/she determines that the allegations meet the threshold definition of HIB, will depend on the HIB policy adopted by the BOE." Department of Education, Anti-Bullying Bill of Rights Act: Questions and Answers (November 2015), at 3, available at <www.state.nj.us/education/students/safety/behavior/hib>.

Under the Board's HIB policy, "[t]he Board requires a thorough and complete investigation to be conducted for each report of violations and complaints which either identify harassment, intimidation, or bullying or describe behaviors that indicate harassment, intimidation, or bullying." Board Policy No. 5512, Section G. If, as petitioners allege, "[o]n the day after the incident . . . Dr. Rossi advised that due to the student being a 'special needs' student, that 'extenuating circumstances' did not justify a[n] HIB investigation," then Dr. Rossi reasonably concluded that an HIB investigation was not necessary under the Board's policy because C.K.'s complaint did not identify HIB or describe behaviors that indicated HIB. Thus, the Board did not fail to timely investigate the incident in accordance with N.J.S.A. 18A:37-15(b)(6) or otherwise violate the procedural requirements under the ABRA once Dr. Rossi decided not to investigate the incident.

The Board ultimately investigated the incident in May 2015, but only because the CCOE asked the Board to do so "[a]s a matter of record and in an effort to protect the district." The Board's cooperation with the CCOE's request does not alter the conclusion that Dr. Rossi appropriately determined that an HIB investigation was not required when the incident was first reported.

Nonetheless, once the Board initiated an investigation, the Board was under an obligation to follow the minimum requirements for an investigation procedure under N.J.S.A. 18A:37-15(b)(6). Thus, the question becomes whether the Board failed to timely provide petitioners with information about the investigation or failed to hold a timely hearing after the investigation was complete.

On the former issue, the Board did not fail to timely provide petitioners with information about the investigation. Under the ABRA, "[t]his information shall be provided in writing within 5 school days after the results of the investigation are reported to the board." N.J.S.A. 18A:37-15(b)(6)(d). The superintendent reported the investigation results to the Board on June 15, 2015, which was a Monday, and petitioners allege that they received the required information "on or about June 21, 2015." Since June 21, 2015, was a Sunday, petitioners most likely did not get the information on that day, but as alleged, petitioners have failed to show that they did not receive the information within five school days because the fifth school day would have been June 22, 2015.

However, the Board did fail to hold a timely hearing in accordance with N.J.S.A. 18A:37-15(b)(6)(d), under which "[a] parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request." Petitioners asked for a hearing on June 26, 2015, but the Board did not hold a hearing until July 30, 2015. Therefore, the Board failed to hold a hearing within ten days of petitioners' request.

In light of the above, the Board violated the statutory requirement for a timely hearing, but the Board did not violate any other procedural requirements under the ABRA.

While the ABRA does not explicitly provide for remedies upon a successful appeal of a school board's HIB investigation or decision to the Commissioner, the Commissioner has ordered school districts who have violated the ABRA to comply with the statutory requirements, see, e.g., T.R. & T.R. ex rel. E.R. v. Bd. of Educ. of the Bridgewater-Raritan Reg'l Sch. Dist., EDU 10208-13 (September 25, 2014), adopted,

Comm'r (November 10, 2014), aff'd on reconsideration, Comm'r (May 6, 2015), <http://njlaw.rutgers.edu/collections/oal/> (ordering school district that improperly found that a male student who sexually harassed a female student did not commit acts of HIB "to comply with all reporting and other statutory and regulatory requirements applicable to the substantiation of an incident of HIB"). And, as seen here, when a county superintendent separately finds that a school district violated the ABRA, he or she may "issue an order for the school district to develop and implement corrective actions that are specific to the facts of the case." N.J.S.A. 18A:37-25.

In this case, the CCOE found that the Board did not hold a timely hearing in accordance with N.J.S.A. 18A:37-15(b)(6)(d) and ordered the Board to hold timely hearings in accordance with the ABRA and to document the timeliness of its hearings "for the next five (5) incidences of HIB investigated by the district with which a hearing is requested." Thus, while the Board violated the time requirements for a hearing, the Board has already been ordered by the CCOE to remedy this violation.

CONCLUSION

In conclusion, the Board properly found that the conduct alleged in this case did not meet the statutory definition of an HIB violation. The Board did violate the requirement that it hold a hearing within ten days of the petitioners' request; however, the Board did not violate any other procedural requirements of the ABRA.

ORDER

For the reasons set forth above, the Board's motion for summary decision that it properly determined that the incident between I.L. and M.K. did not meet the statutory definition of HIB is **GRANTED**. The petitioners' motion for summary decision that the Board violated the statutory requirement for a timely hearing is **GRANTED**,[4] but the petitioners' motion for summary decision that the Board violated any other procedural requirements under the ABRA is **DENIED**.

[4] No other action is required given the CCOE's corrective action to the Board.

The Board is not hereby ordered to take corrective action because the Camden County Office of Education has already ordered the Board to remedy this violation and it has implemented a corrective action plan.

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

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

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

February 8, 2017
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: February 8, 2017

Date Mailed to Parties: February 8, 2017

/cb

APPENDIX

WITNESSES

For petitioner

None

For respondent

None

EXHIBITS

For petitioner

Brief

For respondent

Brief

82-17

OAL DKT. NO. EDU 08350-16
AGENCY DKT. NO. 143-5/16

P.R., ON BEHALF OF MINOR CHILD, A.R.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/23/17

Date of Mailing: 3/23/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08350-16

AGENCY DKT. NO. 143-5/16

P.R. ON BEHALF OF MINOR

CHILD A.R.,

Petitioner,

v.

BOARD OF EDUCATION OF EWING,

MERCER COUNTY.

Respondent.

P.R., petitioner, pro se

Joseph L. Rossell, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: February 3, 2017 Decided: February 6, 2017

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

This matter was transmitted to the Office of Administrative Law on June 6, 2016, 2016, for determination as a contested case, pursuant to N.J.A.C. 1:1-8.2, N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13

The parties have agreed to a settlement and have executed a Settlement and Release (J-1), as well as the Board Resolution (J-2) both of which are attached hereto.

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

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

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

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

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

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

February 6, 2017
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 2/8/17

Date Mailed to Parties: 2/8/17

/lam

LIST OF EXHIBITS

J-1 Settlement Release

J-2 Board Resolution

JT-1

RECEIVED
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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SCHENCK, PRICE, SMITH & KING, LLP
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Attorneys for Respondent
Ewing Board of Education

P.R., o/b/o minor child A.R., Petitioner, v. BOARD OF EDUCATION OF EWING TOWNSHIP, MERCER COUNTY, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OAL Dkt. No. EDU 8350-16S Agency Ref. No. 143-5/16 **SETTLEMENT AND RELEASE**

This Agreement is made by and between Petitioner, Perry Rhodes, and the Respondent, Ewing Board of Education ("Board").

RECITALS

WHEREAS, in or about April of 2016, Respondent Ewing Board of Education determined, based on the results of a residency investigation, that minor student A.R. was not domiciled in the Ewing School District ("District") and thus not entitled to a free, public education in the District and passed a resolution ordering the removal of the student from the District; and

WHEREAS, Petitioner thereafter commenced an administrative action to challenge the Board's residency determination with regard to A.R.; and

WHEREAS, this administrative action is captioned P.R. o/b/o A.R. v. the Ewing Board of Education, and is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 8350-16S, Agency Dkt. No. 143-5/16

("the Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, in order to avoid the expense, inconvenience, distractions and inherent uncertainties associated with continuation of this dispute, and the fees and expenses that inevitably would result therefrom, the Parties, by this Agreement, herein agree to adopt a full and final settlement of any and all claims, lawsuits, complaints, and/or disputes between Petitioner and Respondent in connection with any and all damages and losses arising from the Litigation; and

WHEREAS, by this Agreement, Petitioner will voluntarily dismiss the Litigation with prejudice, without costs to any party as against the other;

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. The Parties mutually agree that, during the pendency of the residency investigation, A.R. was found by the Board not to be domiciled in Ewing, but rather, in Trenton, New Jersey.
2. Petitioner shall pay the Board the sum of One Thousand Dollars ($1,000.00), representing back tuition due and owing for the period of A.R.'s ineligible attendance in the District during the 2015-2016 school year, which shall constitute a full and final settlement of the claim for back tuition asserted against Petitioner by Respondent Board of Education in the Litigation.
3. The amount of $1,000 is to be paid as follows: Within fifteen (15) days after approval of the Agreement by the Administrative Law Judge and Commissioner of Education, or

after adoption by the Board of Education of a resolution accepting this Agreement, whichever is later, Petitioner shall make an initial payment in the amount of One Hundred Dollars ($100.00), in the form of a check made payable to the "Ewing Board of Education," hand-delivered or mailed to the office of Dennis Nettleton, School Business Administrator/Board Secretary, at the District Administration office, 2099 Pennington Road, Ewing, New Jersey 08618. The remaining amount of $900.00 shall be paid in nine (9) subsequent equal monthly installments of One Hundred Dollars ($100.00) each, until the full amount has been satisfied. Nothing herein shall prevent Petitioner from paying a greater amount than the monthly payment amount, provided that at least the minimum payment of $100.00 is received monthly..

4. Each installment payment is due on the first (1st) day of each Month at the office of the School Business Administrator at the above address, beginning in the month following that in which the initial payment was made. Payments received by the School Business Administrator after the 30th day following the payment due date shall incur a late fee of $25.00. Any payment and late fee not received by the 15th of the then-following month shall constitute a default by Petitioner and a breach of this Agreement. Petitioner will receive receipts for each payment from the School Business Administrator.
5. Petitioner, in consideration of this Stipulation of Settlement and Release, and in full, final, and complete settlement of the matter, hereby agrees to a withdrawal and/or dismissal, with prejudice, of their Petition of Appeal in this matter.
6. Petitioner further understands and agrees that, if he fails to make a payment in accordance with this Agreement, the entire remaining unpaid amount shall immediately become due and owing, payable in a single lump sum.

7. Petitioner further agrees to indemnify Respondent for any and all costs, including court costs and attorneys fees, associated with any action instituted by Respondent to enforce the terms of this Agreement should Petitioner breach the Agreement and/or fail to adhere to the agreed-upon payment plan.

8. The terms of this Agreement shall in no way constitute acceptance or assent by the Board that A.R., nor any other child of Petitioner, as may be applicable, is automatically entitled to a free public education in the District at any point in the future, and the Parties understand and agree that Respondent reserves the right to investigate A.R.'s and/or Petitioner's residency status in the District at any time should A.R. be reenrolled in the District or it otherwise becomes necessary to do so, in order to determine whether or not Petitioner and/or his child(ren) remain domiciled in the District.

9. This Agreement is subject to approval by the Ewing Board of Education. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

10. In exchange for the above consideration, Respondent Ewing Board of Education agrees to release Petitioner from any and all claims, cross-claims, counterclaims, demands, liabilities, damages, indebtedness, costs, attorneys' fees, actions or obligations of any nature, which solely arise out of or are related in any way to this Litigation, through the date of this Agreement and agrees to the withdrawal/dismissal of any counter-claim for tuition payments, through the date of this Agreement.

11. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

13. Petitioner hereby represents that he is freely entering into this Agreement, that he was advised of his right to obtain counsel of his choosing and has knowingly waived that requirement, and that he has read and fully understand the contents and effects of this Agreement.

14. This Settlement may be subject to the approval of the Office of Administrative Law and the Commissioner of Education. In the event that such approval is necessary, the terms of this Agreement shall not be binding until said approvals are received.

15. This Agreement shall be binding upon all parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors, predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, shareholders, members, employees, agents and assigns.

16. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than those set forth herein. This Agreement supersedes all previous arrangements or understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioner and Respondent.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, consisting of six pages, effective on the day and year first above written.

PETITIONER

Date: 11/20/16

Perry Rhodes, Petitioner

FOR RESPONDENT,
EWING BOARD OF EDUCATION

Date: 1-31-2017

,Board President

5C-2

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THE EWING PUBLIC SCHOOLS

CERTIFIED BOARD RESOLUTION
RESOLUTION #: 01.30.17 – I - 8

I, Dennis J. Nettleton, CPA, RSBA, SFO, Board Secretary to the Ewing Township Board of Education, hereby certify that this is a true and exact copy of the Resolution adopted at the regularly scheduled Board of Education meeting held on January 30, 2017 in the Parkway Elementary School Media Center.

RESOLUTION # 01.30.17 – I-8:

RESOLVED that the Board of Education approve the settlement agreement in the matter captioned P.R. o/b/o A. R.

Member	Motion	2nd	Yeas	Nays	Abstentions	Absent
Mr. White			✔			
Mr. Bradley			✔			
Ms. Benedetti	✔		✔			
Mr. Ewell			✔			
Mr. Messina			✔			
Ms. McConnell		✔	✔			
Mr. Benedetti			✔			
Mrs. McKeon			✔			
Mrs. Staub						✔
MOTION CARRIED						

Dennis J. Nettleton, *CPA, RSBA, SFO*
School Business Administrator/Board Secretary

01/31/17
Date

SEAL

THE EWING
PUBLIC SCHOOLS

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Agenda Item Details

Meeting	Jan 30, 2017 - Regular Board Meeting
Category	I. Superintendent Recommendations - Finance & Operations
Subject	8. Approval of Settlement Agreement
Access	Public
Type	Action
Recommended Action	Resolved that the Board of Education approves the settlement agreement in the matter captioned P.R. o/b/o A.R.

Public Content

RESOLVED, that the Board of Education approves the settlement in the matter captioned P.R. o/b/o A.R. v. Ewing Board of Education, OAL Dkt. No. EDU 8350-16S, Agency Dkt. No. 143-5/16, in accordance with the terms and conditions therein; and

BE IT FURTHER RESOLVED, that the Board President is authorized to sign the agreement on behalf of the Board.

Administrative Content

Contact Person: Dennis J. Nettleton, CPA, RSBA, SFO, School Business Administrator/Board Secretary

Fiscal Impact: None

Executive Content

Rhodes Settlement (01729600).pdf (349 KB)

83-17R

83-17

OAL DKT. NO. EDU 8518-16
(EDU 13585-15 ON REMAND)
AGENCY DKT. NO. 186-7/15

WINSLOW TOWNSHIP EDUCATION ASSOCIATION, on behalf of its members, ERIKA MURPHY and MARY KENNEDY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/23/17

Date of Mailing: 3/23/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8518-16

AGENCY DKT. NO. 186-7/15

(ON REMAND EDU 13585-15)

WINSLOW TOWNSHIP EDUCATION ASSOCIATION, ON BEHALF OF ITS MEMBERS, ERIKA MURPHY AND MARY KENNEDY,

Petitioner,

v.

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

Respondent.

Cosmas P. Diamantis, Esq., for petitioner (Zeller and Wieliczko, LLP, attorneys)

Leonard J. Wood, Jr., Esq., for respondent (Wade, Long and Wood, LLC, attorneys)

Record Closed: February 3, 2017 Decided: February 6, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 9, 2016, on remand for clarification of whether the person who signed on behalf of the petitioners, Robert Nevitt, was authorized to sign on their behalf.

I have reviewed the terms of settlement with the additional certifications from Erika Murphy, Mary Kennedy, and Cosmas Diamantis, Esq. I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on their certifications or their representatives' signatures, and as confirmed by the representations of both counsel.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.
3. The additional certifications of petitioners Erika Murphy, Mary Kennedy and Cosmas Diamantis, Esq., ensure that they authorized Robert Nevitt, Jr. to execute the settlement agreement on their behalf as President of the WTEA.

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

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

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

February 6, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 2/10/17

Date Mailed to Parties: 2/10/17

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OFFICE OF

ZELLER & WIELICZKO, LLP
Cosmas P. Diamantis, Esquire
Attorney Identification No. 026802012

Attorneys for Petitioner(s),
Winslow Township Education Association, individually and on behalf of members Erika Murphy and Mary Kennedy

120 Haddontowne Court
Cherry Hill, New Jersey 08034
Phone: (856) 428-6600

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

Agency Reference No: 186-1/15
OAL Docket No: EDU 13585-2015 S

WINSLOW TOWNSHIP EDUCATION ASSOCIATION, individually and on behalf of members Erika Murphy and Mary Kennedy,

Petitioner(s),

vs.

WINSLOW TOWNSHIP BOARD OF EDUCATION

Respondent(s).

CERTIFICATION OF ERIKA MURPHY

I, Erika Murphy, of full age, do hereby certify as follows:

1. I am currently employed as a teacher with the Winslow Township Board of Education ("Board") and am a member of the Winslow Township Education Association ("WTEA").

2. I have had an opportunity to review the Settlement Agreement in the above-captioned matter executed by Robert T. Nevitt, Jr., President of the WTEA, Dr. H. Major Poteat, Winslow

Township School District Superintendent, and Cheryl Pitts, Board President, on April 13, 2016 ("Settlement Agreement").

3. I hereby confirm my consent and agreement to all the terms and conditions contained within the Settlement Agreement, and that the WTEA, through its President Robert T. Nevitt, Jr., was authorized to execute the Settlement Agreement on my behalf.

I certify that the foregoing statements made by me are true. I am aware that if any of the statements contained herein are willfully false, I am subject to punishment.

DATED: January 17, 2017

BY: Erika Murphy
ERIKA MURPHY

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ZELLER & WIELICZKO, LLP
Cosmas P. Diamantis, Esquire
Attorney Identification No. 026802012

Attorneys for Petitioner(s),
Winslow Township Education Association,
individually and on behalf of members
Erika Murphy and Mary Kennedy

120 Haddontowne Court
Cherry Hill, New Jersey 08034
Phone: (856) 428-6600

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

Agency Reference No: 186-1/15
OAL Docket No: EDU 13585-2015 S

WINSLOW TOWNSHIP EDUCATION ASSOCIATION, individually and on behalf of members ERIKA MURPHY and MARY KENNEDY,

Petitioner(s),

vs.

WINSLOW TOWNSHIP BOARD OF EDUCATION

Respondent(s).

CERTIFICATION OF MARY KENNEDY

I, Mary Kennedy, of full age, do hereby certify as follows:

1. I was formerly employed as a teacher with the Winslow Township Board of Education ("Board") and was formerly a member of the Winslow Township Education Association ("WTEA").

2. I have had an opportunity to review the Settlement Agreement in the above-captioned matter executed by Robert T. Nevitt, Jr., President of the WTEA, Dr. H. Major Poteat, Winslow

Township School District Superintendent, and Cheryl Pitts, Board President, on April 13, 2016 ("Settlement Agreement").

3. I hereby confirm my consent and agreement to all the terms and conditions contained within the Settlement Agreement, and that the WTEA, through its President Robert T. Nevitt, Jr., was authorized to execute the Settlement Agreement on my behalf.

I certify that the foregoing statements made by me are true. I am aware that if any of the statements contained herein are willfully false, I am subject to punishment.

DATED: January 17, 2017

BY: Mary Kennedy
MARY KENNEDY

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OFFICE OF ...

Audra A. Pondish, Esquire
WADE, LONG, & WOOD, LLC
1250 Chews Landing Rd., Ste. 1
Laurel Springs, NJ 08021
(856) 346-2800
Attorneys for Respondent, Winslow Township Board of Education
Attorney ID#6462006

WINSLOW TOWNSHIP EDUCATION ASSOCIATION, individually and on behalf of members Erika Murphy and Mary Kennedy Petitioner(s), vs. WINSLOW TOWNSHIP BOARD OF EDUCATION Respondent(s).	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION Agency Reference No: 186-1/15 OAL Docket No: EDU 13585-2015 S SETTLEMENT AGREEMENT

WHEREAS, Petitioner Winslow Township Education Association (hereinafter "Petitioner" or "WTEA") , is the exclusive majority representative of a broad-based bargaining unit consisting of, all certified personnel, secretaries, paraprofessionals, buildings and grounds employees, and athletic trainers employed within Winslow Township School District; and

WHEREAS, Respondent, Winslow Township Board of Education, (hereinafter the "Board" or "Respondent"), with its administrative offices located at 40 Coopers Folly Road, Atco, NJ 08004, is charged with administration and supervision of the District, and is the employer of all employees in the bargaining unit represented by Petitioner; and

WHEREAS, a dispute arose over the distribution of final paychecks and ownership of various furniture items;

WHEREAS, the Petitioner filed a Petition for Appeal; and

WHEREAS, without waiving their respective positions and without any admissions by either party, WTEA and the District wish to fully resolve all outstanding litigation between the parties pursuant to the terms set forth below;

NOW THEREFORE, it is agreed by and between the parties hereto as follows:

1. The Board agrees that it will comply with all other Federal and State Laws, including but not limited to N.J.S.A. 34:11-4.4, as well as Board Policies with respect to the payment and withholding of employee pay or salary.
2. The Board agrees it will not withhold, in whole or in part, any pay or salary from any and all certified personnel, secretaries, paraprofessionals, buildings and grounds employees, and athletic trainers employed by the Board, in a manner contrary to Federal and State Law, including but not limited to, N.J.S.A. 34:11-4.4, as well as all Board Policies with respect to the payment and withholding of employee pay or salary, unless permitted by law.
3. Petitioner agrees that that if employee wishes to bring in personally owned furniture items, they must submit a request to the building Principal personally for approval.
4. The parties agree that the Principal shall have a period of five (5) school days to approve or deny the request. Parties agree that if the Principal does not provide a response to the request within five (5) school days, the request is deemed granted.
5. Parties agree that a new request to have furniture items brought in must be submitted annually.
6. Petitioner agrees that if personally owned items are brought in during the course of the school year, they must be removed at the end of the school year.
7. Parties agree to be responsible for their own legal fees relative to this matter.

8. It is mutually agreed that the terms of this Agreement are and will remain confidential to the maximum extent permitted by law. The parties are free to inform others that the dispute between them has been amicably resolved. This provision shall not apply to any and all communications between the Petitioners and Winslow Township Education Association members.

9. This Agreement is not an admission by either party of any liability, or the violation of any law, statute, or regulation, nor shall it be cited as precedent in any future judicial or administrative proceedings, except as needed for enforcement or interpretation of its specific terms.

10. The Petitioners agree to all terms of this Agreement as complete, full and final satisfaction of all claims of any nature against the Respondent, Winslow Township Board of Education for anything that has happened up until the date on which Petitioners signed this Agreement. This release includes, but is not limited to any and all claims and demand for damages that may arise under N.J.S.A. 34:11-4.4 and any regulations promulgated under any aforementioned law, or any other State or Federal law, statue, rule or regulation or common law, contract, policy or directive, for anything that has happened up until the date on which the Plaintiff signed this Agreement.

11. This Agreement represents the entire understanding between the parties and will not be modified, in whole or in part, except by mutual subsequent written and signed Agreement. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion.

12. This Agreement is subject to formal approval by the Winslow Township Board of Education. In the event the District thereafter approves this Agreement, it shall be executed forthwith by the District and shall become effective upon approval by the Court.

13. This Agreement may be executed in counterparts, each of which when so executed and delivered shall be an original and all of which together shall constitute one and the same instrument.

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

Date: 4/13/16

WTBA

Date: 4-13-2016

Dr. H. Major Poteat, Superintendent

Date: 4-13-2016

Cheryl Pitts, Board President

Winslow Township School District

40 Cooper Polly Road, Atco, NJ 08004
(856) 767-2850 x7510

H. Major Poteat, Ed.D.
Superintendent

Tyra McCoy-Boyle
Business Admin./Board Secretary

Settlement Agreement – WTEA & WTBOE

A motion was made by Ms. Dredden, and seconded by Ms. Mitchell to approve the resolution authorizing the settlement agreement in the matter involving the Winslow Township Education Association and the Winslow Township Board of Education.

Roll Call:

Mr. Blake	Absent	Ms. Watkins	Absent
Ms. Dredden	Yes	Mr. Wilcox	Yes
Mr. Hilton	Yes	Ms. Peterson	Yes
Ms. Mitchell	Yes	Ms. Pitts	Yes
Mr. Vascos	Yes		

Motion Carried

This is to certify that the above is a true copy of the motion adopted by the Board of Education of Winslow Township at the regular session held on April 13, 2016.

Tyra McCoy-Boyle, Business Administrator/Board Secretary

ZELLER & WIELICZKO, LLP
Cosmas P. Diamantis, Esquire
Attorney Identification No. 026802012

Attorneys for Petitioner(s),
Winslow Township Education Association,
individually and on behalf of members
Erika Murphy and Mary Kennedy

120 Haddontowne Court
Cherry Hill, New Jersey 08034
Phone: (856) 428-6600

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

Agency Reference No: 186-1/15
OAL Docket No: EDU 13585-2015 S

WINSLOW TOWNSHIP EDUCATION ASSOCIATION, individually and on behalf of members Erika Murphy and Mary Kennedy,

Petitioner(s),

vs.

WINSLOW TOWNSHIP BOARD OF EDUCATION

Respondent(s).

CERTIFICATION OF COUNSEL
ADDENDUM TO SETTLEMENT AGREEMENT

I, Cosmas P. Diamantis, Esquire, Esquire, of full age, do hereby certify as follows:

1. I am an attorney at law of the State of New Jersey and an associate of ZELLER & WIELICZKO, LLP, attorneys for Petitioners, Winslow Township Education Association ("WTEA"), individually and on behalf of members Erika Murphy and Mary Kennedy, in the above entitled matter. I make this Certification to be attached as an Addendum to the Settlement Agreement executed by the Parties to the above-captioned matter on April 13, 2016.

ZELLER & WIELICZKO, LLP
ATTORNEYS AT LAW

120 Haddontowne Court
Cherry Hill, NJ 08034
P 856.428.6600
F 856.428.6314

ZELLER & WIELICZKO, LLP
ATTORNEYS AT LAW

2. The WTEA is, pursuant to the New Jersey Employer-Employee Relations Act, the exclusive majority representative of a broad-based bargaining unit consisting of, inter alia, all certified personnel, secretaries, paraprofessionals, buildings and grounds employees, and athletic trainers employed within Winslow Township School District by the Winslow Township Board of Education ("Board"). (See attached hereto as Exhibit "A" selected portions of the Collective Bargaining Agreement between the WTEA and the Board).

3. Robert T. Nevitt, Jr. is currently the President of the WTEA, a position he has held for several years. (See Exhibit "A" attached hereto).

4. The WTEA filed the within Petition of Appeal individually and on behalf of members Erika Murphy and Mary Kennedy.

5. Mr. Nevitt executed the Settlement Agreement by and through his authority as an officer (President) of the WTEA.

I certify that the foregoing statements made by me are true. I am aware that if any of the statements contained herein are willfully false, I am subject to punishment.

DATED: August 24, 2016

ZELLER & WIELICZKO, LLP
Attorneys for Petitioner(s),
Winslow Township Education
Association, individually and on
behalf of members Erika Murphy and
Mary Kennedy

By: _____
COSMAS P. DIAMANTIS, Esquire

120 Haddontowne Court
Cherry Hill, NJ 08034
P 856.428.6600
F 856.428.6314

AGREEMENT

between the

WINSLOW TOWNSHIP EDUCATION ASSOCIATION

and the

BOARD OF EDUCATION OF WINSLOW TOWNSHIP

THE COUNTY OF CAMDEN, NEW JERSEY

2013-2016

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PREAMBLE

This Agreement entered into this 21 th day of October 2014, by and between the Board of Education of Winslow Township, the City of Atco, New Jersey, hereinafter called the "Board", and the Winslow Township Education Association, hereinafter called the "Association".

DURATION OF AGREEMENT

A. This Agreement shall be effective as of July 1, 2013 and shall continue in effect until June 30, 2016.

1. This Agreement shall not be extended by oral or written Agreement, and it is expressly understood that it shall expire on the date indicated.

B. In witness thereof, the parties hereto have caused this Agreement to be signed by their duly authorized officers, all as of the day and year first above written.

WINSLOW TOWNSHIP EDUCATION ASSOCIATION

By _____ (President)

By _____ (Secretary)

WINSLOW TOWNSHIP BOARD OF EDUCATION

By _____ (President)

By _____ (Secretary)

WITNESSETH:

Whereas, The Board and the Association recognize and declare that providing a quality education for the children of the Winslow Township School District is their mutual aim and that the character of such education depends in part upon the quality and morale of the teaching service, and

Whereas, The members of the teaching profession are qualified to be consulted concerning the formulation of policies and programs designed to improve educational standards, and

Whereas, The Board has an obligation, pursuant to Chapter 123, Public Laws, 1974, to negotiate with the Association as the representative of unit members hereinafter designated with respect to the terms and conditions of employment, and

Whereas, The Winslow Township Board of Education is committed to ensuring that our schools are safe and secure for children and staff. The District will develop and maintain a safety and security management plan and provide for a means of communication to inform students, staff and parents about safety and security matters, and

Whereas, The parties have reached certain understandings which they desire to confirm in this Agreement,

Therefore, In consideration of the following mutual covenants, it is hereby agreed as follows:

MISCELLANEOUS PROVISIONS

A. This Agreement constitutes Board policy for the term of said Agreement, and the Board shall carry out the commitments contained herein and give them full force and effect as Board policy

B. If any provision of this Agreement or any application of this Agreement is held to be contrary to law, then such provision or application shall not be deemed valid and subsisting, except to the extent permitted by law, but all other provisions or applications shall continue in full force and effect.

C. Any individual contract between the Board and an individual, heretofore or hereafter executed, shall be subject to and consistent with the terms and conditions of this Agreement. If an individual contract contains any language inconsistent with the Agreement, this Agreement, during its duration, shall be controlling.

D. The Board and the Association agree that there shall be no discrimination and that all practices, procedures and policies of the school system shall clearly exemplify that there is no discrimination in the hiring, training, assignment, promotion, transfer or discipline of unit members or in the application or administration of this Agreement on the basis of race, creed, religion, national origin, gender, domicile, marital status, age or handicapped status as per Statutory Requirements.

E. Copies of this Agreement shall be printed and the expense shared equally by the Board and the Association within thirty (30) days, unless an extension is mutually agreed upon, after the Agreement is signed and presented to all unit members now employed or when a contract is offered.

F. Whenever any notice is required to be given by either of the parties to this Agreement to the other, pursuant to the provisions of this Agreement, either party shall do so by letter at the following:

1. If by the Association, to the Board at:
   Secretary
   Board of Education of Winslow Township
   40 Coopers Folly Road
   Atco, New Jersey 08004

2. If by the Board, to the Association at:
   Association President
   Winslow Township Education Association
   24 North Route #73
   Suite 103, P.O. Box 328
   Cedar Brook, NJ 08018-0328
   or
   Association Grievance Representative
   Winslow Township Education Association
   24 North Route #73
   Suite 103, P.O. Box 328
   Cedar Brook, NJ 08018-0328

RECOGNITION

A The Board recognizes the Association as the exclusive and sole representative for collective negotiations concerning the terms and conditions of employment for all personnel under contract including those on leave. The following personnel are excluded: all administrative and supervisory personnel, superintendent's and assistant superintendent's secretaries, business office support staff, human resources support staff, residency officer. Also excluded are the substitute caller(s), substitutes, occupational and physical therapists and community and recreational personnel.

1. Unless otherwise indicated, the term "unit member" when used in this Agreement shall refer to all employees represented by the Association in the negotiating unit as defined above.

2. The term "teacher" when used herein expressly excludes teacher assistants.

B. The parties agree and understand that the position of teacher assistant does not carry with it the requirement for a teacher certificate; and therefore, teacher assistants are not considered teachers within the meaning of the Statutes (18A).

C. The Association hereby recognizes that the Board reserves for itself full jurisdiction and authority over matters of policy and retains the right in accordance with applicable laws and regulations and subject to the provisions of this Agreement:

1. To direct unit members of the district;

2. To hire, promote, transfer, assign and retain unit members in positions within the district and to suspend, demote, discharge or take other disciplinary actions against unit members;

3. To release unit members from duties because of a lack of work or other legitimate reasons;

4. To maintain the efficiency of the district operations entrusted to them;

5. To determine the methods, means and personnel by which such operations are to be conducted;

6. To take whatever actions might be necessary to carry out the goals of the school district in situations of emergency.

D. The term "Support Staff" refers to the following non-certificated staff:

Teacher Assistants , District Delivery Mailperson, Community Liaison Officer, Hall Monitors, Clerical Assistants, District Secretaries, Medical Assistants, District Electrician, Plumber, Carpenter, Maintenance /Grounds, Custodians, Cleaners, Receptionist, Maintenance Helper, Mechanic and Bus Drivers.

92-17

OAL DKT. NO. EDU 2764-17
AGENCY DKT. NO. 37-2/17

ALFONSO MASTROFILIPO, JR.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BERGEN COUNTY OFFICE OF EDUCATION, INTERIM – BERGEN COUNTY EXECUTIVE SUPERINTENDENT, NORAH PECK AND BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Specifically, the petitioner has failed to show that he will suffer irreparable harm if he is not immediately appointed to the Board for a three year term, as he is currently filling another seat on the Board that was left vacant when a Board member resigned before the expiration his term.[1] Therefore, in light of the fact that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the three remaining factors.

Accordingly, the petitioner's application for emergent relief is denied. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/29/17
Date of Mailing: 3/30/17

[1] The circumstances surrounding the vacant board seats are thoroughly outlined in the Order.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 02764-17
AGENCY DKT. NO. 37-2/17

ALFONSO MASTROFILIPO, JR.,

Petitioner,

v.

BERGEN COUNTY OFFICE OF EDUCATION, INTERIM – EXECUTIVE COUNTY SUPERINTENDENT, NORAH PECK, AND BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN,

Respondents.

Alfonso Mastrofilipo, Jr., petitioner pro se

Lauren A. Jensen, Deputy Attorney General, for respondents Bergen County Office of Education and Interim-Executive County Superintendent Norah Peck (Christiphor S. Porrino, Attorney General of New Jersey, attorneys)

Jaclyn M. Morgese, Esq., for nominal respondent Board of Education of the Borough of Lodi (Sciarrillo Cornell, attorneys)

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

Petitioner Alfonso Mastrofilipo, Jr. (petitioner) asserts that he has been deprived illegally or without authority from his seat on the Board of Education of the Borough of Lodi (Board) following the election held on November 8, 2016. As more fully detailed below, petitioner presently holds a seat on that Board but only for a temporary one-year term to fill an unrelated vacancy. He filed a Petition of Appeal as well as a Petition for Emergent Relief, individually as a citizen and not as a current temporary Board member, in order to obtain a determination that another vacancy should not be filled by the Bergen County Office of Education or the Interim-Executive County Superintendent for Bergen County (collectively referred to as "ECS Peck") and that any seat he holds should be deemed to be a position to a three-year term. Petitioner denominated the Board as a nominal respondent, seeking relief principally against ECS Peck in this forum.

PROCEDURAL HISTORY

On February 24, 2017, petitioner filed both his Petition for Emergent Relief with the Commissioner of Education and his merits Petition. On February 27, 2017, this matter was transmitted to the Office of Administrative Law (OAL) by the Bureau of Controversies and Disputes for a hearing on the requested emergent relief. The matter was assigned to the undersigned on March 2, 2017, and oral argument was heard on March 6, 2017, at 1:30 p.m. ECS Peck submitted a legal brief on the emergency application under cover of March 6, 2017. The Board as nominal respondent asserted that it would abide by whatever decision is reached herein, although it also specified its agreement with the position of ECS Peck. After a long discussion off the record, oral argument was conducted on the record, facts were stipulated as not in dispute, and the record was left open for one day for the Deputy to submit a final reply due to the late service in open court of a final response by the petitioner.

STATEMENT OF UNDISPUTED FACTS

On November 8, 2016, an election was held to fill three seats on the Board for three-year terms. There were ten candidates on the ballot, eight of whom were new office-seekers and two of whom were incumbents. Petitioner was one of the new candidates. After the election returns were tabulated and announced, it was determined that petitioner came in fourth place. Accordingly, he was not deemed to be a successful candidate or member-elect. However, in the month just prior to the election, another then-current member of the Board, Joseph J. Licata, resigned because he had moved his personal residence out of the school district.

Following this election, the three highest recipients of votes were subject to statutory examination of their qualifications, including criminal background checks, pursuant to N.J.S.A. 18A:12-1.2(a). Also following the election, the Board announced that it would be accepting applications for the vacant seat left by Licata. Petitioner applied on or before that deadline of November 16, 2016. After the interview process was completed, petitioner was advised that he had been selected for the Licata seat on or about December 14, 2016.

On or about December 20, 2016, member-elect Vincent J. Russo and the Board were notified by the New Jersey Department of Education that his background review had turned up a disqualifying criminal offense. Petitioner was sworn in to fill the Licata vacant seat on December 21, 2016, just one day after Russo was disqualified from serving. The first organizational meeting of the Board was held on January 4, 2017.

On January 17, 2017, petitioner filed a civil action in the Superior Court of New Jersey, Bergen County, Chancery Division, against the same parties named herein. He sought equitable relief in the form of designation as the successor member-elect to the seat contested in the November 8, 2016, election and now open due to the disqualification of Russo. That lawsuit was dismissed without prejudice by the Honorable Menelas W. Toskos, J.S.C., on February 22, 2017, "for the reasons set forth on the record" after oral argument.[1] That Order also stayed any action by ECS Peck until March 1, 2017. As set

[1] The Deputy represented at the argument on this OAL matter that the matter was dismissed because it raised school law issues under Title 18A over which the Commissioner has exclusive jurisdiction. Petitioner stated his disagreement with that characterization during this oral argument and said that Judge Toskos

forth above, petitioner filed his Petition and Emergent Petition with the Department on February 24, 2017.

LEGAL DISCUSSION

The standards which must be met by the moving party in an application for emergent relief are well established. Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that petitioner has satisfied all four prongs of the Crowe test:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

There are two aspects to this application for emergent relief. First, petitioner requests an order mandating that only the Board can fill the seat left empty by Russo's disqualification, which is to say, that ECS Peck should be prohibited from filling the vacancy. Second, petitioner wants an order establishing himself as the rightful successor to Russo's seat as a full three-year term on the Board. As to the latter, petitioner is of the opinion that he is the rightful occupant of the seat as a result of being the third highest qualified candidate who sought the public's endorsement through a duly-held election. With respect to the former, petitioner thinks it is unseemly to have a citizen appointed to the Board by ECS Peck when neither she nor the applicant might have the knowledge and interest to discuss matters of great and specific importance to the Board. At least with respect to filling Licata's seat, he argues, the current Board members appointed petitioner who had put himself through the nomination and ballot process.

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was advised instead by the Deputy in Chancery Court that ESC Peck had authority to appoint petitioner to a three-year term on the Board. While that dispute will only be resolved through a reading of the transcribed oral argument, not yet obtained, I **FIND** that it is not material for the limited purposes of this emergency application.

Respondents argue that petitioner cannot meet the Crowe standard for injunctive relief and further that the law is settled against his argument. Title 18A establishes a clear mechanism for filling vacancies and it is because those appointments circumvent the election system that they are statutorily limited to a one-year term.

With respect to the first prong, petitioner argues that he would suffer irreparable harm because important issues are arising before the Board on which Board members must be interested, knowledgeable, and prepared, including, but not limited to, a new $7.5 million building project, and teacher contract negotiations. I **CONCLUDE** that petitioner has merely posited general and speculative public harm if some person is temporarily seated on the Board in time for any issues that will arise this spring. Indisputably, petitioner now has a seat at the table; he can work with other members of the Board to pursue agenda items as he sees fit. As a large district, the Lodi Board has more members than many school districts in this State and thus each member's vote (or empty seat) is less critical for majority decisionmaking. Petitioner personally has not been deprived of a vote on the Board. Ultimately, the issue of whether he must run again next November in order to continue on the Board will have to be reached but any such deadlines do not presently make for an emergency or irreparable harm.

With respect to the likelihood of success on the merits, I must **CONCLUDE** that petitioner has also not satisfied this Crowe prong. Title 18A makes provision for the filling of any vacancy on a board through several means, depending on the circumstances that caused the vacancy to occur.

> Vacancies in the membership of the board shall be filled as follows:
>
> a. By the county superintendent, if the vacancy is caused by the absence of candidates for election to the school board or by the removal of a member because of lack of qualifications, or is not filled within 65 days following its occurrence;
>
> * * *

> f. By a majority vote of the remaining members of the board after the vacancy occurs in all other cases.
>
> Each member so appointed shall serve until the organizational meeting following the next annual election unless the member is appointed to fill a vacancy occurring within the 60 days immediately preceding such election if the annual election is held in April, or occurring after the third Monday in July if the election is held in November, to fill a term extending beyond such election, in which case the member shall serve until the organizational meeting following the second annual election next succeeding the occurrence of the vacancy, and any vacancy for the remainder of the term shall be filled at the annual election or the second annual election next succeeding the occurrence of the vacancy, as the case may be.
>
> [N.J.S.A. 18A:12-15]

There are additional sub-parts, not relevant herein, that establish other means if an election results in a tie, etc.

Here, the parties disagree as to whether ECS Peck is authorized to fill the vacancy because petitioner claims that Russo cannot be deemed to be a "member." I **CONCLUDE** that post-election, Russo would come within the definition of a "member." The argument posited by petitioner is that Russo could not be a member removed for lack of qualifications because he had not yet been sworn in onto the Board. I agree with respondents that he is mis-reading the statutory provisions and that the above-cited portion must be read in tandem with the following:

> Each member of any board of education, within 30 days of election or appointment to that board, shall undergo a criminal history background investigation for the purpose of ensuring that the member is not disqualified from membership due to a conviction of a crime or offense listed in N.J.S.18A:12-1.
>
> [N.J.S.A. 18A:12-1.2(a)]

This provision is specifically part of the subtitle that addresses qualifications or the lack thereof of members elected to or already sitting on a board of education. The fact that a successful electoral candidate becomes a member and yet is still required to submit to a

background check by the Department "within 30 days of election" is specific and clear, notwithstanding that an oath of office has not yet been administered. Accord N.J.S.A. 18A:12-2.1, which sets forth that a "member" takes an oath "before entering upon the duties of his office."

Based upon the above legal discussion and analysis, I **CONCLUDE** the petitioner has not met his burden of proving entitlement to immediate emergent relief. I do note that Title 18A on School Law does not appear to resolve the ultimate issue of whether petitioner is entitled to a three-year term on the Board as opposed to only a temporary one-year term. Nevertheless, I do **CONCLUDE** that without regard to whether it is the Board or ECS Peck who ultimately fills the Russo vacancy, Title 18A only provides the authority to fill it as a temporary one-year post. In that sense, I am of the opinion that petitioner is unlikely to obtain the ultimate relief he seeks from the Office of Administrative Law and the Department of Education, namely, to be named as filling a three-year seat on the Board.[2]

ORDER

Since the Crowe factors are written in the conjunctive and the petitioner has failed to satisfy any of the four requirements, I **CONCLUDE** that the petitioner has failed to establish grounds for the granting of emergency relief. Accordingly, it is **ORDERED** that the petition for emergent relief is **DENIED**.

It is further **ORDERED** that the merits hearing, by agreement of the parties, shall be determined on the papers as herein submitted or supplemented hereafter in accordance with my instructions.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision on the issue of

[2] This is without prejudice to and without any opinion as to whether relief may be sought under Title 19 or any other general election statute from a Superior Court Judge; however, N.J.S.A. 18A:12-15 does appear to cover most avenues of filling school board vacancies.

emergent relief shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

March 7, 2017
DATE

GAIL M. COOKSON, ALJ

id

93-17

PATRICIA CHIODI,

PETITIONER,

v.

JASON EITNER, SUPERINTENDENT, WATERFORD TOWNSHIP SCHOOL DISTRICT, CAMDEN COUNTY,

RESPONDENT,

AND

DEBORAH BORRELLI,

PETITIONER,

v.

JASON EITNER, SUPERINTENDENT, WATERFORD TOWNSHIP SCHOOL DISTRICT, CAMDEN COUNTY,

RESPONDENT,

AND

DANIEL BITTNER,

PETITIONER,

v.

JASON EITNER, SUPERINTENDENT, WATERFORD TOWNSHIP SCHOOL DISTRICT, CAMDEN COUNTY,

RESPONDENT,

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners – three teachers in the Waterford Township school district – sought to have Superintendent Jason Eitner's certificate revoked for unbecoming conduct, alleging that Eitner had engaged in conduct ranging from age discrimination, to invasion of privacy, to violation of school policies prohibiting harassment, intimidation and bullying. The respondent filed a motion to dismiss, arguing that petitioners failed to set forth a legal basis for which relief can be granted under New Jersey's school laws.

The ALJ found, *inter alia,* that: petitioners herein do not allege a cause of action against respondent under the school laws; any action to remove school administrators must be brought under the tenure provisions of Title 18A:6-10; moreover, an action against a school administrator for conduct related to their position must be brought via a grievance and then an appeal from the grievance; and petitioners have not exhausted this remedy. The ALJ concluded that the instant matter presents no cause of action under the school laws of New Jersey. Accordingly, the respondent's motion to dismiss was granted.

Upon review, the Commissioner concurred with the ALJ that the Commissioner lacks jurisdiction here, and adopted the Initial Decision as the final decision in this matter. The Commissioner noted that, pursuant to *N.J.S.A.* 18A:6-38 and *N.J.A.C.* 6A:9B-4.5, an administrator's certificate may only be revoked or suspended by the State Board of Examiners. The petition was dismissed.

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

March 30, 2017

OAL DKT. NOS. EDU 13721-16, EDU 13722-16 and EDU 13723-16 (consolidated)
AGENCY DKT. NOS. 216-8/16, 2/17-8/16 and 218-8/16

PATRICIA CHIODI,	:	
PETITIONER,	:	
v.	:	
JASON EITNER, SUPERINTENDENT, WATERFORD TOWNSHIP SCHOOL DISTRICT, CAMDEN COUNTY,	:	
RESPONDENT,	:	
AND	:	
DEBORAH BORRELLI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
v.	:	DECISION
JASON EITNER, SUPERINTENDENT, WATERFORD TOWNSHIP SCHOOL DISTRICT, CAMDEN COUNTY,	:	
RESPONDENT,	:	
AND	:	
DANIEL BITTNER,	:	
PETITIONER,	:	
v.	:	
JASON EITNER, SUPERINTENDENT, WATERFORD TOWNSHIP SCHOOL DISTRICT, CAMDEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, along with petitioners' exceptions – filed pursuant to *N.J.A.C.* 1:1-18.4 – and the respondent's reply thereto.

In their exceptions, petitioners argue that the Administrative Law Judge (ALJ) failed to reference that petitioners had filed grievances – including a Harassment, Intimidation, and Bullying (HIB) complaint – and still had not received the results of the Board's investigations. Accordingly, petitioners dispute the ALJ's finding that no HIB complaint was filed. Further, petitioners contend that the matter should be held in abeyance pending a final determination by the Board on the grievances that were filed. Additionally, petitioners argue that the ALJ erred in concluding that the Commissioner does not have jurisdiction over personnel matters filed by individuals, and instead maintain that the matter touches upon school law.

In reply, respondent contends that while petitioners argue that they have not received the investigation reports regarding grievances that they filed, they indicated in their Opposition to the Motions to Dismiss that they were "not seeking any determination by this court regarding any obligation Respondent Eitner would have to furnish the results of an affirmative action investigation" and that they would seek relief from the Board outside of this litigation. (Respondent's Reply Exceptions, at 3). Additionally, respondent argues that the ALJ properly found that the Commissioner does not have jurisdiction over these matters because they do not arise under school law. Instead, respondent points out that issues involving the revocation or suspension of administrative certificates falls under the jurisdiction of the State Board of Examiners and such a proceeding cannot be initiated by individual employees. Finally, respondent argues that the matter should not be held in abeyance until a final determination is made by the Board on the personnel matters, because the doctrine of exhaustion requires petitioners to exhaust their administrative remedies prior to filing a petition.

Upon review, the Commissioner[1] concurs with the ALJ that the Commissioner does not have jurisdiction over these matters, as they do not arise out of the school laws of this State. *N.J.S.A.* 18A:6-9. Indeed, the authority to revoke or suspend the certificates of teachers or administrators lies exclusively with the State Board of Examiners. *N.J.S.A.* 18A:6-38; *N.J.A.C.* 6A:9B-4.5. Further, the Commissioner notes that – although petitioners allege in their Opposition to the Motions to Dismiss that the HIB statute is implicated in this matter – the matter herein does not involve HIB. This case is not an appeal of an HIB determination, nor would an HIB allegation be appropriate in this circumstance as the statute does not contemplate HIB complaints from school employees – only students. *See N.J.S.A.* 18A:37-13 *et seq.* The Commissioner does not find petitioners' exceptions to be persuasive. Although petitioners indicate that they seek the results of affirmative action complaints filed with the Board and not considered by the ALJ in her decision, such exception is irrelevant. Petitioners have made clear in their submissions that the Board is not a party to this matter, nor do they seek the results of the investigation from Respondent Eitner.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

Kathleen A. Ganer

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 3/30/17

Date of Mailing: 3/30/17

[1] This matter has been delegated to the undersigned Deputy Commissioner, pursuant to *N.J.S.A.* 18A:4-34.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING
MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 13721-16
AGENCY NO. 216-8/16

PATRICIA CHIODI,

Petitioner,

v.

JASON EITNER SUPERINTENDENT
WATERFORD TOWNSHIP SCHOOL DISTRICT,
CAMDEN COUNTY,

Respondent,

AND

DEBORAH BORRELLI,

Petitioner,

v.

OAL DKT NO. EDU 13722-16
AGENCY DKT. NO. 217-8/16

JASON EITNER SUPERINTENDENT
WATERFORD TOWNSHIP SCHOOL DISTRICT,
CAMDEN COUNTY,

Respondent,

AND

DANIEL BITTNER,

Petitioner,

v.

OAL DKT NO. EDU 13723-16
AGENCY DKT. NO. 217-8/16

JASON EITNER SUPERINTENDENT
WATERFORD TOWNSHIP SCHOOL DISTRICT,
CAMDEN COUNTY,

Respondent.

CONSOLIDATED

Saul J. Steinberg, Esq., for petitioners (Zucker Steinberg & Wixted, P.A., attorneys)

Andrew W. Li, Esq., for respondents (Parker McCay, P.A., attorneys)

Record Closed: January 12, 2017 Decided: February 13, 2017

BEFORE **SARAH G. CROWLEY**, ALJ:

PROCEDURAL HISTORY

Petitioners filed a verified petition on August 15, 2016, seeking to have the respondent's superintendent's certificate revoked for conduct unbecoming. The conduct ranges from allegations of sexual harassment, age discrimination and bullying. The respondent filed a Motion to Dismiss in lieu of an answer on September 6, 2016. The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matters to the Office of Administrative Law (OAL), where they were filed for hearing as a contested case on September 8, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. These matters were consolidated by Order dated November 16, 2016. Petitioners filed opposition to the Motion to Dismiss on December 23, 2016, and respondents filed a reply brief on January 12, 2017.

STATEMENT OF CASE AND UNDISPUTED FACTS

The petitioners are all employed by the Waterford Township Board of Education[1] (District) and work as teachers in the District. Jason Eitner is the superintendent of the schools in the District. The petitioners have filed verified petitions seeking to have his

[1] The Board of Education has not been named in this matter and the petitioners have advised that they do not seek to name the Board in this matter.

superintendent's certificate revoked on the grounds that he engaged in conduct unbecoming, age discrimination, invasion of privacy and a violation of school policies prohibiting harassment, intimidation and/or bullying. There was a grievance filed by one of the petitioners, and the superintendent issued a letter of apology in response to same. No appeal was filed with respect to the decision in that matter. In response to allegations by the petitioners of harassment and discrimination, the Board hired an attorney to do an Affirmative Action investigation. The undersigned has no details regarding this investigation or the results of same. However, counsel for the petitioner has clarified that no relief is sought with respect to that investigation and no appeal for that finding has been initiated

The respondents have filed a motion to dismiss on the grounds that the petition has failed to set forth a legal basis for which relief can be granted under the Educational Laws of the State of New Jersey. Respondent argues that the petitioners have not alleged any violations of the school laws and that there is no claim for relief under the jurisdiction of the Commission of Education. It is undisputed that no HIB complaint has been filed with respect to harassment, intimidation or bullying complaint, or for the failure of the District to have appropriate HIB policies in place. Moreover, there is no HIB finding that has been appealed. The respondents also allege that the petitioners have failed to exhaust administrative remedies through a grievance or a claim under the anti-bullying statute. The petitioners maintain that the Commissioner of Education has jurisdiction to hear disputes concerning these actions, and that they arise under the state school and education laws. However, no specific authority is provided which would give the Commissioner jurisdiction over a personnel matter filed by an individual employee or employees.

LEGAL ANALYSIS AND CONCLUSION

The issue presented here is whether the respondents are entitled to a decision dismissing the petition as a matter of law. The respondents have filed a motion to decision pursuant to N.J.A.C. 6A:3-1.10 which provides: "at any time prior to transmittal of the pleading to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petitioner on the grounds that the petitioners have advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction for failure to prosecute or other good reason." The motion was filed with the Department of Education and has been transmitted here for consideration. The basis of the motion is that the petitioners have alleged no claim under the education laws of the State of New Jersey and thus, the undersigned has no jurisdiction to hear the matter.

The allegations in the verified petitions are that the respondent has shown bias and engaged in inappropriate behavior, sexual harassment and age discrimination. The petitioners seek to have respondent's Administrators Certificate revoked and to have him suspended from his position as Superintendent of the School District. There have been no prior proceedings regarding this matter, with the exception of an affirmative action investigation, which the petitioners did not, nor do they seek to appeal from. In addition, one of the petitioners filed a grievance against the respondent, from which relief was obtained in the form of an apology letter. No appeal was filed from that matter. Most of the allegations appear to allege HIB, or lack of appropriate policies. However, no HIB complaint was ever filed, nor do the petitioners seek relief under the HIB statute. The petitioners seek to suspend the respondent and revoke his administrator's certificate.

Assuming that all of the petitioners' factual allegations are true, they do not allege a cause of action under School Law against the respondent. An action to remove the administrators must be brought under the tenure provisions of Title 18A:6-10. Moreover, an action against the administrator of the school for action relating to their position in the school must be brought via a grievance and then an appeal from the

grievance. The petitioners have not exhausted this remedy, and the Commissioner of Education does not have jurisdiction to entertain grievances from individual employees in the first instance. The petitioners cite to N.J.S.A.18A:17-7, which requires superintendents to hold an appropriate certificate. However, there are no allegations that the respondent does not hold the appropriate certificate and thus, this statutory provision is inapplicable. The petitioner also cites to several tenure cases in support of the Commissioner's jurisdiction. However, this is not a tenure matter, and moreover, the undersigned does not have jurisdiction over tenure matters.

The undersigned's jurisdiction is limited to those matters falling under the Education Laws in the State of New Jersey, and assuming all facts alleged as true, I **CONCLUDE** that no cause of action under the Education Laws in the State of New Jersey. Accordingly, the respondent's motion to dismiss pursuant to N.J.A.C. 6A:3-1.10 is hereby granted.

ORDER

It is **ORDERED** that the Motion to Dismiss is hereby **GRANTED** and the petition is **DISMISSED**.

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

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

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

February 13, 2017
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: February 13, 2017 (emailed)

Date Mailed to Parties: 2/14/17

/mel

94-17

C.J., on behalf of minor children,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro se petitioner, C.J., sought to have her four children placed out of the Willingboro school district, alleging that the children are being abused and are afraid to go to school. Petitioner further alleged, *inter alia*, that all of her children are being bullied and receive therapy as a result of the anxiety they suffer from attending school in Willingboro. Petitioner refused to send the children to school for a period of time, and has not gone through any channels to have them classified – nor has she requested an investigation into alleged acts of Harassment, Intimidation and Bullying (HIB) under the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* Petitioner demands that the children be placed in another school district, but has not stated where she wants them to attend school or on what legal grounds she seeks an out-of-district placement. A motion for emergent relief in this matter was denied after a hearing in September 2016. The respondent Board filed a motion for summary decision, alleging that petitioner has failed to articulate any cause of action falling under the jurisdiction of the Commissioner.

The ALJ found, *inter alia*, that: there is no genuine issue of material fact in this case, and the matter is ripe for summary decision; petitioner alleges that her children have been mistreated and abused, and seeks an out-of-district placement; only one of the four children has been classified by the District and thereby entitled to special education services; the petitioner appears to raise claims of HIB under the Act, but has failed to follow the procedural requirements for bringing such a claim; alternatively, she alleged her children are experiencing issues that may require an evaluation under the IDEA, but such evaluation must be initiated by request to the school, and appealed to the Office of Special Education Services; the petitioner has not alleged any legal or factual basis for an out-of-district placement for her children. The ALJ concluded that the respondent Board is entitled to summary decision, and dismissed the petition.

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

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

Issued 3/30/17

OAL DKT. NO. EDU 8020-16
AGENCY DKT. NO. 133-5/16

C.J., on behalf of minor children,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons stated in the Initial Decision – that the Board's motion for summary decision should be granted.[1] Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/30/17

Date of Mailing: 3/30/17

[1] It is clear from the record that there has been ongoing discord between the petitioner and the Board involving her minor children. In the future, if the petitioner believes that one of her minor children has been the subject of an act of harassment, intimidation and bullying, she may report the incident to the Board and request an investigation pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*. The Board shall likewise follow the procedural requirements contained in the Act. To the extent that the petitioner has concerns involving her minor children in connection with the Individuals with Disabilities in Education Act she may seek relief from the Office of Special Education in accordance with *N.J.A.C.* 6A:14-2.6.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08020-2016
AGENCY DKT. NO. 133-5/16

C.J., ON BEHALF OF MINOR CHILDREN,
Petitioner,
v.
TOWNSHIP OF WILLINGBORO BOARD OF EDUCATION, BURLINGTON COUNTY,
Respondent.

C.J., petitioner, pro se

Patrick J. Madden, Esq., for respondent Willingboro Township Board of Education (Madden and Madden, P.A., attorneys)

Record Closed: January 17, 2017 Decided: February 14, 2017

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 25, 2016, petitioner filed a Verified Petition for emergent relief with the Commissioner of the Department of Education seeking to have her four children transferred from the Willingboro School District (Willingboro). The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education

transmitted the matter to the Office of Administrative Law (OAL), where it was filed for hearing as an emergent matter on August 25, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. After oral argument, the application for Emergent relief was denied by Order dated September 16, 2016. The denial was adopted by the Commissioner on October 4, 2016. On September 16, 2016, Willingboro filed a Motion to Dismiss the within matter. The matter was adjourned for a period of time at the request of the petitioner. Petitioner filed opposition to the motion on June 21, 2016, and supplemented her opposition by correspondence from the petitioner on December 16, 2016, and January 17, 2017.

FACTUAL BACKGROUND AND STATEMENT OF UNDISPUTED FACTS

Petitioner has four children in the Willingboro School District and seeks to have them placed out-of-district. Petitioner alleges that her children are being abused and are afraid to go to school. She further alleges that one of her children is suffering from depression due to the treatment she has received at school and that one is on blood pressure medication as a result of pressures at school. Petitioner claims that all of her children are being bullied and receive therapy as a result of the anxiety they suffer from attending school in Willingboro. One of the children has been classified and is entitled to special education services in the District. The issues with respect to this child are the subject of a separate action. Petitioner refused to send the children to school for a period of time, and has not gone through any channels to have them classified, nor has she requested an HIB investigation. The relief which is sought unclear except for the demand for to send them out-of-district. The petitioner has not stated where she wants them placed or on what legal grounds she seeks an out-of-district placement.

LEGAL DISCUSSION

The question presented is whether respondent is entitled to dismissal of this matter on the grounds that the petitioner has failed to articulate any cause of action falling under the jurisdiction of the commissioner of education. The respondent further alleges that there is no legal or factual basis for the relief which the petitioner seeks.

Summary decision is appropriate if there is no genuine issue as to any material fact necessary to resolve the claim as a matter of law. Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995) (citation omitted):

[A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose.'" Brill, supra, 142 N.J. at 541. In addressing whether the Brill standard has been met in this case, further guidance is found in New Jersey Court Rule 4:46-2: "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate

inferences therefrom favoring the non-moving party, would require submission of the issues to the trier of fact."

In this case, there are no genuine issues of material fact. Petitioner's children all attend school in Willingboro and are still enrolled in school in the District. The petitioner alleges that her children have been "mistreated and abused" and she seeks to have them placed out-of-district. However, there has been no HIB petition filed pursuant to N.J.S.A. 18A:37-15, nor is there an appeal from one pending before the undersigned. Petitioner alleges that they suffer from depression and other issues which render them fearful of attending school. However, petitioner has not sought to have them evaluated for special education services or filed a due process petitioner for the failure of the school to provide such services. Petitioner has one child that has been classified by the District as entitled to special education services. The issues related to that child have been be addressed in the separate due process proceeding.

The Commissioner's jurisdiction is limited to matters arising under school law and brought in accordance with such laws. The petitioner appears to be raising a claim under the Anti Bullying statute, but has failed to follow the procedural requirements for bringing such a claim. In the alternative, she alleges her children are experiencing issues which may render an evaluation under the IDEA appropriate. However, the process for such evaluations is through a request with the school, and an appeal to the Offices of Special Education Services. The petitioner has not alleged any legal or factual basis for an out of district placement for her children.

I therefore **CONCLUDE** that respondent is entitled to summary decision dismissing the petition.

ORDER

Accordingly, I hereby **ORDER** that respondent's motion to dismiss, or in the alternative for summary decision is **GRANTED**, and that the petition is hereby **DISMISSED**.

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

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

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

February 14, 2017
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: February 14, 2017 (emailed)

Date Mailed to Parties: 2/15/17

SGC/mel

95-17

OAL DKT. NO. EDU 14170-16
AGENCY DKT. NO. 37-2/16

M.O'K. AND S.O'K., on behalf of minor children, A.O'K. AND C.O'K.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CRESSKILL, BERGEN COUNTY; BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY; NORAH PECK, EXECUTIVE COUNTY SUPERINTENDENT; AND NEW JERSEY DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. The tuition payment amount outlined in paragraph 4 of the Agreement is due within thirty (30) days after the execution of the Agreement by the parties. This date has preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

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

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/30/17
Date of Mailing: 3/30/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 14170-16
AGENCY DKT. NO. 37-2/16

M.O'K. AND S.O'K. ON BEHALF OF MINOR CHILDREN A.O'K. AND C.O'K.,

Petitioners,

v.

BOROUGH OF CRESSKILL BOARD OF EDUCATION, BERGEN COUNTY, BOROUGH OF LITTLE FERRY BOARD OF EDUCATION, BERGEN COUNTY, NORA PECK, EXECUTIVE COUNTY SUPERINTENDENT AND NEW JERSEY DEPARTMENT OF EDUCATION,

Respondents.

M.O'K. & S.O'K., pro se petitioners

Stacey T. Cherry, Esq. for respondent, Cresskill BOE (Fogarty & Hara, attorneys)

Dennis G. Harraka, Esq. for respondent, Little Ferry BOE (Winne, Banta Basralian & Kahn, attorneys)

Caroline Jones, Deputy Attorney General, for respondents (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: February 14, 2017 Decided: February 14, 2017

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 19, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

February 14, 2017
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: 2-16-17

Mailed to Parties: FEB 16 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

Fogarty & Hara, Esqs.
21-00 Route 208 South
Fair Lawn, New Jersey 07410
Telephone (201) 791-3340
Facsimile (201) 791-3432
Attorneys for Respondent,
Cresskill Board of Education
Our File No. 121

2017 FEB 14 P 3:04

M.O'K. and S.O'K. o/b/o A.O'K. and C.O'K., Plaintiffs, v. CRESSKILL BOARD OF EDUCATION, LITTLE FERRY BOARD OF EDUCATION, NEW JERSEY STATE COMMISSIONER OF EDUCATION, BERGEN COUNTY OFFICE OF EDUCATION, Defendants.	STATE OF NEW JERSEY BEFORE THE COMMISSIONER OF EDUCATION OFFICE OF ADMINISTRATIVE LAW OAL DCKT NO.: EDU 14170-2016N AGENCY REF. NO.: 37-2/16 **SETTLEMENT AGREEMENT AND RELEASE**

WHEREAS, the Cresskill Board of Education (hereinafter referred to as the "Cresskill Board") is a kindergarten through 12th grade public school district that operates the Cresskill School District (hereinafter referred to as the "Cresskill District") which has offices located at One Lincoln Drive, Cresskill, New Jersey 07626;

WHERAS, the Little Ferry Board of Education (hereinafter referred to as the "Little Ferry Board") is a kindergarten through 8th grade public school district that operates the Little Ferry School District (hereinafter referred to as the "Little Ferry District") (the Cresskill District and the Little Ferry District, collectively, the "Districts") which has offices located at 130 Liberty Street, Little Ferry, New Jersey 07643;

WHEREAS, M.O'K. and S.O'K. (hereinafter referred to as the "Parents") are the parents of A.O'K. and C.O'K. (hereinafter referred to as the "Children") (hereinafter collectively referred to as "Petitioners"); and

WHEREAS, on or about November 10, 2015, the Cresskill Board was notified that on October 26, 2015 the Interim Executive County Superintendent (hereinafter referred to as the "ECS") Nora Peck determined A.O'K. and C.O'K. are no longer homeless within the meaning set forth in State and federal law and that the Children were entitled to a tuition free education in the Little Ferry School District for the remainder of the 2015-2016 school year (hereinafter referred to as the "2015-2016 Homelessness Determination");

WHEREAS, on or about December 16, 2015, the Cresskill Board notified the Parents that the Superintendent intended to recommend to the Cresskill Board that A.O'K. and C'O.K. be disenrolled from the Cresskill District;

WHEREAS, on or about February 11, 2016, A.O'K. and C.O'K. and the Parents appealed the 2015-2016 Homelessness Determination to the Commissioner of Education;

WHEREAS, on February 22, 2016, the Cresskill Board voted to disenroll A.O'K. and C'O.K. from the District and provided notice to the Parents of same on or around February 29, 2016;

WHEREAS, the Cresskill Board has not been paid tuition for A.O'K. and C.O'K. for the 2015-2016 and 2016-2017 school years;

WHEREAS, the Cresskill Board, Little Ferry Board, and the Parents (collectively the "Parties") are desirous of resolving the issues related to A.O'K.'s and C.O'K.'s residency and the reimbursement of tuition, and have reached an amicable resolution thereby avoiding the time and expense associated with further litigation.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the Parties agree as follows:

1. The children, A.O'K. and C.O'K., shall be permitted to attend school in the Cresskill District through December 31, 2016 without contribution towards their tuition from the Parents.

2. The Parents shall provide transportation to and from the District for A.O'K. and C.O'K. through December 31, 2016, without contribution or reimbursement from either the Cresskill Board or Little Ferry Board.

3. The Parents agree that A.O'K. and C.O'K. shall be disenrolled from the Cresskill District without any further due process or action by the Board on January 1, 2017, unless the Parents and A.O'K. and C.O'K. have found permanent housing in the Cresskill District by this date and submit proof of residency in accordance with Board Policy and Regulation 5111, Eligibility of Resident/Non Resident Students, in which case, A.O'K. and C.O'K. may remain enrolled in the Cresskill District. Following January 1, 2017, A.O'K. and C.O'K. will be enrolled in the district where they reside, or where they may be eligible to attend school under the

McKinney-Vento Homelessness Assistance Act, 43 U.S.C. 11301 et seq., and New Jersey's statutes and regulations, or they shall be home schooled pursuant to N.J.S.A. 18A:38-25. The Parents will be permitted to re-enroll A.O'K. and C.O'K. in Cresskill District at any time in the future if the Parents and A.O'K. and C.O'K. are able to obtain permanent housing in the Cresskill District and provide proof of residency in accordance with Cresskill Board Policy and Regulation 5111, Eligibility of Resident/Non Resident Students.

4. The Little Ferry Board shall remit to the Cresskill Board the sum of Eleven Thousand Seven Hundred and Eight Dollars and Sixty Cents ($11,708.60) within thirty (30) days of execution of this Settlement Agreement and Release by all Parties in full satisfaction of the tuition owed for the Children for the 2015-2016 school year and through December 31, 2016 of the 2016-2017 school years.

5. Subject to the terms of this Agreement, the Parties hereby mutually release and discharge each other from all claims, demands, actions, judgments, damages, liabilities and executions of any kind whatsoever, in law or equity, administrative proceedings and judicial and quasi-judicial proceedings, that were or could have been brought through the date of this Agreement, except that the Cresskill Board shall retain all rights with regard to the tuition owed by the Little Ferry Board to the Cresskill Board for the 2013-2014 and 2014-2015 school years in the amount of One Hundred and One Thousand Six Hundred and Forty Nine Dollars ($101,649). It is also

expressly understood, however, that any Party may bring an action to enforce the terms of the within Agreement.

6. The Parents' signatures on this Agreement shall serve as their request to withdraw with prejudice the appeal of the 2015-2016 Homelessness Determination. Any Party may submit a fully executed copy of this Agreement, together with resolutions from the Cresskill Board and Little Ferry Board approving this Agreement, to the Commissioner of Education as notification in accordance with N.J.A.C. 6A:3-1.13 that the Parents withdraw with prejudice their appeal of the 2015-2016 Homelessness Determination.

7. It is further understood and agreed that all Parties shall bear their own attorneys' fees and costs in connection with this matter, except that in the event an action is brought to enforce this Agreement, the prevailing Party in the enforcement action shall be entitled to attorneys' fees and costs in connection therewith.

8. The terms of this Agreement represent the compromise of disputed claims between the Parties. This Agreement shall not constitute, be interpreted, construed, or used as evidence of any admission of fact, law, responsibility, or liability on the part of any Party.

9. This Agreement shall be construed and enforced in accordance with the laws of the State of New Jersey.

10. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective Party.

11. The Parties may execute this Agreement in counterparts, each of which is deemed an original and all of which only constitute one original.

12. This Agreement constitutes the entire understanding of the Parties hereto and shall supersede any prior agreements between the Parties with respect to its subject matter. Further, there are no representations, warranties, covenants or undertakings other than those expressly set forth herein. The Parties acknowledge and agree that they are not relying upon any oral statements, representations, promises, or expectations which are not expressly and explicitly set forth in this Agreement, which alone fully and completely expresses all agreements between the Parties.

13. The terms of this Agreement shall remain strictly confidential and shall not be divulged to any third party, except the Parties' attorneys and/or accountants/auditors unless such disclosure is required under applicable law and/or legal process. In response to any direct inquiry about the outcome of the above-described action, the Parties shall indicate only that the matter has been concluded. In the event that the terms of this provision are violated, the non-breaching party may take all reasonable measures (including, but not limited to, court proceedings) to restrain the prohibited or unauthorized disclosure of said information. Any and all costs incurred in connection with such proceedings, including, but not limited to,

reasonable attorneys' fees, shall be charged to the breaching party.

14. The terms and conditions set forth herein shall be deemed severable. If any clause or provision contained herein shall be held unenforceable by a court of competent jurisdiction, it shall not affect the validity of any other clause or provision, all of which shall continue in full force and effect.

15. The Parties recognize that each had the opportunity to be represented by legal counsel if they so choose, that they sign this within Agreement as their own voluntary act and deed, and that they understand the duties and obligations enumerated herein. The Parties further state that if represented by counsel they are fully satisfied with the legal representation provided.

16. This Agreement is subject to approval by the Cresskill Board and the Little Ferry Board. In the event this Agreement is not approved by either Board, all Parties shall revert to their original positions and this Agreement shall not be enforceable against any Party.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth below.

WITNESS:

Antoinette Kelly

ANTOINETTE KELLY
Board Secretary/Business Administrator

DATED: 1/23/2017

CRESSKILL BOARD OF EDUCATION

BY: Denise Villani

DENISE VILLANI
Board President

DATED: 1/23/2017

WITNESS:

_____

DENNIS FROHNAPFEL
Interim Board Secretary/Business Administrator

DATED: _____

LITTLE FERRY BOARD OF EDUCATION

BY: _____

RAY VORISEK
Board President

DATED: _____

WITNESS:

_____

DATED: _____

_____

M.O'K. Father of the Children

DATED: _____

WITNESS:

_____

DATED: _____

_____

S.O'K. Mother of the Children

DATED: _____

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth below.

WITNESS:

_____
ANTOINETTE KELLY
Board Secretary/Business Administrator

DATED: _____

CRESSKILL BOARD OF EDUCATION

BY: _____
DENISE VILLANI
Board President

DATED: _____

WITNESS:

Dennis A Frohnapfel
DENNIS FROHNAPFEL
Interim Board Secretary/Business Administrator

DATED: 1/12/2017

LITTLE FERRY BOARD OF EDUCATION

BY: _____
RAY VORISEK
Board President

DATED: 1/12/17.

WITNESS:

_____

DATED: _____

_____
M.O'K. Father of the Children

DATED: _____

WITNESS:

_____

DATED: _____

_____
S.O'K. Mother of the Children

DATED: _____

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth below.

WITNESS:

ANTOINETTE KELLY
Board Secretary/Business Administrator

DATED: _____

CRESSKILL BOARD OF EDUCATION

BY: _____
DENISE VILLANI
Board President

DATED: _____

WITNESS:

DENNIS FROHNAPFEL
Interim Board Secretary/Business Administrator

DATED: _____

LITTLE FERRY BOARD OF EDUCATION

BY: _____
RAY VORISEK
Board President

DATED: _____

WITNESS:

Donna Schmidt

DATED: 1-4-16

M.O'K. Father of the Children

DATED: _____

WITNESS:

Donna Schmidt

DATED: 1-4-16

Sharon O'Keeffe
S.O'K. Mother of the Children

DATED: 1/4/16

Little Ferry Public Schools

130 Liberty Street, Little Ferry, NJ 07643 (201) 641-6192 FAX (201) 641-6604

Home of Memorial School

A "Governor's School of Excellence"

Mr. Frank R. Scarafile
Superintendent of Schools

Dr. Dennis R. Frohnapfel
Interim SBA/Board Secretary

DO134 Whereas, the petitioners on behalf of students named in the attached Settlement Agreement and General Release, filed a Petition with the New Jersey Commissioner of Education, OAL Docket No. EDU14170-2016N, Agency Ref. No. 37-2/16 (the "Action"); and

Whereas, the parties, through Counsel, have reached a settlement of said dispute as set forth in a Settlement Agreement and General Release, the parameters of which were discussed in closed session on January 3, 2017 and which are confidential as it relates to a student matter and as may be required by law; and

Whereas, in order to avoid further expense of litigation, the parties enter into this Agreement, and by so doing, without admitting any liability on the part of the Board, they seek and intend to fully resolve, terminate and settle all disputes, claims and actions between the parties related to the Action; and

Whereas, the Superintendent of Schools and the Board Attorney have recommended that this matter be settled according to the terms and conditions reflected in the Settlement Agreement and General Release attached hereto as Exhibit A; now

Be It Resolved, that subject to receipt of an executed copy of the Agreement by petitioners and approval and execution of the Agreement by the other respondent, Cresskill Board of Education, the Little Ferry Board of Education hereby approves the attached Settlement Agreement and General Release, and upon receipt of an appropriately executed original from Petitioner, authorizes the Board President and Board Secretary to execute the Settlement Agreement and General Release, attached hereto as Exhibit "A".

District Operations resolution 134				
Motion: Ms. Flanagan	***Second:*** Ms. Brattoli			
Member	***Yes***	***No***	***Abstain***	***Absent***
Ms. Brattoli (Michelle)	X			
Ms. Ferrante (Suzanne)				X
Ms. Ferrara (Jeanine)	X			
Ms. Flanagan (Debra)	X			
Ms. Fucci (Jill)	X			
Mr. Fytros (Nicolas)			X	
Ms. Gottlieb (Leslie)	X			
Mr. Mele (Frank)	X			
Mr. Vorisek (Raymond)				X

I, Dennis R. Frohnapfel, Ed.D., Secretary of the Little Ferry Board of Education, hereby certify that the foregoing is a true copy of a motion duly adopted by said Board at a Special Meeting held on January 3, 2017.

IN WITNESS WHEREOF, I have set my hand and the seal of the Little Ferry Board of Education, January 19, 2017.

Dennis R. Frohnapfel, Ed.D., Secretary
Little Ferry Board of Education

BOARD OF EDUCATION REGULAR MEETING, JANUARY 23, 2017

On a motion by Michael DePalo, seconded by Rosanne Rabinowitz and carried, the Board approved the following Educational Planning item:

Resolved, that the Board of Education, upon recommendation of the Superintendent, approve the attached settlement agreement and release. (Attachment EP-1)

ROLL CALL VOTE

	YES	NO	ABSTAIN	ABSENT
Trustee Sally Cummings	√			
Trustee Michael DePalo	√			
Trustee Dionna Griffin	√			
Trustee Mary Klein	√			
Vice President Stephen Moldt	√			
Trustee John Park	√			
Trustee Rosanne Rabinowitz	√			
Trustee Cindy Wolfer				√
President Denise Villani	√			

I CERTIFY THE FOREGOING TO BE A TRUE COPY OF THE RESOLUTION ADOPTED BY THE BOARD OF EDUCATION OF CRESSKILL IN THE COUNTY OF BERGEN, NEW JERSEY, AT A MEETING HELD ON JANUARY 23, 2017.

Respectfully submitted,

Antoinette Kelly, CPA
Business Administrator/
Board Secretary

99-17

THE CENTER FOR EDUCATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – the Center for Education (Center) – alleged that the respondent New Jersey Department of Education (NJDOE) acted in a biased and arbitrary, capricious and unreasonable manner when the Office of Special Education Programs (OSEP) denied the petitioner's 2014 application to become an Approved Private School for Students with Disabilities (APSSD). Petitioner further contended that the NJDOE conducted an improper investigation in connection with the Center's application for approval. Respondent asserted that the denial of the Center's application was pursuant to regulatory requirements and proper under the circumstances. Respondent further contended that the matter became moot when the Center's application was advanced from Phase II to Phase III in March 2015; the Center received preliminary approval in May 2015.

The ALJ found, *inter alia,* that: the matter was not moot because the issue was capable of repetition and of substantial importance to the public; and the OSEP's investigation was a sham, and its conclusion was contrary to the facts before it. The ALJ concluded that while the NJDOE's conduct did not demonstrate bias, NJDOE did act in an arbitrary, capricious and unreasonable manner when it improperly denied the Center's 2014 application "based on information it knew was incorrect." The ALJ ordered that the matter be concluded "in accordance with the findings set forth" in the Initial Decision.

Upon a comprehensive review, the Commissioner rejected the Initial Decision, finding that the matter became moot when the Center's application was advanced in March 2015, and then granted preliminary approval in May 2015. In so deciding, the Commissioner found that the ALJ either failed to understand or disregarded the governing regulations with respect to the facts in the matter and the standard for mootness.

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

April 3, 2017

99-17

OAL DKT. NO. EDU 14525-14
AGENCY DKT. NO. 280-9/14

THE CENTER FOR EDUCATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law ("OAL") have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the respondent, and the petitioner's reply thereto. In this matter, petitioner alleges that the New Jersey Department of Education ("NJDOE") acted in an arbitrary, capricious and unreasonable manner when the Office of Special Education Programs ("OSEP") denied the Center for Education's ("Center") application to establish itself as an Approved Private School for Students with Disabilities ("APSSD") on the basis that the Center did not demonstrate a need for the school.[1] Petitioner further contends that the NJDOE acted in a biased manner, and conducted an improper investigation in connection with the Center's application for approval. Respondent argues that the NJDOE did not act in an arbitrary, capricious, unreasonable, or

[1] For clarity and accuracy, this decision will only refer to the Center for Education as "Center," and the Special Children's Center will be referred to as "SCC." A review of the record reveals that the Initial Decision and several submissions by petitioner use "Special Children's Center" and "Center for Education" interchangeably. The Center and SCC cannot be considered the same entity with regard to the subject matter of this litigation: SCC is described as a non-profit organization located in Lakewood, New Jersey and Brooklyn, New York, providing various services to children and adults with disabilities; it is not an APSSD, nor is SCC seeking such status in this litigation. Notably, the Lakewood School District ("Lakewood" or "District") has an ongoing relationship with SCC that is separate from the Center, which includes a services agreement entered into in August 2012, to provide services to the District's children with special needs at SCC's "Day Care Center." The Center for Education, which is not the "Day Care Center" and is referred to as a *division* of SCC in various documents submitted by petitioner, is a for-profit school for young children with disabilities, and is the only entity in this litigation seeking to establish itself as an APSSD. Therefore, referring to the two entities as the same is incorrect.

biased manner because the denial of the application was pursuant to the regulatory requirements, and proper under the circumstances. Respondent further contends that the matter became moot when the Center's application was advanced to Phase III in March 2015, after the NJDOE received documentation demonstrating sufficient need, which rendered the Center eligible for APSSD status.[2]

The ALJ found that the matter was not moot because the issue was capable of repetition and of substantial importance to the public. The ALJ explained:

> The approval given in the matter was a preliminary approval only good for two years and the petitioner will have to continue substantiating a daily enrollment of at least twenty-four students. During this process they may well be faced with again dealing with the issue of being denied continued approval based on unknown or known incorrect information relied upon by the DOE and is therefore subject to repetition. In addition, this issue is of substantial important because of the waste of judicial resources, the expense in filing and prosecuting this appeal, and the substantial expenditure of resources in defending the indefensible on the part of the DOE after it knew it had relied on incorrect information. Furthermore this matter I find to be of substantial importance also for the reason that it hopefully will affect public policy by henceforth having applications under OSEP's review be treated fairly, openly, honestly and efficiently in the application process. (Initial Decision at 5)

The ALJ further found that OSEP's "investigation was a sham, and its conclusion was contrary to the facts before it." The ALJ concluded that while the NJDOE's conduct did not demonstrate bias, the NJDOE did act in an arbitrary, capricious and unreasonable manner when it denied the Center's application. (*Id.* at 6)

Respondent takes exception to the ALJ's finding that the matter is not moot and that the NJDOE acted in an arbitrary, capricious and unreasonable manner. Respondent argues that: the ALJ erred when he determined that this matter was not moot after the Center was

[2] The needs assessment survey submitted by Lakewood in March 2015, in support of the Center's application for APSSD, reflected that more that twenty-four students from the District would likely be placed at the Center.

advanced from Phase II to Phase III and received preliminary approval; the ALJ erred when he conducted a hearing in this matter and denied the NJDOE's motion to dismiss the matter as moot – filed in March 2015 – during the May 8, 2015 hearing; the ALJ erred when he found that the NJDOE acted in an arbitrary, capricious and unreasonable manner in denying the Center's application at Phase II; and the ALJ erred in entering summary decision in favor of the Center.[3] Respondent maintains the matter is moot because there is no existing controversy, and the issue involved is not a matter of substantial importance to the public that is capable of repetition yet evading review. Respondent further contends that the NJDOE's denial of the Center's application in Phase II was appropriate and reasonable because information provided to OSEP by way of the needs assessment survey did not satisfy the regulatory requirement of "sufficient need."[4] Respondent submits that OSEP's investigation of the matter and reliance on the local school district were also appropriate and reasonable.[5]

Petitioner has filed a reply to respondent's exceptions, arguing that the ALJ correctly determined that the matter was not moot and that OSEP's investigation was a sham. Petitioner repeats the following arguments in its submission: 1) NJDOE employees were "well aware" that there were more than twenty-four students from Lakewood who would be enrolled at the Center based on information available to the NJDOE from the Center, documents that the NJDOE had access to from other offices and employees within the Department, and informal exchanges between OSEP and other NJDOE employees. The NJDOE "chose to ignore" all the

[3] Although the Initial Decision does not explicitly dispose of the motion and cross-motion filed by the petitioner and respondent, respectively, *after* the hearing in this matter, the pleadings are referenced in the Initial Decision and it can be inferred that determination of the pending motions were incorporated into the ALJ's recommendation to the Commissioner.

[4] "The applicant shall . . . document the need for a minimum of 24 public school placement students in order to be approved by the Commissioner." *See N.J.A.C.* 6A:23A-18.3(b)(1).

[5] *N.J.A.C.* 6A:14-7.2(a)(2) provides in relevant part: "A survey of need indicating the number, age range, types of students with disabilities to be served by the proposed programs/services and the reasons these students cannot be served in the resident district, supported by documentation from local public school districts. Documentation of local school districts surveyed shall be included."

"independent" information and engaged in "deviant behaviors"; 2) OSEP conducted a "sham investigation" as it relied on information from Lakewood employees, even though OSEP employees were "warned" of a Lakewood employee's alleged bias against the Center.[6] OSEP improperly interviewed the Superintendent of Schools and the Director of Special Services when it should have contacted the Center or the Lakewood employee who executed the needs assessment survey; 3) The matter is not moot because it is capable of repetition yet evading review, since the law cannot "sanction such 'sham' investigations of the facts," and because in this matter the NJDOE "deviated from its normal procedures and the Code, albeit, ***failing*** to allow truthful and accurate correction, not to mention inquiring of individuals who had known 'agendas' and/or no knowledge and/or information." (Petitioner's Exceptions at 10-11, emphasis in original) Additionally, petitioner asserts that the NJDOE has already repeated this conduct, citing a case wherein OSEP employees "direct[ed]" Lakewood to remove students from SCC and "wreaked havoc with tons of classified public school children's lives."[7] (*Id.* at 12) Finally, petitioner reiterates its position that this matter should be independently reviewed by another entity other than the Commissioner because the NJDOE is a party to this matter.[8] (*Id.* at 13)

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[6] Petitioner inappropriately introduces a tenure matter relating to one of the Lakewood employees, interviewed by OSEP during its investigation process, to establish that the Lakewood employee was not credible and had "her own agenda towards the Application," and that the NJDOE was aware of this "fact." Petitioner's assertions are unsubstantiated because there is neither any proof nor has there been a finding of "agenda" or "bias" against the Center and its application from the Lakewood employee with regard to this matter. Moreover, the Lakewood employee is not a party to this matter, and the facts in this matter are unrelated to the tenure charges.

[7] Petitioner, again, introduces a case where the facts and issues are unrelated and does not support its argument that the issue in this matter is capable of repetition. Petitioner refers to *J.N. and F.N. o/b/o E.N., et al., v. Lakewood Twp. Bd. of Educ.*, OAL Dkt. No. EDS 13659-14, (August 24, 2016), to suggest that the issue in that litigation – revision of children's IEPs to change their placement from SCC to another school – is the same as the NJDOE's initial denial of the Center's application for failure to establish sufficient need. It is undeniable that the placement considerations raised in *J.N.*, and the parents' objections to removal of their children from SCC had nothing to do with the Center's application to become an APSSD. Based on the evidence in the record, it also bears noting that the Lakewood students enrolled in SCC have no effect on the Center's student enrollment because the SCC students do not automatically transition from SCC to the Center's program – placement is based on the students' Individualized Education Program as determined by the Lakewood Child Study Team.

[8] *N.J.S.A.* 18A:9-1 provides in relevant part, "[t]he commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing

Upon a comprehensive review of the record, the Commissioner rejects the ALJ's decision. Specifically, the Commissioner finds that the matter became moot when the Center's application was advanced from Phase II to Phase III in March 2015, and there was no remaining dispute or controversy once the Center was granted preliminary approval in May 2015. It appears that in deciding the mootness issue, the ALJ either failed to understand, or disregarded, the governing regulations with respect to the facts in this matter and the standard for mootness.

It is well-settled that a matter is moot when it no longer presents a justiciable controversy, and the determination sought, when rendered, cannot have a practical effect on the existing controversy. *See Oxfeld v. New Jersey State Board of Education*, 68 *N.J.* 301 (1975). Moot cases may, nevertheless, be adjudicated when the issues raised are of substantial importance to the public and are capable of repetition yet evade review. *See In re J.I.S. Industrial Service Co. Landfill*, 110 *N.J.* 101 (1988). The ALJ found that the issue at hand is capable of repetition because the Center's approval was "a preliminary approval only good for two years and petitioner will have to continue to substantiate a daily enrollment of at least twenty-four students."[9] Essentially, the ALJ suggests that the issue at hand – NJDOE's denial of preliminary approval – is capable of repetition two years from now because the Center (just like all other preliminarily approved schools in its position) has to provide evidence of compliance with the regulatory requirements in order to attain approval as a "new school" and maintain its APSSD status.

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higher education, or under the rules of the State board or of the commissioner." The State Legislature has provided the Commissioner with jurisdiction to hear and determine *all* controversies and disputes relating to the school laws of the State except in limited circumstances. The subject matter of this litigation does not fall within one of the narrow exceptions enumerated in the statute. Additionally, the Legislature has not made an exception for situations where the NJDOE is a party to the case.

[9] *N.J.A.C.* 6A:23A-18.3(c)(1)-(i) provides: The school shall receive preliminary approval to operate for a two year period, after which the school shall provide documentation that the school has a minimum ADE of 24 public school placement students by the end of the second school year . . . . A school meeting the minimum ADE of 24 public school placement students by the end of the second school year shall receive new school approval.

First, the preliminary approval stage and the new school approval stage are two separate phases of the approval process. Preliminary approval requires corroboration from the local school district: a needs assessment survey is to be conducted at the local school district level to substantiate "sufficient need." Once the applicant has received preliminary approval, the local school district is no longer involved.[10] Second, at the end of the two years, the applicant school needs to meet the minimum *average daily enrollment* (ADE) of twenty-four public school placement students so that it may receive approval as a "new school."[11] In other words, the Center (just like other APSSDs in its position) needs to satisfy the minimal requirements of the regulation and the onus remains exclusively on the Center to provide proper information and data *from its records* to the NJ DOE to prove that it continues to qualify as an APSSD. Additionally, if a dispute arises regarding the Center's approval, there is a mechanism through which the Center may appeal the determination. As such, the issue raised in this litigation relating to the NJDOE's denial of the Center's preliminary approval is not capable of repetition yet evading review.

Similarly, this matter does not meet the criteria of substantial importance to the public. The ALJ's finding – that the issue is of substantial importance because of "the waste of judicial resources, the expense in filing and prosecuting this appeal, and the substantial expenditure of resources in defending the indefensible on the part of the DOE. . . ", and because it "hopefully will affect public policy by henceforth having applicants under OSEP's review be

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[10] This should also resolve the ALJ's concern that "[d]uring this process they [the Center] may well be faced with again dealing with the issue of being denied continued approval based on *unknown or known incorrect information* relied upon by the DOE. . . ." (emphasis added), because any information provided to the NJDOE would be coming directly from the Center.

[11] *N.J.A.C.* 6A:23A-18.1 defines "average daily enrollment" as follows: the sum of the days present and absent of *all school students enrolled in the register(s) of the school* divided by the number of days the approved private school for students with disabilities was actually in session for the entire school year rounded to the nearest four decimal places, except in no event shall the divisor be less than 180 days (emphasis added).

treated fairly, openly, honestly and efficiently in the application process" is unsubstantiated and unpersuasive. Matters of substantial importance are issues that relate to the welfare of the general public or issues that could arise in the public context where the general public may be a collective stakeholder. An individual's or entity's personal interests cannot be substituted for matters that are of substantial importance to the public. Furthermore, the "waste of judicial resources" and "substantial expenditure of resources" were certainly not a result of the nature of this issue (denial of preliminary approval pursuant to State regulations); thus, such bases cannot be utilized to justify a finding of "substantial importance."[12] The Commissioner, therefore, finds that this matter became moot in March 2015, when the Center received preliminary approval from the NJDOE, and no justiciable controversy exists that is of substantial importance and capable of repetition yet evading review.

The Commissioner also finds that the ALJ's determination that the NJDOE acted in an arbitrary, capricious and unreasonable manner when OSEP conducted an investigation and denied the Center's application, was incorrect. Specifically, the Commissioner finds that the ALJ inappropriately applied the requirements of the governing regulations when he determined that the NJDOE's actions were arbitrary, capricious and unreasonable. The ALJ's finding that the NJDOE was arbitrary, capricious and unreasonable does not require significant discussion, as the matter has been rendered moot. Notwithstanding, the Commissioner has considered the merits and finds that OSEP followed the mandate of the regulation when it denied the Center's application for failure to demonstrate "sufficient need."[13] Once documentation was submitted

[12] The ALJ's decision to proceed to hearing when the matter was moot – despite having the opportunity to dispose of the case prior to the hearing – was improper, extraneous, and the true waste of judicial resources. There is also no evidence in the record that either the Center or any other applicant has been treated unfairly, dishonestly or inefficiently by the NJDOE with regard to the approval process.

[13] The needs assessment survey submitted by Lakewood listed *less* than twenty-four students, which is the minimum requirement. *See N.J.A.C.* 6A:23A-18.3(b)(1).

establishing sufficient need, OSEP approved the application within the regulatory timeframe.[14] Since OSEP's investigative efforts in this matter exceeded the scope of the governing regulations, the Commissioner will not address the merits of the investigation in detail either. The Commissioner finds, however, that OSEP appropriately relied on representations made by Lakewood and information provided by its employees because "sufficient need" *must* be supported by documentation from the local school district, not the applicant or any other independent source. *See N.J.A.C.* 6A:14-7.2; *N.J.A.C.* 6A:23A-18.3. Seeking alternative confirmation of "sufficient need" – as petitioner and the ALJ have proposed – when the regulations are unambiguous, would constitute a deviation from the regulations. In this regard, OSEP undertook an unnecessary yet considerate project when it conducted its investigation, as the plain language of the regulations *do not* require such efforts. OSEP could have simply denied the application without engaging in an investigation, solely based on the contents of the needs assessment survey, because it did not reflect sufficient need as defined under *N.J.A.C.* 6A:23A-18.3. Instead of denying the application outright, OSEP appears to have provided the Center a second chance by investigating the matter and seeking to reconcile any discrepancy between the Center's representations in its application and the information on Lakewood's needs assessment survey in support of the Center's application.

The regulations are clear: it is the applicant's responsibility to ensure submission of all required information pursuant to the provisions of *N.J.A.C.* 6A:14-7.2 and *N.J.A.C.* 6A:23A-18.3; the applicant must provide evidence of sufficient need (corroboration from the local school district); if the applicant follows the procedures and meets the requirements, it advances through the application process; if the applicant does not ensure provision of proper evidence and information, the applicant does not obtain approval. Following

[14] *See N.J.A.C.* 6A:14-7.2(a)(2).

the regulations and acting in accordance with its provisions is the antithesis of arbitrary, capricious and unreasonable. Remarkably, the suggestions made by the ALJ in the Initial Decision and by the petitioner in its exceptions would result in OSEP circumventing the regulatory process, which could be deemed arbitrary, capricious and unreasonable.[15] Accordingly, the recommended decision of the ALJ is rejected, and the petition is hereby dismissed as moot.

IT IS SO ORDERED.[16]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/03/17
Date of Mailing: 4/03/17

[15] The ALJ and petitioner have suggested that in reviewing the Center's application, OSEP should have: looked to other sources not outlined in the regulations; relied on informal information shared and discussed among colleagues; made inappropriate inferences regarding the sources of information and parties involved in the process; determined the credibility of information received based on tenuous allegation, and engaged in activities not required by the regulation.

[16] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 14525-14
AGENCY DKT. NO. 280-9/14

THE CENTER FOR EDUCATION,
Petitioner,
v.
STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,
Respondent.

Michael I. Inzelbuch, Esq., for petitioner

Caroline Jones, Deputy Attorney General, and **Jennifer Hoff**, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Eric L. Harrison, Esq., and **Steven K. Parness**, Esq., for intervenor (Methfessel & Werbel, attorneys)

Record Closed: October 11, 2016 Decided: November 17, 2016

BEFORE **JOHN SCHUSTER III**, ALJ:

In this matter petitioner, the Center for Education t/a Special Children's Center (SCC), brings a Notice of Motion, filed September 20, 2016 requesting the relief by way of a finding that respondent, State of New Jersey, Department of Education (DOE) acted in a biased and arbitrary manner in not granting petitioner's 2014 application to become an approved private school for students with disabilities. DOE filed a Cross Motion on October 11, 2016 seeking an order dismissing the petition as moot or in the alternative moving for summary decision as no material facts are in dispute.

FINDINGS OF FACT AND PROCEDURAL HISTORY

The DOE is authorized to approve institutions of learning to provide programs for students with disabilities upon proof that certain criteria are met. N.J.A.C. 6A:14-7.1 et als. Among the criteria is the demonstration of need from local public school districts. Need is met upon a showing that a minimum of twenty-one public school students attend the school. N.J.A.C. 6A:23A-18.3. Petitioner filed an application seeking approval in April 2014. Phase I of the application process was met by May 6, 2014 leaving only a sufficient determination of need. On or about June 30, 2014 the Lakewood School District submitted Attachment C, Local School Districts' Assessment Survey Response Form (P-1) to the DOE as part of petitioner's application process. The document was signed by Laura Winters, the Superintendent of Schools and Eli Freund, the District's Supervisor of Child Study Teams and listed by initials twenty-one students who were currently at petitioner's facility and would continue in the 2014–2015 school year. This contradicted petitioner's application which informed DOE "The Special Children's Center Preschool (Center) currently educates thirty-eight preschool children with disabilities from the Lakewood Public Schools (Lakewood)." Presumably to resolve this disparity the DOE Commissioner's Office dispatched John Worthington, the Manager of Policy and Planning, to investigate this issue.

Instead of checking with the DOE's county office which is supposed to have a record of all out-of-district placements, a meeting was arranged with the Lakewood District. Mr. Worthington directed Dr. Dolores Walther, the Acting Coordinator of Dispute Resolutions and Coordinator of Complaint Investigations, to accompany him to

that meeting. Her purpose was to listen, take notes, and ask follow-up questions if relevant. Lakewood District was represented at that meeting by Superintendent of Schools, Laura Winters and Helen Tobia, the Director of Special Services. Ms. Winters signed the assessment along with Eli Freund, the Supervisor of Child Study Teams. Ms. Tobia was not a signatory. Mr. Worthington asked at that meeting if any names were missing or were the twenty-one individuals listed accurate, and whether there was any reason to reconsider the document. Ms. Winters stated she did not prepare the list of twenty-one students on attachment C (P-1) as that was done by the District's attorney Mr. Zitomer and given to her for signature. She stated she did not know anything about the particular students at petitioner's facility and signed it assuming its accuracy. Ms. Tobia however believed that the twenty-one students were an inaccurate number as five or six of them were no longer attending the Special Children's Center. That brought the number from twenty-one down to fifteen or sixteen students. Either Mr. Worthington or Dr. Walther asked to see the IEPs for the children at SCC but only ten IEPs could be produced. The IEPs revealed that some of the students were in an inclusion class with supports or in a preschool disabled class. As a result of that meeting the discrepancy of what the District reported as opposed to what the petitioner reported increased instead of what was expected that being that additional students at SCC would be identified. Mr. Worthington's investigation seemed to end at that point. A reasonable effort could have been made to contact Mr. Freund who signed the document and inquire as to him how many students he could verify were at SCC and were going to continue in the 2014–2015 school year or SCC could have been contacted directly and/or visited to physically see the students in attendance and/or review their records to determine the accuracy of the thirty-eight or thirty-nine students that they claimed to be in attendance. This did not happen. And one must questions the gross inefficiency in which this investigation took place. In addition, in the early part of August 2014 Dr. Walther informed Mr. Worthington that she was aware at that time that there were at least thirty-one preschool disabled students attending SCC. Mr. Worthington acknowledged receiving that information. In spite of the DOE having that information a denial letter was sent to SCC on August 25, 2014 by Susan Martz the Assistant Commissioner denying the 2014 application for approval based on the needs assessment surveys submitted to OSEP did not reflect the minimum of twenty-four

potential student placements at SCC. DOE has not explained why they did not review their own county office's records, did not question Mr. Freund, did not physically count the number of children from Lakewood at SCC or did not examine the student records and IEP's in SCC's files as the later would have given Mr. Worthington an accurate number upon which the DOE could make a supportable determination of need. While one could argue an incomplete investigation is simply inefficient and/or negligent work one must conclude capriciousness in the denial of August 25, 2014 when the DOE knew directly from Dr. Walther that there were at least thirty-one students attending the Special Children's Center.

As a result of that denial a petition was filed by SCC on September 24, 2014 seeking further review of the needs assessment, to complete the review of SCC's application based on the needs assessment review and for a finding that DOE acted in a biased and arbitrary fashion. The answer was filed by DOE on November 4, 2014. The Lakewood BOE was permitted to intervene on February 10, 2015. In furtherance of a motion, on or about February 9, 2015, Mr. Eli Freund submitted an affidavit as the Supervisor of Special Services for the Lakewood Board of Education indicating that SCC educates thirty-eight Lakewood students, thirty-four of which are preschool disabled. In spite of now learning from the signatory on the original needs assessment that there were thirty-four preschool disabled students at SCC the litigation continued and testimony of Dr. Walther and Mr. Worthington was taken on May 5, 2015. The litigation terminated on May 28, 2015 when DOE advised petitioner that they were preliminarily approved for the 2015–2016 and 2016–2017 school years for four classes for preschool disabled students and one class for multiply disabled students. That notice also provided that this preliminary approval could be revoked if SCC did not provide documentation of a minimum average daily enrollment of twenty-four public school students.

Ms. Walter testified during the hearing of May 8, 2015 that all the children on P-1 were confirmed to have IEPs at SCC in the preschool disabled self-contained program in the 2014–2015 school year. She was also shown during that hearing eighteen

additional IEPs for children at SCC which brought the number at that time to thirty-nine students attending the preschool disabled program.

LEGAL ARGUMENT

Respondent argues that because preliminary approval to operate was granted to petitioner effective July 1, 2015 this matter should be dismissed as moot. "An action is considered moot when it no longer presents a justiciable controversy because the issues involved have become academic. A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." Victoria v. Board of Educ. of Woodbridge, 1982 S.L.D. 1, 5. However courts will hear moot cases nevertheless when the issues they raise are of substantial importance and are capable of repetition yet evade review. In re J.I.S. Indus. Serv. Co. Landfill, 110 N.J. 101 (1988); See also Handabaka v. Div. of Consumer Affairs, 167 N.J. Super. 12, 14 (App. Div. 1979). In this matter SCC's license to operate is always subject to the scrutiny of the DOE. The approval given in this matter was a preliminary approval only good for two years and the petitioner will have to continue substantiating a daily enrollment of at least twenty-four students. During this process they may well be faced with again dealing with the issue of being denied continued approval based on unknown or known incorrect information relied upon by the DOE and is therefore subject to repetition. In addition this issue is of substantial importance because of the waste of judicial resources, the expense in filing and prosecuting this appeal, and the substantial expenditure of resources in defending the indefensible on the part of the DOE after it knew it had relied on incorrect information. Furthermore this matter I find to be of substantial importance also for the reason that it hopefully will affect public policy by henceforth having applicants under OSEP's review be treated fairly, openly, honestly and efficiently in the application process. For those reasons I **CONCLUDE** that this matter is not moot but the issues raised are of substantial importance and are capable of repetition.

As to petitioner's demand for a finding that DOE operated in a biased and arbitrary fashion I do not find that any bias has been demonstrated on the part of

respondent. I cannot find however that it did not act arbitrarily, capriciously, or unreasonably. In fact I find it operated in all three of those manners. Its investigation was a sham, and its conclusion was contrary to the facts before it. While I cannot find any fault with Assistant Commissioner Martz because there have been no facts submitted that she was aware of the knowledge and actions of Mr. Worthington, that does not excuse the conduct of the DOE.

CONCLUSION

For the reasons set forth above I **CONCLUDE** that the DOE acted in an arbitrary fashion when it incorrectly decided the issue of Phase II based on information it knew was incorrect. And I hereby **ORDER** that this matter be concluded in accordance with the findings set forth herein.

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

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

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

November 17, 2016
DATE

JOHN SCHUSTER III, ALJ

Date Received at Agency: November 17, 2016

Date Mailed to Parties: November 17, 2016

/cb

APPENDIX

WITNESSES

For petitioner:

Dolores Walther

John Worthington

For respondent:

None

For intervenor:

None

EXHIBITS

For petitioner:

P-1 Attachment C, dated June 30, 2014

P-2 Attachment C, dated March 13, 2015

P-3 Letter from Chaya Bender to Dr. Walther

For respondent:

None

For intervenor:

None

100-17

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges

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

Petitioner,

-and-

URSULA WHITEHURST,

Respondent.

AGENCY DOCKET
NO.: 263-9/16

OPINION AND AWARD

BEFORE: RUTH MOSCOVITCH, Arbitrator

Appearances:

For the Petitioner:

Christina Michelson Abreu
Scarinci Hollenbeck
1100 Valley Brook Ave.
PO Box 790
Lyndhurst, NJ 07071

For the Respondent:

Jason Sokolowski
Zazzali Fagella Nowak Kleinbaum & Friedman
150 West State Street, 3rd Floor
Trenton, NJ 08608

This matter comes before me on tenure charges brought under N.J.S.A. 18A:6-10, 6-11, 6-16, 6-17.1, 6-17.2 AND N.J.A.C. 6A:3-5.1 by Petitioner State-Operated School District of the City of Newark (the "District) against Respondent Ursula Whitehurst. The tenure charges at issue here were filed with the Bureau of Controversies and Disputes on September 29, 2016. I was appointed the arbitrator to adjudicate this matter on October 27, 2016.

In this proceeding, I heard testimony from 9 witnesses over 8 days. The District presented the testimony of Principal John Weinstein, VPs Lori Ween and

Curtis Adair from Bard Early College High School (Bard), and Principal Larry Ramkissoon, VP Henry Ogele, and Edith Battle, a veteran teacher and "Academic Interventionist," all from Westside High School (Westside), and Brad Haggerty, the District's Chief Academic Officer, and Homere Breton from the office of the District's General Counsel as well as two large binders containing a total of 66 exhibits. The Respondent testified in her own behalf and placed in evidence a single large binder with 64 exhibits. All witnesses were sworn and their testimony was recorded by a court reporter. The parties submitted post-hearing briefs on Monday, March 20, 2017, and the District requested and was granted leave to file a responsive brief by Thursday, March 13, 2017. No objection has been made to the fairness of this proceeding.

TENURE CHARGES

CHARGE ONE: INEFFICIENCY

During the period from September 2013 to the present, Respondent has demonstrated an inability to completely and responsibly execute her duties as a teacher in the following manner:

a. The Respondent has failed to implement curricular goals and objective(s).
b. The Respondent has failed to design coherent instruction.
c. The Respondent has failed to assess student learning.
d. The Respondent has failed to create an environment of respect and rapport.
e. The Respondent has failed to manage student behavior.
f. The Respondent has failed to manage classroom procedures.
g. The Respondent has failed to establish a culture of learning.
h. The Respondent has failed to communicate clearly and accurately.
i. The Respondent has failed to use questioning and discussion techniques with flexibility and responsiveness.
j. The Respondent has failed to engage students in learning.
k. The Respondent has failed to provide feedback to students.
l. The Respondent has failed to attain student achievement that meets or exceeds performance benchmarks.
m. The Respondent has failed to reflect on teaching.
n. The Respondent has failed to contribute to the School and District

o. The Respondent has failed to grow and develop professionally
p. The Respondent has failed to demonstrate promptness and attendance.
q. The Respondent has received a Partially Effective Rating for the 2013-2014 School Year in an Annual Summative Evaluation.
r. The Respondent has received a Partially Effective Rating for the 2014-2015 School Year in an Annual Summative Evaluation.
s. The Respondent has received a Partially Effective Rating for the 2015-2016School Year in an Annual Summative Evaluation.

CHARGE TWO: AND OTHER JUST CAUSE

1. The District restates the allegations contained in Charge One and re-alleges and incorporates them by reference as if fully set forth at length herein.
2. The Respondent has failed to properly adhere to the District's protocol for overseeing students and improving her teaching skills.
3. The Respondent has consistently failed to follow instructions and violated the District's policies and procedures.
4. The cumulative effect of Respondent's misconduct and inefficiency as set forth above constitutes other sufficient cause sufficient to warrant dismissal.

WHEREFORE, Respondent has shown that she is unfit to discharge the duties and functions of the position in which she holds tenure in the School District, and she should be dismissed.

FACTUAL BACKGROUND

Respondent is a tenured teacher of mathematics. She has been employed in that capacity in the District since September 1990. She holds certificates in elementary education and secondary mathematics. During her teaching years, she taught middle school math to 8th graders at Lewis Munoz Marin for 6 years; and high school mathematics at University High School for 4 years, Barringer High School for 10 years and Malcolm X/Shabazz for 2-3 years. She was released from Shabazz High School, because the school was eliminating staff positions. Starting the next year, 2011-2012, Respondent became EWPS (educator without placement site). For the 2012-13 she was placed at Westside High School. For the 2013-14 school year, Respondent remained EWPS and was assigned to Bard

Early College High School (Bard). At the end of that year, she was served with tenure charges for the preceding two years and temporarily suspended from teaching. Those charges were dismissed, and in the middle of the 2014-2015 school year she was returned to Bard, again as EWPS.[1] For the 2014-2015 school year, Respondent was assigned to a position teaching mathematics at Westside High School (Westside). The present tenure charges were served upon Respondent after the end of the 2015-2016 school year.

The District has adopted guidelines for teachers and administrators to be followed in evaluating teachers and improving instruction for Newark's students in compliance with the mandates of New Jersey education law, TEACH NJ. The guidelines for the years at issue are embodied in the Framework for Effective Teaching ("Framework"). (D. 50, 51, 53) This document is regularly updated and administrators receive training on it each August and throughout the school year. (See, e.g., Tr. 29-30) Administrators are required to review expectations with faculty as well. (Tr. 30) The document identifies four teaching "competencies" and multiple indicators within each competency. The competencies are: (1) Lesson sequence; (2) Rigor and inclusiveness; (3) Culture of achievement; and (4) Demonstration of Learning. A fifth competency, "Commitment to Personal and Collective Excellence" gets reviewed in the mid-year and year-end summary evaluations. Under the Framework, administrators must observe teachers at least three times each year, and at least four times for teachers who are under a Corrective Action Plan (CAP). The Framework specifies not only the number of

[1] The District refiled its tenure charges for the 2012-13 and 2013-14 school years under Section 8; those charges are stayed pending the outcome of an appeal in the Appellate Division about the reassignment of the charges to the same Arbitrator who heard the original case.

such observations, but the length of the observations, and that they should be a mix of long, short, announced and unannounced. The current set of charges are based upon administration's conclusion at the end of the 2015-2016 school year that Respondent had been repeatedly evaluated as only "partially effective and "failed to demonstrate adequate growth" within the Framework, even after receiving assistance through one-on-one coaching and participation in: Professional Learning Communities (PLC), school-wide professional development, and the school's improvement panel (SIP). (D. 1)

Specifically, the present tenure charges (Charge I) are based upon Respondent's teaching performance during three academic years, when she was assigned to two schools: Bard for the 2013-2014 and 2014-2015 years and Westside for the 2015-2016 year. The remaining tenure charges (Charge II) are based on "other" conduct during the same years.

2013-2014. Bard High School Early College. Respondent was notified on August 26, 2013 that she was assigned to Bard, effective September 3, 2013 as an "additional support staff member for the 2013-2014 school year." She arrived on the first day of school in time to attend the school's beginning-of-the-year faculty meetings. (Tr. 1088) While at Bard, Respondent remained in EWPS status. (R. 58) For the fall semester of that year, Respondent did not have an assignment for the first approximately two weeks. (Tr. 1093-4) She was then assigned, not to be the teacher of record for any class, but to assist and support two teachers: Ms. Nagarsheth, who taught two 10th grade algebra and geometry classes, and Dr. Schnidman, who taught one physics class. Principal Weinstein (Tr. 607-8) and VP Ween (Tr. 690, 724-5) described the assignment with Ms.

Nagarsheth as "co-teaching." However, VP Ween was not sure that anyone at the school formally advised Respondent that she was team-teaching that fall. (Tr. 736) Respondent was not the teacher of record in PowerSchool, the District's computer database, and she had no access to PowerSchool; she had no student roster; she provided no lesson plans or assessment tests; and she administered no grades. (Tr. 1105) When either teacher was absent, she did not substitute-teach the class; rather a sub was brought in. (Tr. 1101-2)

Respondent testified that her duties, as described by Principal Weinstein, consisted of supporting both teachers in the classroom and working with students. (Tr. 1095) Each of the teachers "would tell me to help certain students when they were in groups or they had independent work, then I would circulate around the class giving students some support, students that needed some reassurance on what they were doing." (Tr. 1102) Respondent also sat in the library and tutored students, some of whom were in the classes she supported, as well as others who simply signed up for assistance. (Tr. 1099-1100) Principal Weinstein was aware of her tutoring activities, because his office was also in the library, and he saw her working with students (Id.), as did VP Ween (Tr. 728).

In the spring semester, Respondent was again assigned to support Ms. Nagarsheth teaching 10th grade students in algebra and geometry and Dr. Schnidman teaching physics, and she began supporting Dr. Beridze, who taught college algebra. She also attended district-wide Math Olympics meetings. Tr. 1107-114. Both Dr. Weinstein and Dr. Ween testified that Respondent taught 4 college algebra students and was the teacher of record. (Tr. 609; Tr. 703, 731-2, 748) However, Respondent testified that in the spring, just as in the fall, she had

no roster of students, was not the teacher of record for anyone. (Tr. 114) Dr. Weinstein, in his letter recommending tenure charges, appears to agree with Respondent, because he describes her spring assignment as working with 6 students "within a larger class," only four of whom showed up. (D. 27, p. 416) One again, Respondent did not have access to PowerSchool to input grades. (Tr. 114) Dr. Ween testified that at some point Respondent did get access to PowerSchool, but could not say when that was. (Tr. 786-7) Dr. Beridze asked her to work particularly with four students, but for the most part she worked with them in Dr. Beridze's classroom. (Tr. 1112) In addition she worked with a particular student in Ms. Nagarsheth's class for one-on-one tutoring at least twice a week the whole semester. That student did pass the class. (Tr. 1109) As in the fall, Respondent did not substitute teach when the teachers she was supporting were absent. (Tr. 1117)

CAP. On October 15, 2013, Respondent met in the school library (Tr. 1121) with Dr. Dumaine Williams, one of the Vice Principals at Bard, and signed a Corrective Action Plan (CAP) (D. 31). The CAP contains no reference to any Student Growth Objectives (SGOs). Respondent testified:

- She did not prepare any part of the CAP (Tr. 1120, 1127);
- On its face, the CAP refers to a year-long "College Algebra" class (D. 31, p. 1), yet Respondent was never assigned to teach such a class; her only relationship to college algebra took place in the spring semester, when she supported Dr. Beridze, who assigned her to assist specific students. (Tr. 1163, 1112);

- The CAP was identical to the IPDPs that she worked on with other teachers in the math department (Tr. 1124, 1130);
- All of the text was drafted by the other two math teachers, based upon data provided from prior years (Tr. 1125, 1128-29);
- She never received coaching from any mentors or teachers, nor was she ever directed to observe a highly effective teacher (T. 1117-8).

Dr. Williams did not testify in this proceeding. Principal Weinstein testified:

- He does not know if Respondent wrote any part of her CAP (Tr. 835); some departments at BARD have written IPDPs and CAPs together – he does not know if that happened with the math department in 2013 (Tr. 835-7); he never met with Dr. Williams specifically about Respondent's CAP (Tr. 830); he believed that Respondent worked with Dr. Beridze on the CAP that year, even though she did not teach with Dr. Beridze until the spring (Tr. 812);
- He regarded a faculty meeting on September 20, 2013 that Respondent attended as her training on creating a CAP. (Tr. 611)
- The CAP, which was drawn up and signed in October 2013, refers only to College Algebra, but Respondent did not teach that subject until the spring; he reviewed the CAP before he performed an observation of Respondent on May 8, 2014 (Tr. 831);
- He believed that Dr. Williams had one coaching session with Respondent in the 2013-2014 school year (Tr. 821);

- He relied upon the goals contained in Respondent's CAP in his annual evaluation to rate her on Competency 4 (Student Growth) (Tr. 643); Respondent's submissions to him in terms of a portfolio of student material did not provide enough information to evaluate whether the students were achieving the goals he believed she had set (Tr. 644).

Observations and Evaluations. During the 2013-2014 school year, Respondent was observed 4 times; she received midyear and end of year evaluations.[2]

First, Long Observation by VP Lori Ween on a date in November 2013, shortly before Thanksgiving. (Tr. 689) No formal pre-observation meeting; Post-observation conference on December 23, 2013. (Tr. 757-8) Rating: Partially effective.

The lesson observed was a jeopardy-type math game. Dr. Ween approved the lesson in advance: since Respondent was not instructing students Dr. Ween told her, "Okay, I'll observe you doing that [the game] because I have to observe you" (Tr. 1149). Respondent planned the game with the two math teachers she supported. (Tr.1144) VP Ween was critical of: (a) how long it took to get the game started; (b) Respondent was late to class, and Ms. Nagarsheth had to start the class; (c) the game included both physics and math questions which confused the students; (d) Respondent did not know some of the answers and was unable to help the students recognize when the answers were correct; (e) instruction was not differentiated; and (f) not all students participated. (D. 32, Tr. 690-694) On

[2] In his recommendation for tenure charges, Dr. Weinstein states that Respondent was observed three times formally, and, in addition, was informally observed in a coaching session by the VP of Culture and Climate. (D. 27, p. 415) I cannot verify his statement.

the plus side, the students enjoyed and were engaged by the game. (D. 32, p.1589) Respondent filed a response to this observation, explaining that it was standard practice for Ms. Nagarsheth to open class by reviewing homework; and the game had been planned to use some math-related physics questions, both to challenge the students and fulfill the need for interdisciplinary teaching. (D. 32, p. 1594)

Mid-year Review by VP Ween, conference on February 14, 2014. Rating: partially effective. VP Ween testified that Respondent failed to submit a portfolio until after the deadline and it was incomplete, which affected Dr. Ween's ability to assess progress on CAP goals in the midyear review. (Tr. 697) VP Ween, quoting extensively from her long observation in the fall, was critical of Respondent's failures to show coherent planning or understanding growth of her students. Although Dr. Ween testified that she based the midyear on informal observations of Respondent in addition to the one formal observation of the Jeopardy lesson, she was unable to identify a single date or class that she had observed and she took no notes of any such informal observations. (Tr. 702-3, 53)

VP Ween also noted that Respondent's attendance and punctuality were a problem. (D. 32, p. 1575) Respondent testified that she was often tardy due to the special needs of a teenage child who lived with her. (Tr. 1157) Dr. Ween did not give a specific student growth objective score in her midyear examination of Respondent, testifying that it was not part of the review process. (Tr. 768)

Second, short observation, by VP Ween, signed on February 27, 2014. Unannounced. Rating: Effective.

VP Ween observed Respondent as she proctored an examination. She made no notations about evidence of strengths or growth. She does not remember how or why she chose to observe a proctoring session, although, as part of a teacher's duties, "it is up for evaluation." (Tr. 772) Respondent is the only teacher she has ever evaluated performing proctoring duties. Respondent testified that she was unaware she was being observed. VP Ween did not discuss the observation with her other than to inform her that it was rated "effective." (Tr. 1162-3)

Third, long Observation, by Principal Weinstein on May 8, 2014, signed May 23, 2014. (D. 39) Pre-observation conference May 7, 2014. (D. 39, p. 1519, Tr. 633-34) Rating: Partially effective.

This was an observation of Respondent teaching college algebra to the four students assigned to her for assistance. Principal Weinstein was critical of: (a) Respondent's unfamiliarity with some of her students' names; (b) the lesson could have been better connected to prior learning; (c) when students were confused, some of the adjustments she tried to make did not work; (d) not all of the students participated, indicating that some were not mastering the subject matter (Tr. 635-7); and she had the same lesson objective for three days in a row (D. 39, p. 1541).

Fourth, short observation, by VP Ween on May 12, 2014, unannounced, with the post-observation conference and signing on May 28, 2014. (D. 40) Rating: Partially effective.

VP Ween was critical of: (a) the pacing of the lesson; uneven participation by the students; not enough time for independent student work.

Annual Evaluation, by Principal Weinstein, conference with Respondent on May 14, 2014, signed May 23, 2014. Rating: Partially effective.

Principal Weinstein testified that he based the annual evaluation on "all of the observations that were done at that point." (Tr. 639)

Other issues. Bard's administration was concerned about aspects of Respondent's performance other than her teaching competence. Only two of those issues, however, resulted in any form of reprimand or memo to Respondent's file.

Attendance. In March, 2014, Respondent received a standard letter advising her that he had accumulated 5 absences. (D. 28) She received a second letter identified as a "Warning Letter" on June 3, 2014 advising her that she had by then accumulated 9 absences and that continued absenteeism could result in "further disciplinary action." (D. 41, p. 1494) The District took no further action. In his recommendation for tenure charges, Principal Weinstein mentioned Respondent's tardiness. (D. 27) However, there is no evidence that Respondent was warned or reprimanded during the year for tardiness.

Reprimands. VP Ween placed a letter in Respondent's file for improperly proctoring the ACT Explore exam on April 23, 2014 and speaking in a disrespectful way to her co-proctor. (D. 35) Dr. Weinstein placed another letter in her file for being AWOL on April 24, 2014 (D. 36, p 1557) , although Respondent in fact was attending a Math Olympics event on that day in the district. (Tr. 1166-7)

Tenure Charges. At the close of the 2013-2014 academic year, Bard notified District administration that Respondent had received a rating of partially

effective for the year and recommended the filing of Tenure Charges. (D. 27) Those charges were in fact brought in August 2014. (R. 59)

2014-2015. Bard High School Early College. Because of pending tenure charges, Respondent was put on leave before the fall semester of 2014-2015. After those charges were dismissed,[3] Respondent was informed of her return assignment to Bard via email dated January 13, 2015. (R. 3) The administration of Bard was not initially notified that she had been reassigned and was surprised when she arrived at school. (Tr. 1246) Respondent sat in the library or in Dr. Morris' tenth grade geometry class until the start of the second semester (Tr. 1247), at which time she was assigned her own tenth grade geometry class. She was also assigned to assist Mr. Bonnett with his Algebra II class and she subbed for Dr. Silverman, a chemistry teacher. (Tr. 1249, 1253) That semester her supervisor was Dr. Adair, a new Vice Principal at Bard in charge of the math department. (Tr. 1255)

CAP. Bard administrators advised Respondent that she had to have a CAP for the 2014-2015 school year. On March 27, 2015, the day before spring break, VP Adair met with Respondent and presented her with a copy of a draft CAP that he had prepared. (D. 42, Tr. 1258, Tr. 1509) He prepared the draft because he had made more than one request of Respondent to draft the document, but "I was not getting the draft or getting the response" and "I wanted to make certain that I did not interfere with the process." (Tr. 1510) VP Adair

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[3] The charges covering the 2013-14 school year that were brought in 2014 are the subject of an appeal that is pending in the Appellate Court. (R. 60) In the meantime, those proceedings are stayed. (R. 62)

believed "I was helping her in a process that was already uncomfortable for her." (Id.)

At the meeting, VP Adair asked her to review and modify the document. (Tr. 1261, TR. 1511) Respondent characterized the conversation as brief, perhaps five minutes long; there was no collaboration between them. (Tr. 1263-4) Respondent did write in one portion of the CAP after she returned from spring break (Tr. 1261), namely, the students' starting point that she obtained from their teacher in the fall semester. (D. 42, p. 1490, Tr. 1262) On May 5, 2015 Respondent met with VP Adair again. At that time he presented her with a version of the CAP that he subsequently claimed they had "drafted together;" he also claimed she had refused to sign the CAP. (R. 8) Respondent rejected that characterization of how the document had been developed, but said in an email that she was "open to a discussion resolving this matter." (Id., Tr. 1278) Respondent also discussed the matter of a CAP with Principal Weinstein in a meeting with her union representative that took place later in May. (Tr. 1271)

Sometime in April or early May Respondent sought guidance from the state Department of Education as to whether she was supposed to be on a CAP; she felt that since the previous charges against her had been dismissed, she was starting over and therefore should just have an IPDP (Individual Professional Development Plan). A Ms. Wright at the state department and her union both told her that she should not have a CAP. (Tr. 1273-1275) She conveyed that information to Principal Weinstein (Tr. 1276), but the guidance he got from the District was that she did have to have a CAP. (Tr. 939-47) The matter was not resolved, and Respondent never signed that or any other version of a CAP for the

2014-2015 academic year, although she testified that she would have signed the proposed CAP at the May meeting with Dr. Weinstein if she had been given an opportunity to do so. (Tr. 1280) Her annual evaluation took place three weeks after her meeting with Dr. Weinstein regarding the CAP. (Tr. 1280)

Observations and Evaluations. In the spring semester of 2015, the only semester that Respondent taught at Bard during that school year, she was observed three times, two short and one long observations, by two administrators and a fourth time by a peer evaluator. She received mid-year and end of year evaluations.

First, short observation, March 25, 2015 by Principal Weinstein, announced, with pre-observation conference also on March 25, 2015 and post-observation conference on April 14, 2015. Rating: Partially effective. (D. 43, R. 31) This was a 30 minute observation of her 10th grade math class. Principal Weinstein was critical of Respondent's difficulty using the SmartBoard, some unnecessary delays, tailoring instruction to meet some student needs, and joking about a student who spoke slowly. (Tr. 655-6) He referred to the CAP, although it was not completed at the time. (Tr. 658) Respondent filed a written response, objecting to comments about a CAP that had not yet been agreed upon, the short notice of a pre-conference only 35 minutes before the observation, and a post-conference so long after the observation as to be unhelpful. (R. 31, p. UW 40) Respondent also explained that she had a routine for the beginning of each class to help her students get focused; she had good rapport with her students and her students were all participating with the majority demonstrating enthusiasm toward learning. (Id.)

Second, long observation, May 5, 2015 by VP Adair, announced, pre-observation conference May 4, 2015, and post-observation conference on May 8, 2015. Rating: Effective. (R. 32) This was a lesson for her 10th grade geometry class on how to use the Inscribed Angle Theorem to develop relationships between circles, chords and arcs. It was a subject that the class had begun in a previous lesson. Adair found that most students were able to get correct answers and that the pacing and momentum seemed appropriate for most. He noted that there were opportunities to go deeper into the material. (R. 32, p. UW48)

Mid-year Review by VP Adair, dated May 15, 2015. Rating: Partially effective. (D. 45) Since Respondent only arrived and started teaching at Bard that academic year in February, the "mid-year" was actually a mid-semester review. VP Adair was critical of deficiencies in the inclusiveness and rigor of Respondent's lesson planning (Tr. 1524-5), of failing to get all of her students involved (Tr. 1526), not correcting students when their answers were not completely accurate (Tr. 1527), and not using data to determine if students were progressing toward mastery (Tr. 1527-8). Respondent asked Adair to model a lesson for her, but that never occurred, according to Adair, because Respondent never gave him the lesson she wanted him to model. (Tr. 1530) Adair acknowledged that the time spent observing Respondent was "short," but he attributed that to fact that even a draft CAP was not presented until late in the semester. (Tr. 1531)

Third, short observation, May 29, 3015 by VP Adair, unannounced, with post-observation conference on June 12, 2015. Rating: Effective. (D. 46, R. 34) This was a 25 minute observation of Respondent's 10th grade geometry class.

Respondent had completed a "Do Now" activity, but the observation itself took place when the students had relocated to the computer lab for independent work. (R. 34, p. UW64) Adair noted that Respondent made herself available to students as they requested her assistance, and she was able to assist them, tailoring strategies that reflected her knowledge of her students and that would lead to mastery. The students were enthusiastic as they worked collaboratively to solve the problems. (Id., p. UW 65) The few comments that Adair seemed to have as "growth areas" had to do with the program the students were using, The Khan Academy, rather than deficiencies in Respondent's assistance to students (Tr. 1533-36), although he observed that she was not moving around the room to see if students needed her help before they came to her. (Tr. 1538)

Peer Evaluation, June 1, 2015 by Amy Tepper. Long observation. Rating: Highly Effective. An outside teacher performed a long, peer observation of Respondent's 10th grade geometry class. She found "nearly all students demonstrated enthusiasm;" Respondent tailored her instruction and that led to success; Respondent moved around the room, providing feedback on different groups of students. (R. 35, p. UW 71, 72)

Coaching. Respondent was provided some degree of coaching during this abbreviated academic year. VP Adair held back on offering coaching until the CAP was agreed upon, or at least a proposed CAP was presented to her. (Tr. 1531) Thereafter he coached her in the context of providing feedback on his observations. (Tr. 1632) At the mid-year review meeting, Respondent asked VP Adair if he would model a lesson for her; he never did that because the opportunity never came up: "she never gave me the lesson that she wanted me to

model." (Tr. 1530) He testified that Respondent did not attend meetings of her colleagues where she could have collaborated on student growth and on her own development. (Tr. 1529)

Annual Evaluation, June 15, 2015 by VP Adair. Rating: Partially effective. On June 9, 2015, about one week after his short observation of Respondent, but before he had reviewed his findings with her, VP Adair completed an annual evaluation. (D. 47) In preparing this evaluation, he relied upon the other evaluations that had been conducted as well as any evidence that Respondent had shared with him or uploaded. (Tr. 1540) He was critical of Respondent in the areas of differentiating instruction (Tr. 1541), not modeling or demonstrating what she expected of her students (Tr. 1542), not discussing with students why they had picked correct or incorrect answers when they did so (Tr. 1543, 1544), not using data effectively to guide instruction during the semester (Tr. 1543), although he acknowledged that Respondent's students in fact performed well on their final exam with a passing rate better than 80%, which indicated that in fact the students mastered the material. (Tr. 1545) Adair noted that during both of his observations, "the lessons were standards-based and grade-level appropriate," but he faulted that there was no written lesson plan, even though he acknowledged that written lesson plans were not required at Bard. (Tr. 1626) Mr. Adair placed emphasis on Respondent's failure to draft a CAP or IPDP, although he acknowledged that she uploaded a document in which she set goals for herself. (D. 47, p. 1421) He also faulted her for not attending weekly department meetings more than once per month. (Id., Tr. 1422) He found no fault with her attendance or punctuality. (Id.)

As to his findings with regard to the portions of Competency 4 where objective, quantifiable student growth should be reported, Mr. Adair wrote the following, in relevant part:

"(4d) There is still no evidence [Respondent] is using data to help her plan instruction. ***

(4e) [Respondent] is confident she understands her students and their abilities. However, she has not been able to provide evidence to support her claims***

((4f) ***[Respondent gave her students multiple assessments that she has been using to help determine progress. She administered a district Geometry final consisting of 25 questions where the class mean was better than 80%. The challenge with data occurred throughout the semester when data was not being used to track and assess student progress. It was difficult to determine if students were mastering objectives because there was no data available that measured student progress as the data that has been shared at the end of the course.***"

Other issues. The District presented evidence that the Bard administration was concerned about aspects of Respondent's performance other than her teaching competence. None of those issues, however, resulted in any form of reprimand or memo to Respondent's file.

Failure to cooperate. According to VP Adair, Respondent did not cooperate with him in their discussions about her CAP or other matters, refusing to meet with him unless she could have a union representative present. (Tr. 1519-20) She was "not receptive" to VP Adair's coaching or comments, "she received it as my criticizing her performance, as opposed to an opportunity for us to work together to grow in her performance." (Tr. 1531) She did not upload data or provide portfolio materials to demonstrate her students' progress. (Tr. 1543-4) In addition, she did not participate in the school's professional learning community:

> [Respondent] did not involve herself in the collaboration that took place with the other employees in the department. And that was based primarily on the fact that [Respondent] was not present whenever her colleagues would meet, and that I was not aware of her meeting with any of the colleagues at any time that might have been convenient for her to collaborate on student growth and development.

(Tr. 1529)

Aftermath of 2014-2015 school year. No tenure charges were filed against Respondent at the conclusion of the 2014-2015 school year.

2015-2016. West Side High School. Over the summer of 2015, Respondent assumed she would be returning to Bard, and reported there on September 2, 2015. The administration was surprised to see her, because she wasn't on the school's budget. Later in the day, VP Ween handed Respondent a letter from the District, directing her to report on September 8, 2015 to Newark Vocational, one of the schools on the Westside campus. (R. 9, Tr. 1337-9) Respondent's principal for the 2015-2016 school year was Larry Ramkissoon; her VP and immediate supervisor was Henry Ogele.

Respondent's status at Westside was no longer that of a teacher without position (EWPS); instead she was in a regular budgeted position. (Tr. 1346) On September 10, she was given a schedule to teach three classes: two twelfth grade pre-calculus and one ninth grade Algebra 1. (TR. 1341-5) She also volunteered before and after school to tutor students, putting out a sign-up sheet. Students from her own and other classes came to her for help. (Tr. 1358-60)

The school's schedule provided for blocks of 80 minutes instruction. Respondent told VP Ogele via email dated September 13, 2015 (D. 3, p. 1405) that she had never taught an 80-minute block before, and asked for his guidance.

He met with her (Tr. 318) and arranged for her to observe a class taught by the lead math teacher, Mr. Bhatt. (Tr. 316)

Respondent initially had about 30 students in each of her pre-calculus classes and over 40 in the Algebra 1 class. (Tr. 1348) All of the students she was assigned to teach were enrolled in Newark Early College, another of the schools on the Westside campus. (Tr. 1344) In the spring, she continued to teach the same pre-calculus classes, although the number of enrolled students dropped to around 20 in each (Tr. 1354-6); she did not teach the Algebra I class in the spring. (Tr. 1352)

Respondent testified in this proceeding, and complained to the administration, of the difficulty in managing her students, particularly in the Algebra I class. Some of the students were not listed in PowerSchool, the District's computer database. (Tr. 1350) Three of the Algebra students had IEPs that required extra in-class support in the form of another teacher or an inclusion teacher (Tr. 1353). In November the administration assigned a second teacher, Mr. Douglas, to her class (Tr. 1353); he was certified in special education but not in math. (Tr. 1372) Three of the pre-calculus students in her afternoon class were also special needs students, and Mr. Douglas helped with these as well, including throughout the spring semester. (Tr. 1372-3) In addition, she had significant problems with disruptions to her class. These are discussed below.

CAP. For the academic year 2015-2016, Respondent was on a CAP. She participated in a "goal-setting conference" on October 14, 2015 with both her principal, Larry Ramkissoon, and her VP, Henry Ogele. She and Principal Ramkissoon signed the CAP on October 15, 2015. (D. 4) Principal Ramkissoon

testified that there were other meetings regarding the CAP in addition to the one on October 14, although he didn't remember how many. (Tr. 103) VP Ogele testified that the CAP was created "in collaboration with the teacher and immediate supervisor, principal" (Tr. 326); Principal Ramkissoon characterized the process as "Absolutely" collaborative (Tr. 107); and Respondent agreed that the process was collaborative (Tr. 1390).

During the goal-setting conference, her supervisors agreed with Respondent's assessment of where her students were in terms of readiness to learn the prescribed materials. They then agreed upon goals for the two pre-calculus classes Respondent was assigned to teach. Although Respondent was also assigned to teach an algebra class, the CAP was limited to the two pre-calculus classes, because, according to Principal Ramkissoon, the administration's goal "is not to make the Corrective Action Plan burdensome so it's unattainable. Quite the opposite, it tried to provide an opportunity to verify that the teacher has grown in this." (Tr. 43)

For the students in one pre-calculus class, they agreed upon the goal "By the midyear, at least 10/30 students would be able to factor polynomials where a>1 and find the root of a polynomial using the quadratic formula." (D. 4, p. 1398, Tr. 37) For the other class, they agreed upon the goal "By the midyear, at least 15/30 students would be able to factor polynomials where a>1 and find the root of a polynomial using the quadratic formula." (Id, p. 1400, Tr. 38) Principal Ramkissoon identified the goals in the CAP as the Student Growth Objectives required by Achieve NJ. (Tr. 96) Both VP Ogele and Respondent also equated student learning goals with the SGO required of a teacher. (Tr. 447, 1390)

The CAP identified specific action steps for Respondent (using assessment data to identify students needing additional support; analyzing the assessment data to develop action plans; designing lessons with a co-teacher; developing plans to work with individual students and small groups; consistently submitting planning documents) and for the administration (coaching Respondent, scheduling a teacher coach to support and co-plan with her; providing her with feedback on her planning documents). (D. 4, p. 1401)

At the mid-term evaluation, Principal Ramkissoon testified that VP Ogele determined Respondent did not meet either goal. (Tr. 111, 115, 449) VP Ogele testified, with respect to the first goal, that he based his conclusion on his January 28 observation of the class, and on student work Respondent provided to him after the class was completed, which showed that 3/13 students met the objective, rather than 10/30. (Tr. 449-51) VP Ogele was unsure whether there were still 30 students in the class at that point. (Tr. 449) With respect to the second goal, VP Ogele did not recall whether Respondent reached that goal. (Tr. 453) Respondent testified that in fact she did meet the first goal. She placed in evidence student work (R. 52, 53), including student scores on mid-term examinations on quadratic equations and trinomials, showing her students successfully passed these examinations. (R. 52, p. UW213, 214) The test scores were available to VP Ogele because they were in PowerSchool and Agile Mind. (Tr. 1715-17) Respondent also presented the documents to VP Ogele during a meeting with him, and he "kind of looked through them and then he pushed them aside." (Tr. 1713-14)

The charges drafted by Principal Ramkissoon include findings that Respondent was "not successful in getting the majority of her Algebra or Pre-'Calculus students to demonstrate mastery of the Common Core Standards for Mathematics." He goes on to cite the PowerSchool records of end-of-year testing as showing only 76% of Algebra students earned an "F" or "D," while 58% of Pre-Calculus students earned an "F" or "D". (D. 1, p. 1154)

Coaching. Respondent was provided with extensive coaching during the school year to help her improvement. Her primary coach was VP Ogele, who met with her in one-on-one sessions in September, October, January, February, March, April and May. (D. 1, p. 1152) She also received personal coaching from Edith Battle, a member of the school's SIP (School Improvement Panel) and "academic interventionist" at Westside, who, though not a math teacher, has won accolades for her teaching and is used by the school to assist teachers on such issues as planning, lesson design and sequence. (Tr. 191, 193) Ms. Battle was assigned to work with Respondent beginning in January 2016, (D. 11) as was Mr. Bhatt, the Lead Math Teacher. (D. 13, p. 1313) Ms. Battle had an initial session with Respondent, which VP Ogele also attended on January 11, 2016. She then accompanied Respondent as they observed another teacher's algebra class on January 15, 2016, after which she "debriefed" Respondent on January 19, 2016. She also observed Respondent teach an Algebra class in March; she found Respondent executed every component of the entire lesson design and focus, within the suggested time frame (Tr. 197); it was an effective lesson (Tr. 200). Although Respondent asked Ms. Battle to meet again, at the scheduled time Ms. Battle found Respondent was absent. (Tr. 202-3)

Another master teacher, Ms. Ragoo, was assigned by VP Ogele to assist Respondent, particularly with classroom management issues. This occurred in September of 2015 after Respondent reported problems with student behavior, and VP Ogele and Ms. Ragoo visited her classroom and intervened. (D. 5, p. 1379) Respondent testified that Ms. Ragoo never coached her (TR. 1402); however Respondent acknowledged turning to Ms. Ragoo for guidance after a classroom incident in February 2016. (R. 19, Tr. 1702) Respondent also went with Ms. Ragoo to observe a class taught by Mr. Bhatt on September 17, 2015, after Respondent asked VP Ogele for assistance since she had never taught an 80 minute block. (D 3, p. 1405-7) In addition, Respondent worked with Mr. Bhatt in January and attended a workshop he gave on instruction. (Tr. 1412-3)

All of these coaching activities were coordinated through the formal work of the School Improvement Panel (SIP), whose members (Ogele, Battle) met with Respondent three times in January 2016. (D. 11)

Observations and Evaluations. In the 2015-2016 school year, Respondent was observed five times, three short and two long observations, by two administrators. Only one of the five, in the fall semester, was announced, and preceded by a pre-conference. She received mid-year and end of year evaluations. Feedback for her last two observations took place the day before and the same day as her year-end evaluation.

First Short Observation, November 13, 2015 by VP Ogele, unannounced, post observation conference on November 12 or 13, 2015. (Tr. 1426, cf. 506) Both parties signed the document on November 13, 2015. (D. 7, p. 1360) Rating: partially effective. This was an hour and 19-minute observation of

Respondent's morning pre-calculus class. VP Ogele was critical of Respondent's organization of the lesson, its pacing and momentum, lack of tailored instruction; several times the students were confused about what she expected of them. (D. 7)

Second, Long Observation, January 28, 2016 by VP Ogele, announced, with pre-conferences on January 20 and 27, 2016, and post-conference on February 2, 2016. (D. 15) Both parties signed the document on February 4, 2016. (D. 15, p. 1276) Rating: Partially effective. This was an hour and a half observation of Respondent's twelfth grade morning pre-calculus class. VP Ogele praised Respondent for the clarity of her instruction, her positive interactions with her students and the enthusiasm her students demonstrated, but was critical of the lesson sequence, her modeling of the methodology, the pacing and momentum of the lesson, insufficient tailoring of instruction, insufficient checking to be sure her students, most of whom were somewhat confused, understood the material. (D. 15)

Respondent submitted a detailed six-page response to this observation. (R. 40) She countered specific observations with a detailed explanation of how she had in fact demonstrated the competencies questioned. Rather than post the rebuttal on BloomBoard, because it was too long to fit in that format, she informed her principal that she was submitting a rebuttal and sent it to the Evaluation Committee. (Tr. 1435-6)

Mid-Year Review, February 9, 2016 by VP Ogele. Rating: Ineffective. (D. 16) Although VP Ogele had rated Respondent "partially effective" on each of his two observations of her work in the classroom, in this review, he rated her as "ineffective." He noted only one strength: communicating content more

effectively. (D. 16, p. 1255) He reported on actions she had taken to respond to her CAP, steps she would need to continue to take, and the steps taken by administration. (Id., p. 1259) In the review, he criticized her, inter alia, for not consistently submitting planning documents, for the pacing and momentum of her lessons, for not collaborating sufficiently with her colleagues, for insufficiently tailoring instruction, for lack of precision in what she required from students, for not having high enough expectations from her students and not submitting sufficient assessment data.

With respect to the section on Competency 4, where the administration is supposed to enter its findings on Student Growth Objectives, VP Ogele entered the following comments, among others:

4c. "Demonstration of learning: There is inconsistent or no evidence that students master the objective as evidenced from formal observations on 11/9 and 1/28. The most recent observation indicates that students were helping each other during independent practice which compromised the integrity of the artifacts. As a result, there is no evidence to support if students mastered lesson objective."

4d. "Teacher has not submitted any assessment data or corrective action plan as requested; that help provide insight as to each student's progress toward mastery as evidenced from write-up on 10/20 and 1/5. As a result, teacher does not have any baseline data to help guide planning an instruction."

4e. "Understanding of Growth: Teacher's failure to create assessment data results in her inability to articulate whether students has internalized grade-level standards. As a result, teacher is unable to provide differentiated assignments that will move each students [sic] toward grade-level standards."

4f. "Progress Toward Goals: There is no assessment data created by teacher. As a result, there is no evidence that students are progressing towards goals."

(Ex. 16, p. 1257)

In answer to the question whether the teacher is on track to meet the goals that were set, VP Ogele wrote

> The teacher is not on track.
> The teacher must submit planning documents on time.
> Create assessment data and corrective action plan for each unit and use it to guide instruction.
> Regularly attend weekly coaching session.
> Continue working with SIP Panel.

In response, Respondent gathered together a large number of documents that she felt refuted his conclusions. She offered the documents (R. 53) to VP Ogele at a meeting in the principal's office, but he "ignored it." (Tr. 1442) She also made sure VP Ogele saw documents in the nature of journaling that she had her students prepare to track their progress. (R. 52, Tr. 1444)

Third Short Observation, March 30, 2016 by VP Ogele, unannounced, with post-observation conference on April 1, 2016. Rating: Partially effective. (D. 19) This was a 32 minute observation of one of Respondent's twelfth grade pre-calculus classes. VP Ogele noted as positives that Respondent connected the lesson to previous learning, unit objectives and long-term goals, so that the students understood why the skill they were learning was beneficial. He also noted that she required her students to provide a well-structured rationale for their responses, and most students read mathematical terms fluently and accurately. On the negative side, VP Ogele was critical of the pacing and momentum of the lesson, lack of preparation, inadequate planning and tailoring

instruction, inadequate feedback, leading to student confusion. He noted that only 5 students out of 12 were able to complete assigned work.[4]

Respondent prepared a detailed rebuttal to this observation. (R. 42) Noting that even VP Ogele had observed the connection of the lesson to prior learning, unit objectives and long-term goals, Respondent stated she should have been given a highly effective rating since that she had met the framework's requirements. (Id., p. UW 115) She noted in other sections that she was moving her students toward mastery, actively circulating through the class, and celebrating with students who mastered difficult challenges. To Ogele's criticism that a student did not have a calculator, she answered that no calculator was needed for the given activity. (Id, p. UW 116) As before, she did not give VP Ogele a copy of the rebuttal, but sent it to the Evaluation Committee as specified in the Framework. (Tr. 1460)

Fourth Short Observation, May 5, 2016, unannounced, by Principal Ramkissoon. There was a post-observation conference that is recorded on the District form as taking place on May 11, 2016, but which Respondent testified took place on May 12, 2016 (Tr. 1486), the day they both signed the form. (D. 23, p. 1180) Rating: Partially effective. This was a thirty-five minute observation of one of Respondent's pre-calculus classes. On the positive side, Principal Ramkissoon observed that the lesson was organized and students were working productively, participating in the "we do" part of the lesson, some in collaboration with their peers. He also noted that Respondent had appropriately

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[4] In another section of the observation write-up, VP Ogele noted that 5 out of 17 students were able to successfully solve logarithmic functions. There is no explanation for this discrepancy.

tailored strategies to help her students move to mastery, and the students were enthusiastic about learning, with an overall positive atmosphere in the classroom. Nonetheless he found that sometimes her instructions were unclear; she did not challenge students to explain their solutions, be precise, or present supporting evidence; she did not verify student understanding or give adequate feedback to her students. (D. 23)

Respondent prepared a detailed rebuttal to this observation (R. 44), which she sent to the Evaluation Committee. (Tr. 1487) Respondent testified that she asked Principal Ramkissoon to reevaluate her, and that he said he would come and observe her once more, but that never happened. (Id.)

Fifth Long Observation, May 10, 2016 by VP Ogele, unannounced, with post-observation conference on May 11, 2016. Rating: Partially effective. (D. 22) This was an observation of one of Respondent's twelfth grade pre-calculus classes; it lasted an hour and 14 minutes. VP Ogele praised Respondent's lesson for her pacing, spending an appropriate length of time on each lesson component. He also praised the fact that she challenged her students and they showed enthusiasm for learning and supported community values and norms. He observed that she could have done a better job of using questions to guide the students toward mastery and to avoid confusion, and he criticized her for not adequately addressing student questions so they left class without adequate knowledge, and she had difficulty keeping students on task. (D. 22)

Respondent did not agree with VP Ogele's conclusions and prepared a lengthy and detailed rebuttal (R. 46), which she provided to the Evaluation Committee (Tr. 1488-9).

Annual Evaluation, May 12, 2016. (D. 24) This evaluation was prepared by VP Ogele and delivered to Respondent on the afternoon of May 12, 2016, the same day that Principal Ramkissoon held a post-observation conference with her for the observation he conducted on May 5, 2012 and the day after VP Ogele held a post-observation conference with her for the observation he conducted on May 10, 2016 (Tr. 1490-1) Rating: Partially effective.

VP Ogele recorded positive comments in only two areas: competency 5, where he noted Respondent collaborated with her peers and met expectations for attendance and competency 3 (D. 24, p. 1165), for fostering enthusiasm for learning and a positive learning community (Id., p. 1164). He was critical of her performance in connecting lessons to objectives (Id., p. 1162); in pacing, momentum, clarity of instruction, tailoring instruction, demanding precision from her students (Id., p. 1163); in guiding her students to be persistent and strive to meet high expectations, in using data to asset and adjust her lesson planning (Id., p. 1164); and for failing to submit diagnostic assessment data to the administration and inconsistently reporting on student progress (Id., Tr. 1165).

In the sections devoted to assessing student growth, VP Ogele, made the following comments:

4.c. "Demonstration of learning: Evidence from formal observations on 11/9 1/28, 3/30, 5/5 & 5/10 indicates that over the course of the year, there is inconsistent or no evidence that students master lesson objective. As a result, most students are not moved to grade-level standards."

4.d. "Using data: Teacher sometimes submits 'End of Unit' assessment analysis spreadsheet and corrective action plan as required; as evidenced from write-up on 10/20 & 1/15. As a result, teacher is unable to track each student's progress toward mastery and to adjust planning and instruction

– Teacher did not submit correction action plan/intervention plan for Unit 3: Rational Functions as requested from email sent to all math teachers on November 9th 2015.
-- Teacher submitted analysis sheet (Unit 4) on 4/11. However, teacher did not submit corrective action plan for Unit 4.

As a result of inconsistent submission of assessment analysis spreadsheet and corrective action plan, there is no evidence of teacher using data to guide planning and instruction."

4e. "Understanding of Growth: Teacher can sometimes articulate whether or not each student has internalized grade-level standards. As a result of teacher's inconsistent submission of end of unit assessment analysis spreadsheet, there is little evidence to demonstrate student growth."

4f. "Progress Toward Goals: Data reflect that sometimes students are mastering the objectives of the focus areas.

- Evidence from End of Unit assessment (Unit 3-Ratoinal Functions) indicates that most students did not master grade-level standards. Class mean indicates that 37% mastered grade-level standards.
- Evidence from End of Unit assessment, Block 1, (Unit 4 – Exponential/log functions indicates that 45% mastered grade-level standards.
- Evidence from end of Unit assessment, Block 3, (Unit 4 – Exponential/log functions) indicates that 57% mastered grade-level standards."

(Ex. 24, p. 1164)

In a later section, VP Ogele repeated one of the two goals Respondent had set in her CAP, namely that at least 10/30 students would be able to factor polynomials where a>1 and find the root of a polynomial using the quadratic formula. In response to the question of what progress students demonstrated around these learning goals, he wrote:

"Observation conducted on 1/28 indicates that most students were not able to factor polynomials/factor trinomials; and as a result could not complete assigned task of finding the vertical asymptote of a function."

(Ex. 24, p. 1165)

Other Issues. Throughout the school year, Principal Ramkissoon was made aware of complaints from students about Respondent's teaching and conduct in the classroom. Sometimes complaints came directly to him, while

others were brought to his attention by guidance counselors, parents, and other school personnel. In early October, for example he received a complaint from a senior in Respondent's pre-calculus class, written ostensibly on behalf of other classmates, complaining that Respondent is always late for class; was "holding us back from our learning in various ways;" jumps from one subject to another before the students can understanding the previous topic; lacks control of the class; and does not treat the class with respect." (D. 6, p. 1366) This complaint was followed by six others that same month, complaining variously about Respondent ignoring some of the students, while focusing all her attention on a small group (D. 6, p. 1371) ; yelling at and arguing with students (D. 6, p. 1367-8, 1374); and continuing to jump from one topic to another without helping her students reach understanding (D. 6, p. 1376, 1375, 1373). Principal Ramkissoon met with some of the students and their guidance counselors, and had VP Ogele to follow up with visits to the classroom. (Tr. 57) He told the students that he was not going to replace their teacher, and that they needed sometimes to work out answers to math problems by themselves. (Tr. 56)

In December 2015, Principal Ramkissoon received more student complaints, this time from Respondent's algebra class as well as her pre-calculus class. The gist of these complaints was that Respondent ignored students and did not help them learn (D. 9, p. 1335, 1336, 1339), or wastes student time by teaching below the level of the class (D. 9, p. 1342). (Tr. 58) Principal Ramkissoon and VP Ogele met with Respondent about these student concerns. (D. 10, p. 1332)

In January 2016, the administration received yet another complaint about Respondent, this time from a parent whom respondent had informed that her son was failing math. The parent wrote to the Principal, after she found Respondent to be unprepared for their meeting together, unresponsive to the mother's concerns, and unable to justify the student's poor grade. (D. 12, p. 1320-1 Tr. 59-60)

Finally, on May 5, 2016, Respondent had a confrontation with a student who walked into her classroom without permission and took a friend's phone. Respondent told the student, in effect, "You don't just walk into my classroom." There is dispute about exactly what was said next, but four students wrote statements about the incident. (D. 20) At least three students reported that Respondent told the student, "I'll break your face;" (D. 20, p. 1203, 1205,1206) while another said Respondent exchanged "fighting words" with the student. (D. 20, p. 1204) Principal Ramkissoon had a social worker investigate the incident and interview students. (Tr. 63) He did not necessarily believe the students who complained, since they were friends with one another. (Tr. 66) He suspended the student, because he believed she had been wrong to walk into the classroom and had used disrespectful language to Respondent. He imposed no formal discipline upon Respondent (Tr. 63-64), although VP Ogele sent her an admonishing email referring to her having used "fighting words" about "breaking" the student's face. (D. 25, Tr. 402)

Recommendation for tenure charges. Toward the end of the academic year, on June 3, 2016, Principal Ramkissoon wrote a memorandum to the District Superintendent recommending that tenure charges be brought

against Respondent. He discussed at some length Respondent's deficits in teaching, and her failure to make improvements in the areas identified in Respondent's CAP, noting these same areas had been identified by administrators during the immediate two prior teaching years. Principal Ramkissoon made no recommendation based upon any of the other issues referred to above.

POSITIONS OF THE PARTIES

The District argues that it has met its burden to prove the charges against the Respondent warranting dismissal, in that:

1. The role of the arbitrator in this tenure proceeding is limited by law to determining whether: the District's evaluation failed to adhere substantially to the evaluation process, including by providing a corrective action plan; or if there is a mistake of fact in the evaluation; or the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination or other prohibited conduct; or if the District's actions were arbitrary and capricious.

2. The evidence proves that during each of the three years in question, Respondent was provided with a Corrective Action Plan, the proper number of observations by appropriate administrators, mid-year and annual summative evaluations, and extensive professional development and personal coaching, both on a one-on-one basis and in a group or collaborative setting. Nevertheless, she failed to make any significant improvement. The District properly determined that Respondent had not met her established Student Growth Objectives in mid-year and end of year evaluations of Competency 4, using the method approved by

the Department of Education through the granting of the District's application for waivers.

3. Respondent has offered no evidence of any kind, of any of the defenses provided by law, such as discrimination or bias. Accordingly, the arbitrator must uphold the educational decision made by Respondent's supervisors as to her inefficiency as a teacher.

4. The District has also proven the charges in Charge II of other just cause, having produced credible evidence that Respondent neglected her duty as a tenured teacher and had a pattern of poor classroom management and insubordination toward her supervisors. Over the past three years, she was reprimanded several times for failing to abide by District policies when she was insubordinate to her VP during the proctoring of an exam; when she was AWOL to attend a Math Olympics event; for failing to collaborate with her departmental colleagues; for her frequent tardiness; for ignoring students, improperly grading them, and displaying temper and insulting comments toward them.

For these reasons, the District's decision to revoke Respondent's tenure and terminate her employment within the District should be upheld.

The Respondent, on the other hand, argues that the charges against the Respondent must be dismissed and Respondent must be restored to her teaching position with full benefits and seniority, for the following reasons:

1. The evaluations in each of the three years at issue failed to include statutorily mandated Student Growth Objectives (SGO); SGOs form the core of the new data-driven approach to evaluating teachers on student progress; by ignoring the need for SGOs and substituting subjective criteria for objective data,

the District has failed to adhere substantially to the evaluation process and acted arbitrarily and capriciously;

2. No growth objectives were identified at all in year 2013-14 or 2014-15 and the administrators responsible for evaluating Respondent appeared to have no understanding of that component of the evaluation process; the next year, there were two growth objectives identified by Respondent and the District, but the mid-year evaluation made reference to only one of those, and that reference was factually erroneous; the annual evaluation made no reference to objectives at all; for those reasons, all of the annual evaluations of Respondent are void substantively as well as procedurally;

3. To the extent that Respondent had what may be considered goals in 2015-2016, her supervisors ignored evidence that Respondent, in fact met those goals;

4. The District's evaluations of Respondent failed to adhere substantially to the evaluation process in other ways, notably, (a) each of the three years, administrators conducted observations late in the school year, often just before the final evaluation, with post-observation feedback in some cases the same day as the final evaluation, so that Respondent had no meaningful opportunity to digest the feedback and improve, which is, after all, the purpose of observations; (b) a CAP was imposed on Respondent for 2013-2014 for which she had no input, and referenced a class she did not teach; a proposed CAP was imposed on Respondent for 2014-2015 long after the deadline for developing CAPs, and despite advice she received from the Department of Education that she should not have been on a CAP at all; Respondent understandably resisted signing the CAP;

5. All charges related to the 2013-2014 school year were disposed of in a prior decision by Arbitrator Simmelkjaer in an order dated January 5, 2015, which is the law of the case; the District refiled those charges and they are currently being held in abeyance by Arbitrator Simmelkjaer pending the outcome of an appeal; accordingly all charges regarding that year should be held in abeyance until the appellate division and Arbitrator Simmelkjaer can consider the matter.

6. The "catch all" pleading in Charge Two of "Other Just Cause" should be dismissed, as Respondent requested at this hearing, because (a) it is vague and unspecific; (b) to the extent it repeats allegations about inefficiency in teaching, it is duplicative of Charge One; and (c) the few incidents raised by the District were either factually refuted, or had been handled at the time with either no discipline or in one case, a note to file; certainly these incidents do not amount to cause for removal of tenure.

DISCUSSION

Both parties were represented by counsel in this proceeding and had full opportunity to present evidence and make arguments in support of their respective positions. In the preparation of this Opinion and Award, I have given careful consideration to the testimonial and documentary evidence, the legal authorities cited, and the positions and arguments set forth by the parties. I find the District has proven Charge I of inefficiency against the Respondent for the years 2014-2015 and 2015-2016 for the reasons set forth below. I find the District has failed to prove Charge I of inefficiency for the year 2013-2014. With respect to Charge II, I find the charges must be dismissed.

My authority in this matter is limited. As set forth by statute, my purview is to determine whether the District has substantially followed the legal framework for evaluating a tenured teacher. I must also consider whether the District was motivated to bring these charges due to considerations of political affiliation, nepotism, union activity, unlawful discrimination or any other unlawful conduct. Finally, I must consider whether the District's actions were arbitrary and capricious.

PROCEDURAL ISSUES

Both sides, at different times and for different reasons, have requested me to stay the issuance of my decision and order in this matter.

Charges for the 2013-2014 academic year were dismissed by Arbitrator Simmelkjaer on January 5, 2015. (R. 60) The District refiled, and the case was reassigned to Arbitrator Simmelkjaer. Respondent has appealed the assignment of the case to the same arbitrator who heard it earlier, and it is that issue that is the subject of an appeal pending in the appellate court. In the meantime, Arbitrator Simmelkjaer has stayed the proceedings before him. Respondent urges me to regard Arbitrator Simmelkjaer's decision as *res judicata* and dismiss these charges. In the alternative, Respondent urges me to stay my findings for that year until the pending proceedings in the appellate court and before Arbitrator Simmelkjaer are resolved.

On Friday, March 24, 2017, the District filed a request for stay because it had learned of a pending court challenge to one of the arbitral decisions relied upon by the Respondent that deals with the issue of the District's obligations

under statute to evaluate teachers on Student Growth Objectives. No date is currently set for the disposition of that court case.

For reasons of judicial economy, I decline to grant either request. The parties expended considerable time and resources to place the facts before me and make legal arguments based upon them. And I have used considerable time to review and reflect upon the record. It seems expedient to me to share my findings and conclusions with the parties at this time. To the extent that my decision touches on either of the issues noted above, I discuss those in the appropriate sections of my Discussion. Naturally, the parties are entitled to pursue whatever appeals or stays of my decision they deem appropriate after it has been issued.

GENERAL OBSERVATIONS

As a preliminary matter, I note that there was absolutely no evidence presented, nor argument made by Respondent that these charges were due to any prohibited motivation. Indeed, throughout these proceedings, I observed polite, even at times cordial, relations between the administrators and the Respondent. I therefore limit my review of the evidence to issues of process – whether the administrators in each charged year substantially followed the District's mandated evaluation system. My review, however, necessarily includes not only what administrators did each year, but what Respondent did as well. Respondent has been on notice for the past four years that her supervisors found her only partially effective as a teacher. The District had the obligation to offer her professional development, mentoring, guidance, and fair and timely observations

and evaluations; she, in turn, had the obligation to work with her appointed supervisors and mentors and try to improve her teaching.

In the first year I am asked to review, 2013-2014, I find, as set forth in detail below, that the District did not substantially adhere to the required protocol for observing and evaluating a tenured teacher. Its actions that year were arbitrary and capricious and cannot be the basis for any adverse ruling on tenure. During the two subsequent years, however, the administrators supervising Respondent did substantially follow protocols. As set forth below, they met the requirements for observing, mentoring and evaluating a teacher in danger of losing tenure due to multiple "partially-effective" ratings. Respondent, however, did not cooperate with her supervisors: she did not do her part. Among other failings, she resisted and ultimately declined to sign a corrective action plan during 2014-2015; she resisted meeting with her supervisors; and she failed to submit data and artifacts both years to show that her students might be progressing to meet the growth objectives established in one year by the administrators alone and the final year by Respondent in collaboration with her supervisors.

CHARGE ONE: INEFFICIENCY

2013-2014 School Year. Bard High School Early College. The District failed to comply substantially with its own established evaluation framework. I find the following irregularities nullify Charge I for that year:

Teaching assignment. Respondent was never assigned a class to teach during the entire academic year. She was, instead, assigned to assist other teachers in various classes, and to mentor and tutor students both in the

classroom and in the library. Although school administrators testified that Respondent was assigned to "co-teach" that year, I find otherwise. There is simply no evidence that she was in any way a partner with the classroom teachers of record. Yet she was evaluated and rated as if she were.

CAP. On October 15, 2013, the day established in the Framework for completing a CAP (D. 50, p. 246), Bard's VP Williams met with her and presented her with a draft CAP, which she signed the same day. This CAP was fatally defective because it was built around a class that Respondent never taught, namely, college algebra. Respondent was never the teacher of record for such a class. In fact, Respondent had nothing to do, either in a teaching or supportive role, with college algebra for the entire fall semester. It was only in the spring that she met with some college algebra students and that was solely for tutoring/support purposes. Additionally, it is undisputed that Respondent had nothing to do with drafting any portion of the CAP.

Observations. Bard's administrators conducted the necessary number of observations for a teacher on a CAP – namely, four – and two different administrators observed her, as required. Nevertheless, the observations were fatally defective both in timing and in the choice of lessons to observe. The only observation before the mid-year review was of the game of "Math Jeopardy" on the day before Thanksgiving. While Respondent participated in the planning of this game and led the game during the observation, the activity was planned as well, by the class teachers; it was not a normal instructional period; and Respondent was not the teacher for those students. The post-observation

conference took place on December 23rd, a month after the observation, rather than within 10 days as required in the Framework.

Of the three observations after the mid-year, one was of Respondent proctoring an exam – not teaching. The other two – the only two that can be considered observations of Respondent instructing students – took place on May 8 and May 12, at the end of the second semester and far too late in the term to have any benefit to Respondent as guides for improvement. Indeed, the post-observation conferences for those conferences took place *after* her annual evaluation, which was held on May 14. The point of observations and post-observation conferences, obviously, is to give the struggling teacher feedback on what she is doing well, what needs to be improved, and to give suggestions in time for the teacher to work on improving her instruction. Clearly, the timing of these observations was such that the District gave no meaningful guidance to Respondent throughout the entire year.

Mentoring and Coaching. The only evidence that Respondent received one-on-one mentoring and coaching was Principal Weinstein's testimony that he thought VP Williams had one coaching session with her that year. Principal Weinstein also testified to group sessions held by the School Improvement Panel, weekly faculty meetings and professional development. None of these group sessions comes close to satisfying the District's obligation to provide "specific support and periodic feedback." (C. 26, 18A-6-119 (3))

2014-2015 School Year. Bard High School and Early College. As Respondent points out, this year was shortened: Respondent was suspended from teaching for the entire fall semester because of the tenure charges referred

to above that were ultimately dismissed. However, Respondent was returned to Bard in time to teach the entire spring semester and at that time, unlike the prior year, she was given her own class. She also had a new supervisor, VP Adair, who not only supervised her, but also offered her support, as mandated by the Framework.

The law and regulations clearly anticipate that in some circumstances a teacher may not be in the classroom for the entire year; nevertheless, the evaluation and other protocols apply, on a *pro-rated* basis. See, for example, N.J.A.C. 6A: 10- 4.4 (e) l, which provides:

> If a teacher is present for less than 40 percent of the total student school days in an academic year, he or she shall receive at least two observations to earn a teacher practice score.

See also, Framework (D. 50, p. D. 243):

> If a teacher hasn't been in your school for the entire year, the number of evaluations can be reduced proportionally based on the amount of time the teacher has been in your school. This is true for teachers new to the district and/or new to the school, as well as teachers who have been out on an extended leave.

I find that the District did effectively and substantially meet the requirements for evaluating Respondent during the spring semester. To be sure, there were aspects of the evaluation process that were not completed. However, I find Respondent, rather than the District, responsible for those failings. The evaluation and review process requires input and work on the part of the teacher as well as her supervisors. Where a teacher fails to cooperate, for example, in the drafting of a CAP or the submission of evidence of student progress, as I review below, she cannot fault the District.

CAP. Relatively early in the spring semester, VP Adair requested, more than once, that Respondent draft a CAP, but she did not respond. So he drafted a proposed CAP and discussed it with her on March 26. Eventually, Respondent did write in one portion of the document (D. 1489), but despite many meetings, emails, and cautions from Principal Weinstein and VP Adair, Respondent never signed the document. She testified that she relied on advice she obtained from the Department of Education in April or early May that she was not required to be on a CAP, and said in this proceeding that she would have signed the CAP in May when she met with Principal Weinstein, but was not given that opportunity. This dispute about the CAP, then, consumed at least two months out of the spring semester.

Notwithstanding Respondent's resistance to the CAP, VP Adair did his best to work with Respondent throughout the year, offering her coaching and being sensitive, for example, by approaching her when she was by herself, not in front of students or colleagues, in the hope that she would not feel he was being antagonistic. (Tr. 1519) Her supervisors ended up treating the proposed CAP that Adair had drafted as Respondent's CAP for the year.

Respondent argues forcefully that because she did not sign the CAP, and should not have been required to do so, the entire evaluation process for the academic year should be void. I cannot agree. She knew that she was obligated to cooperate in the preparation of some kind of action plan for the year, whether an IPDP or a CAP. Instead, she spent months resisting the finalization of any kind of action plan. I cannot fault the administration for proceeding, as best it

could, on the basis of a CAP that it proposed to Respondent, especially when it gave her two months in which to engage and make modifications.

Observations. Respondent has challenged the schedule of observations in this, as in the other years at issue. In this year, the observations took place in the compressed time frame of a single semester, but they were, nevertheless, spaced to provide Respondent with feedback in time for her to make improvements, if she chose to do so. There were three observations by two administrators within the shortened time available, more than sufficient, since the Framework mandates only two if a teacher teaches for less than 40% of the school year.

Before the mid-year (which in this case was a mid-term) review, which took place on May 15th, there were two observations of Respondent teaching her 10th grade math class. The first, on March 25th, was a short, 30-minute observation, conducted by Principal Weinstein, with pre-observation and post-observation conferences; the second, on May 5th, was a long observation by VP Adair, also announced, with pre and post observation conferences. Respondent objected to the first because the pre-observation conference was immediately prior to the observation itself, and because the post-observation conference was 17 calendar days after the observation. Under the Framework, however, those dates are not necessarily non-compliant: a pre-observation conference "should occur within the seven days before the observation" (D. 51, p. 1060), which this did; the post-observation conference "must" follow an observation "within 10 calendar days;" however the 10 days may be extended by the number of days that either party is absent. (D. 51, p. 1061) The record is unclear about whether either

party was absent due to a school break or other cause. In any event, I find the timing of those conferences to be substantially compliant with the Framework and spaced in a fair way to give Respondent time to reflect upon the observations and make adjustments in her teaching. And, it is clear that these observations were thoughtful, and fair. Indeed, VP Adair gave Respondent a rating of "Effective" on his evaluation of the lesson on May 5th.

Before the final evaluation, which took place on June 15th, there was one more observation by VP Adair that was unannounced on May 29, with a post-observation conference on June 12. This, too, resulted in a rating of "effective." In addition, there was a peer evaluation by an outsider on June 1, 2015 that was rated highly effective.

In sum, I find no basis to fault the number or timing of the observations during the academic term. I note that the District did not press tenure charges after the conclusion of the 2014-2015 school year, but gave Respondent a fresh chance, at a new school, with a real teaching assignment the following year, to continue work on improving her performance.

Evaluations. Respondent has challenged the year-end rating of partially effective that she received for the 2014-2015 school year. In addition to the objections noted above, she objected to the scoring of the ratings. The crux of her objection appears to be that she should not have received a partially effective overall rating when she had received two effective observations out of three in the spring term: she is being unfairly penalized for her failure to execute a CAP.

I find that the administration properly considered Respondent's lack of cooperation – on the CAP and in other respects – in rendering a final evaluation

for the academic year. VP Adair included in his year-end comments on Competency 5 that Respondent "has not seemed comfortable receiving constructive feedback during evaluation conferences. This has made it difficult to assist her as desired with her professional development." Further, he noted that she does not attend math department meetings more often than once a month, although the meetings are held weekly, and there was no evidence that she was collaborating with her colleagues. (D. 47, p. 1422) These, too, are valid considerations supporting a rating of "partially effective."

2015-2016 School Year. Westside High School. I find that throughout this academic year, the administration was in substantial compliance with the District's evaluation protocol.

CAP. In this year, Respondent was placed in a budgeted position and assigned her own classes to teach. She collaborated with her supervisors, VP Ogele and Principal Ramkissoon, to draft a CAP that included two specific and quantifiable student growth objectives, after she obtained baseline assessment data on her students. The CAP included specific action steps for Respondent to take and for the administration to support her. It was signed on October 15, 2015, the last day set aside for completing CAPs in the Framework. In short, the CAP contained all required elements.

Observations. During the year, Respondent was observed five times by two administrators. The observations were spaced throughout the year, with two occurring before the mid-year review, and three before the year-end evaluation. The last two observations took place shortly before the year-end summative evaluation, with the fourth post-observation conference taking place the day

before and the last post-observation conference on the same day as the annual evaluation. While the timing of feedback for the last observation, in particular, was less than ideal, it also represented the fifth observation of the year: by that time, the administration had given Respondent a great deal of timely feedback so that she knew where she was falling short and what she had to do to improve.

Coaching. During this academic year, Respondent received extensive personal coaching. VP Ogele, a careful and conscientious supervisor, met with her one-on-one every month and the school's "academic interventionist," Edith Battle, an award-winning educator, worked with her beginning in January. Respondent also worked with both Ms. Ragoo, a teacher coach on issues of classroom management, and Mr. Bhatt, the Lead Mathematics teacher. Her development was overseen by the School Improvement Panel, as required by the Framework. In short the District met its obligation to provide "specific support and periodic feedback." (C. 26, 18A-6-119 (3))

Evaluations. Respondent has urged me to find the entire evaluation process defective for the academic year 2015-2016 because the District failed to calculate an SGO score and include that in the mid-year review or year-end summative evaluation. She cites other arbitrators who found evaluations fatally deficient for lack of a quantitative SGO score. I cannot agree with Respondent for several reasons.

I have reviewed the decisions by Arbitrator Simmelkjaer in the *Carroll* case and Arbitrator Bluth in the *Dawkins* case. Both of those cases are factually inapposite in a number of ways. Both concern teachers of the elementary grades

where the rules require calculation of a Student Growth Percentile (SGP) rather than the SGO required in high schools. But that is not the only difference.

In *Dawkins*, there were many deficiencies in the evaluation process, not only the lack of SGOs. To name a few of those deficiencies: much of one year Mr. Dawkins was out due to injuries; he had only 3 months of teaching; all observations and few evaluations were compressed into a two-month period, with two observations occurring on consecutive days, and another year, twice on the same day, so that he had no opportunity to learn from whatever feedback the administration had to give him. In addition, the goal that was set was not a "growth" goal – there was no attempt to obtain base-line data against which to measure achievement – but a "mastery goal." In other words, the administration did not attempt to measure "growth" or progress.

In *Carroll*, the administration made a "terse statement" that the teacher had not met student learning goals; there was no effort to review metrics as against the baseline data she and the administration had agreed upon. In one of the years at issue, the administration made its annual summative evaluation in April – at least one month earlier than the Framework recommends.

In other words, there were multiple errors in both cases that led the Arbitrators to conclude the District had not followed mandated protocols for teacher evaluation.

The other concern is *how* the District must include quantitative student progress data in the evaluation. The District applied for and was granted a waiver for the years 2014-2015, 2015-2016 and 2016-2017 to "combine the CAP setting conference with the process for developing student growth objectives."

(D. 52, p. D. 1093) The District's approved application for that waiver specifically considered SGOs and SGP as "additional evidence while calculating the rating for Competency 4 (Student Progress toward Mastery)." (Id., p. 1095) Progress on goals, then, is to be included in the scoring of Competency 4. And, as the District explained to the State, Competency 4 counts for 6 out of 19 points or 32% of the rating, and thus is in compliance with TEACH NJ's requirement that growth be 20% of a teacher's evaluation score. (Id., p. 1096)

Since the State has granted the District a waiver to consider SGOs within the context of observing and evaluating Competency 4, I do not find the failure to separately calculate and score SGO to be a fatal defect in the evaluation process. The District may not ignore student growth measurements, however: the State and District have mandated inclusion of quantitative information about student progress on specific growth objectives chosen by the Respondent in collaboration with her supervisors. That information must be included in Competency 4. The question remains whether the analysis undertaken by the District in 2015-2016 regarding Respondent's work with her students was substantially compliant with that mandate.

In the fall of 2015, Respondent developed two specific and quantifiable growth objectives for two classes, building on base-line data concerning those students. In the mid-term review, VP Ogele noted that Respondent had not provided assessment data. "As a result, there is no evidence that students are progressing toward goals." In the year-end VP Ogele made reference to only one of the two goals. He also noted, in pertinent part:

- "...over the course of the year, there is inconsistent or no evidence that students master lesson objective." (4c)
- "...over the course of the year, there is inconsistent or no evidence that students master lesson objective. As a result, most students are not moved to grade-level standards." (4.c.)
- "As a result of teacher's inconsistent submission of end of unit assessment analysis spreadsheet, there is little evidence to demonstrate student growth." (4.e.)
- "Evidence from End of Unit assessment...indicates that most students did not master grade-level standards. (4f)

In other words, Respondent did not provide the data necessary for the administration to calculate progress on CAP goals. This conclusion was repeated in a number of places in the documents and in the testimony.

Yes, the District must set goals and objectively and fairly observe and evaluate Respondent and calculate student progress. The District must also offer Respondent meaningful, one-on-one support. But, as I noted above with respect to the prior year, Respondent also must cooperate and submit data to prove her students are meeting the goals set in her CAP. Respondent presented testimony and documents in the form of sheaves of paper to show that her students were doing well, and she presented evidence that over 80% passed her final exam. I am not an educator; I cannot look at those test sheets or scores and conclude that the students did meet the CAP goals. Nor is that my role. The educators entrusted with that role were Principal Ramkissoon and VP Ogele. They looked at the data presented and the data that was absent and concluded that

Respondent had not demonstrated progress toward the SGOs. Their conclusions were reflected in their assignment of numerical values to Competency 4. In so rating the Respondent, they met their obligation to incorporate an objective, quantitative measurement into their evaluation of her efficiency as a teacher.

Conclusion. I find the District has proven the charge of inefficiency against Respondent for the school years 2014-2015 and 2015-2016. I decline to make findings with regard to each and every subparagraph (a) through (s). Instead, I have reviewed the evidence as weighed against the key components of the state's mandated protocols for reviewing tenured teachers. The District met its responsibility with respect to those protocols and has proven the charges. As to the charge of inefficiency for the year 2013-2014, that charge is not proven and is dismissed for the reasons set forth above.

CHARGE TWO: AND OTHER JUST CAUSE

To the extent that Charge Two, Paragraph 1 "restates" and "re-alleges" the allegations in Charge One, those allegations have been addressed. Paragraph 2, which alleges Respondent has failed to adhere properly to District protocols for "overseeing students and improving her teaching skills," similarly is a restatement of matters covered in Charge One. Accordingly, both Paragraphs 1 and 2 of Charge Two are stricken as duplicative.

As to the charges in Paragraph 3 of failure to "follow instructions" and violation of District policies and procedures, the District has not pled with any specificity what conduct it considers as under that umbrella. During the course of this lengthy proceeding, the Department introduced testimonial and documentary evidence regarding such matters as unprofessional conduct toward

students, tardiness and absence on one occasion without leave. It is not up to the arbitrator to parse the evidence and tease out what particular actions the District regards as failing to follow instructions or violating policies and procedures; that is the District's duty in its pleadings. Paragraph 3 is dismissed as vague.

Finally, Paragraph 4 charges "The cumulative effect of Respondent's misconduct and inefficiency as set forth above constitutes other sufficient cause sufficient [sic] to warrant dismissal." This is nothing more than an effort to sweep up an unidentified quantity of evidence to fill the bucket of "sufficient cause to warrant dismissal." The reference to "inefficiency," as noted above, is duplicative of Charge One, while the District has not identified what it considers "misconduct." Such vague pleadings are manifestly unfair to the Respondent and must be stricken.

In sum, the entirety of Charge Two is dismissed.

AWARD

The District has established Charge I with respect to academic years 2014-2015 and 2015-2016. Accordingly, Respondent's dismissal for inefficiency is upheld. The remaining charges are dismissed.

Ruth Moscovitch

Ruth Moscovitch, Arbitrator

Date: March 30, 2017

ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On March 30 2017, RUTH MOSCOVITCH, whom I know, came before me and acknowledged that she executed the foregoing as and for her Opinion and Award in the above-captioned matter.

John P. Anderson

Notary Public
My Commission expires 1/7/20

JOHN P. ANDERSON
Notary Public, State of New York
No. 01AN6180053
Qualified in New York County
Commission Expires January 7, 2020

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01019-15
AGENCY DKT. NO. 357-12/14

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF CHAE HYUK IM, SCHOOL DISTRICT OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY.

Christine Bernacki Smith, Esq., for petitioner Wayne Board of Education (Machado Law Group, attorneys)

Louis P. Bucceri, Esq., for respondent Chae Hyuk Im (Bucceri & Pincus, Esqs., attorneys)

Record Closed: December 6, 2016 Decided: February 24, 2017

BEFORE **CAROL I. COHEN**, ALJ:

STATEMENT OF THE CASE

Petitioner, the Board of Education of the Township of Wayne (the Board), seeks an order suspending the respondent's teaching certificate for a period of one year, contending that he resigned from his teaching position with inadequate notice. Respondent, Chae Hyuk Im, replies that he resigned because he was appointed as a Federal Bureau of Investigation (FBI) agent and had to begin his training immediately.

When he asked the Board for a leave of absence, it denied his request. He therefore had no alternative but to resign immediately.

PROCEDURAL HISTORY

On December 1, 2014, at the request of the Board, the Commissioner of Education (the Commissioner) entered an Order directing Im to show cause why his teaching certificate should not be suspended for unprofessional conduct, pursuant to N.J.S.A. 18A:28-8. Im filed a pro se answer on December 29, 2014. On January 21, 2015, the Commissioner transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On February 6, 2015, the matter was assigned to Judge Irene Jones. On August 13, 2015, the petitioner filed a motion for summary decision. On September 3, 2015, the respondent filed his responsive brief. On September 10, 2015, the petitioner filed a reply brief. On April 4, 2016, this matter was transferred to the undersigned. On May 11, 2016, I issued an oral decision from the bench granting partial summary decision to petitioner on the issue of unprofessional conduct. Questions of fact remained that required testimony on the issue of mitigation. On May 18, 2016, I issued Partial Summary Decision.

On May 17, 2016, Im filed a request for interlocutory review of the oral decision. On May 27, 2016, the Commissioner declined to hear an application for interlocutory review of the partial summary decision Order. On June 30, 2016, the Commissioner issued a decision in which he concurred with the administrative law judge that the respondent was guilty of unprofessional conduct pursuant to N.J.S.A. 18A:28-8. On July 15, 2016, Im filed a Notice of Appeal with the New Jersey Superior Court, Appellate Division. On September 2, 2016, the Appellate Division declined to hear the interlocutory appeal. Testimony on the issue of penalty was heard at the OAL on November 17, 2016, and counsel submitted their summation briefs on December 6, 2016. The record closed that day.

Due to unforeseen family medical reasons, the undersigned submitted to Acting Director Laura Sanders a request to extend the time to file the initial decision. The

Extension was granted allowing for the initial decision to be extended until March 6, 2017.

ISSUE

What penalty should be imposed for Im's failure to give sixty days' notice prior to his leaving his teaching position?

TESTIMONY

For the Board

Two witnesses testified for the Board, Mark Toback, the superintendent of schools, and Kenneth Palczewski, the principal of Wayne Valley High School, where Mr. Im had taught prior to his departure.

Mark Toback testified that he had become Superintendent in August 2014. He was aware that Mr. Im had made a request for leave prior to the Superintendent's arrival in the District. The request had been discussed at the committee level, but then was withdrawn. J-8 was the Board Committee report dated August 5, 2014. It stated that Mr. Im was requesting leave in order to go to the FBI, but he was not sure if he could successfully complete the program. Therefore, he wanted to take a leave of absence from his teaching position. The Report said that it was agreed that Mr. Im was an excellent teacher and it would be prudent to allow him the year to determine if he wanted to make the career change. The Superintendent said that he was aware of the prior request. Mr. Toback said that he had a meeting with Mr. Im in mid-October 2014, at which time respondent wanted to discuss requesting a leave in order to take a position with the FBI. Mr. Toback said that he advised Mr. Im of the sixty-day requirement under the statute, but Im said that he would be leaving the District under any circumstance. Mr. Im did not volunteer to find a replacement and he did not say that he was leaving materials for a replacement teacher, or that he would notify his fellow teachers that he was leaving. Also, Im did not discuss any student issues with

Mr. Toback. However, Mr. Toback said that these issues were usually dealt with by the school principal.

The superintendent said that the second leave request was discussed by the Board but denied because of concerns about finding a replacement for a chemistry teacher and the fact that they would be setting a pattern if other teachers sought leave in order to explore other career options. Superintendent Toback stated that it was especially difficult to find chemistry teachers because there was a lot of competition from private industry. It was even harder to find a quality replacement mid-year because a permanent position was uncertain and tenure could not accrue right away. When questioned why he had referred the matter to the Department of Education, he said that he was not sending a message of punishment, but rather was just following the law.

Kenneth Palczewski was the principal of Wayne Valley High School for four years. He said that prior to his October 2014 request for leave, Mr. Im had discussed the fact that he might have an opportunity to join the FBI, and if he got it, he would take it. Mr. Palczewski told Im that if he did leave, it would be the principal's responsibility to cover the classes,[1] and Mr. Im should follow the career path for which he had a passion. Mr. Palczewski said that he did not advertise for a replacement for Mr. Im in August, because the District did not advertise for positions until they were actually available. The principal said that after Mr. Im left he looked for opportunities to cover his classes. He used in-house staff and a substitute teacher, who was a retired science teacher, whom he knew.[2] Mr. Palczewski did not recall Mr. Im offering to find a replacement teacher for him. Nor did he recall Mr. Im telling him that he had left materials for the classes. He also did not think that Mr. Im talked to him about any concerns he had with any students. The District advertised for a replacement for Im in October and hired someone, who was a friend of another teacher, in November. However, this teacher could not begin teaching the chemistry classes until January, because he had to give his district sufficient notice.

[1] According to Mr. Palczewski, Mr. Im taught four classes, with approximately twenty to twenty-four students per class.

[2] He did not know if the substitute was specifically trained in chemistry.

Mr. Palczewski said that it is hard to find chemistry replacements because people trained in this field often work in non-educational settings. Also, it is hard to find substitute teachers who have the proper certification. When asked if there were any problems caused as a result of Mr. Im's leaving, he said that some parents complained that the level of instruction of the substitute teacher was not equal to that of the regular teachers, who took on extra classes to cover Mr. Im's classes. He said that he had to speak to the substitute teacher about the situation, and he made sure that the substitute spoke to other staff members to improve his teaching methods. In addition, Mr. Palczewski said that while they were able to cover all the classes with in-house staff and a substitute, because of the schedule conflicts for the chemistry labs, the students might have had three to four different teachers during the period from October through December 2014.

For Im

Chae Hyuk Im testified that he always wanted to help people. In college he looked into a number of science-oriented courses and then decided to become a teacher. He worked in the Wayne school system and became tenured. In 2011 a college friend said he had applied for a position at the FBI, and Im began thinking about pursuing a new career. He described a rigorous FBI application process, which he was initially able to pass. He stated that he had informed his immediate supervisors and the local union president of the progress of the application process. However, in 2011 he suffered two herniated discs that sidelined him from taking the physical-fitness portion of his testing. Then, as a result of government sequestration, there was a freeze on all job hiring. This remained in effect until 2014, when his application was reactivated. Mr. Im was informed that he would be considered for the July 2014 entry class. It was at that time that he submitted his leave request. He stated that he asked for leave because he did not know if the career change would suit him and if he would complete the training process. He wanted to leave his options open. In August 2014 he was informed that he had failed the physical portion of the job requirement. That is when he told the Board of Education that he would not be taking a leave. The next physical test was scheduled for September 11, 2014. However, he decided not to take that test, because he did not

think that his body would be in the proper condition to pass the test. If he did not pass, he would have had to wait one full year to take another physical exam. Then, in September 2014 he was informed that another physical-fitness exam would be conducted in October. Mr. Im explained the situation to the building principal, the science supervisor, and someone in Human Resources (HR). He said that they wished him good luck and asked that he keep them abreast of the situation. Mr. Im took the physical and was told that he had passed on October 9, 2014. He was told that he had to arrive for training at Quantico on October 19, 2014. He said that on October 9 he informed the principal, someone from HR, and the science vice principal of the results of the test and that he would be leaving to start training. He said that he asked how his classes would be handled, and that Mr. Palczewski wished him good luck and told him that he should not worry, because it was the principal's job to find a teacher replacement, and that he should get his personal life in order. He got the same reaction from HR and the science vice principal. Mr. Im's last day of teaching was October 17, 2014. Mr. Im was informed by either the HR person or his union president that his leave request was denied by the Board.

Mr. Im said that he spoke to his FBI mentor to question him about whether he could wait to start at the Academy. His mentor said that he should not decline the appointment because there was no guarantee that he would get another entry date, and that his failure to begin the Academy at once could be taken as a sign of lack of dedication.

Mr. Im testified as to how he felt he had mitigated the harm done to the students by his leaving early. He said that it was the practice of the Chemistry Department to have weekly meetings. The people in the department knew how to proceed if an emergency developed. The teachers would take over for each other. He said that over the course of his teaching career he had compiled worksheets for his students and had teacher notes. In 2008 he put these notes into binders. During the weekly meetings he would discuss the information in the binders. Since he did not have a classroom of his own, he would bring the binders to the different rooms he taught in. Therefore, the other chemistry teachers were aware of the binders. He explained that the CD of his notes for class (J-15) was organized by chapter. Mr. Im left all of his teaching notes.

Presumably he would not need them because he would be following a different career path. Before he left he spoke to Linda Wills, who had been his in-class support teacher, about these notes.[3] He said that sometime before he left, he mentioned to Ms. Potts, a biology teacher, that he had left chemistry binders in the office for use by the teachers. He also talked to Diane Marturano, a primary chemistry teacher, about the notes. However, neither Ms. Wills nor Ms. Potts was teaching the same chemistry courses as Mr. Im was teaching at the time of his departure. Mr. Im stated that he did not know who was going to be replacing him when he left. However, he knew that three of the teachers who filled in for him had many years of experience and had taught the same or different levels of the classes that he had been teaching, and the substitute teacher was a retired science teacher. He stated on cross-examination that he had proposed a potential replacement teacher, but she was not hired.[4]

Mr. Im stated that he did have contact with some of the students after he left because they had asked him to write letters of recommendation for college, which he did provide.

Mr. Im testified that in his present position as a special agent for the FBI, he earned $55,000 during his first year of employment. Now that he is working in the New York area, there has been a salary adjustment and he earns $62,000 per year. Before he joined the FBI he was a tenured teacher in Wayne and earned about the same as what he is earning now. However, the salary at the school district included health benefits, which were not included at the FBI.

Mr. Im said that he informed the FBI that charges had been filed against him by the District. They said that he should keep them informed, and that if the ruling of unprofessional conduct were sustained, then any time he was working on a case that went to trial he would have to notify the assistant U.S. attorney, so that they could disclose the information to the defense. Mr. Im said that the people he spoke to at the FBI did not know of the specific unprofessional conduct, but if he were unable to testify

[3] At the time of Im's departure, Ms. Wills was teaching lower-level chemistry courses.

[4] It was pointed out that prior to this testimony, Mr. Im had never mentioned in discovery that he had proposed a potential replacement.

as a criminal investigator, then he would be switched to an analyst role as a special agent. Mr. Im said that the people he spoke to at the FBI referred him to the policy annunciated in Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

Diane Marturano was a longtime chemistry teacher in the District. She said that she knew Mr. Im since 2005. She stated that chemistry teachers were a close-knit group, who met at least one time per week to discuss issues and curriculum. They gave common mid-terms and finals. The teachers agreed on the same labs that would be done by each of the classes. She said that she learned a few days before his departure that Mr. Im would be leaving. Mr. Im was teaching high-level chemistry classes that year, and she was also teaching high-level and AP chemistry. She said she knew that all of Mr. Im's notes had always been kept and were available in the chemistry office. She did not use his materials because she had been a teacher for a long time and actually had given him some of her materials. She recalled telling the other teachers that Mr. Im had left his binders in the chemistry office. She stated that Mr. Im's leaving was not a problem because there was a common curriculum for chemistry and the teachers had access to Mr. Im's materials. When the new teacher came in to replace Mr. Im in January, she did not hear any complaints that the children from Mr. Im's class were behind. She was the senior teacher, and no one came to her with concerns about the students or their learning after Mr. Im left. When asked whether she felt that it was disruptive to have a teacher leave mid-term, she said that there are adjustments when there is a new relationship, but if you spend a day or two and have the students express their concerns and reassure them that even though there is a different teacher they will get the same education, this will allay their fears and they can move on. She felt that, in fact, it would have been more difficult for the students if Mr. Im had waited the sixty days and then left, because they would have established a stronger relationship with him.

FINDINGS OF FACT

The parties stipulated to the following **FACTS**:

1. Im was employed by the Board from September 2005 into October 2014 as a chemistry teacher. He has standard teaching certifications in physical science and biological science. (J-1.) He was recommended for tenure as a teacher (J-2) and became tenured in September 2008. His individual contracts for 2006–07, 2007–08 and 2008–09 are attached as J-3, J-4 and J-5.

2. Im is currently employed as a special agent by the FBI.

3. Im is a naturalized citizen who has resided in this country since the age of three. His application to the FBI was first submitted in 2011. The application was inactive for several years during a period of federal hiring freezes. On May 15, 2014, Im received a letter from the Board stating his salary for the 2014–15 school year. In that letter he was also informed that if he should have reason to believe he would be unable to serve for the 2014–15 school year he should inform the District immediately. (J-6.)

4. Part of the FBI application process involved a background investigation and a physical fitness test (PFT). Around May 2014, agents of the FBI contacted both his high school (Wayne Valley High School) and the District (Wayne Board of Education) as part of his background investigation. The administration at building level and district level were aware of the application process at that time. At that time there was a different superintendent of schools. The new superintendent, Dr. Mark Toback, took over on or about August 11, 2014.

5. In July 2014 Im was informed that he was listed for a September 2014 training start date—the last such date in the federal fiscal year (October–September). In anticipation of entering the Academy he wrote a letter to the Board on July 23, 2014, requesting a one-year leave of absence. (J-7.) The Board and superintendent agreed to grant the leave, if it was needed. (J-8.)

6. On August 7, 2014, Im had his pre-training PFT. If he had passed, he would have begun to serve in September 2014, the September FBI class training date.

7. Im did not pass the PFT, and was removed from the September training start date.

8. As a result of the test failure, Im advised the Board's administration that he would be starting the 2014–15 school year as usual.

9. Later in August 2014, Im was informed that he was unexpectedly added to the roster for the first training class of the new fiscal year (October 2014), but this was contingent on retaking and passing the PFT.

10. Failing the PFT a second time requires a mandatory one-year wait time before a new application can be processed. (J-9.) Im decided not to take the September PFT and to wait for the October PFT because he did not have time to train sufficiently to pass the September fitness test. (J-10; J-11.)

11. In or about September 2014 Im informed his building administrators and the HR department of the District that there was a new possibility of his entering the FBI Academy for training in October 2014. He approached the superintendent about seeking a one-year leave because he wanted to preserve the opportunity to return to Wayne Valley High School in 2015–16 if he failed to qualify for the FBI. The new superintendent said that it would not be likely that a one-year leave would be granted since the school year had already started.

12. On October 9, 2014, Im again took the pre-training PFT and was told that day that he had passed. This was later confirmed in writing under date of October 10, 2014. (J-12.) On the afternoon of October 9 Im drove from the PFT to Wayne Valley High School and the Wayne Board office to inform them that, with the passing of the PFT, he was expected at the Academy on October 19. Mr. Im was given a "Rice" notice on October 9, 2014, stating that the terms of his employment might be discussed in

executive session at the Board meeting on October 16, 2014. (J-13.) The Board of Education had its meeting on October 16, 2014.

13. Mr. Im learned the next day, October 17, 2014, that he was definitively denied a one-year leave by the Board. Im submitted his letter of resignation, which he had prepared and signed on October 15, 2014. (J-14.)

14. At the time of his resignation Im was teaching four sections of high-school chemistry.

15. As part of his teaching process throughout his employment at Wayne Valley High School he had been compiling binders of documents which included class-procedure lists, chemistry worksheets and handouts for student use, quizzes linked to textbook chapters, lab-equipment sign-out sheets, and other materials. These items had been collected and supplemented and updated by Im, with contributions from other teachers, continuously since approximately 2006. (J-15.)

16. At the time of his departure from the District on October 17, 2014, Im was not aware of which teachers would take over his classes. He advised Diane Marturano of the fact that his materials in the binders and on a thumb drive would be left behind for use by whoever was assigned.

17. The classes taught by Im were taken over by currently employed staff members in the Wayne School District's science department, namely, Diane Marturano, Katherine Cofer, Katie Poremba, and Fred Vafaie, who were paid a contractually specified stipend for accepting an extra period in addition to their current class schedule. Al Ruffini, a per-diem substitute, was also hired to cover Mr. Im's classes. This form of coverage continued until a replacement teacher, Thomas Villa, began teaching in January 2015. (J-16.)

18. Due to their work covering Mr. Im's classes, Katherine Cofer was paid $456.08; Diane Marturano was paid $2,280.32; Katie Poremba was paid $2,487.89; and Fred Vafaie was paid $310.95. Al Ruffini was paid $100.00 per day to teach one of

respondent's classes. For forty days of coverage, the cost of the per-diem substitute was $4,000.00 before taxes.

19. Had Mr. Im given the District sixty days' notice prior to his resignation, that notice period would have expired on December 20, 2014. The costs expended by the Board to replace him during the sixty-day period were less than the amount the Board would have expended in providing salary and benefits to Mr. Im if he had worked during that same period.

20. At the next Board meeting, November 13, 2014, Mr. Im's resignation was formally accepted for the effective date of October 17, 2014. The teachers covering his classes were also approved for their additional stipend with an effective date of October 20, 2014. Further, at that meeting, Mr. Im's replacement, Thomas Villa, was approved for hire, with a start date of January 19, 2015, or sooner. (J-17.)

21. Attached are true copies of Im's annual teaching evaluations from the Wayne School District from 2007–08 through 2012–13, and two 2013 observations. (J-18 through J-23; J-24; J-25.)

22. Attached is a true copy of Wayne District Policy #3141, "Resignation." (J-26.)

LEGAL ARGUMENTS

Arguments of the Board

Wayne argued that Mr. Im should receive a penalty of a full year's suspension. It cited the decision in In re Teaching Certificate of Capshaw, EDU 12318-06, Comm'r (June 12, 2007), <http://njlaw.rutgers.edu/collections/oal/>, in which the Commissioner stated:

> the Commissioner has historically evaluated all attendant circumstances specific to each case. As a general rule,

> however, given the underlying purpose of the statute, this evaluation—with *rare* exception—has resulted in suspension of any and all certificates for the maximum one-year period, particularly where the facts demonstrate that individuals have violated the 60-day notice requirement for strictly personal reasons, putting their own self interest above the interests of students and their professional obligation to provide adequate notice to the Board.

The District pointed out that Im had been looking for other employment since 2011, but had not given the Board notice until 2014. It argued that to decide that certain jobs are more worthy of exemption from the statute (i.e., FBI agent) than others is a slippery slope. Not to impose a suspension would remove any power or security of the District to maintain teaching operations and would render the statute on sixty days' notice meaningless. It would eviscerate any ability of the Board to ensure that teachers give the requisite notice. The statute was designed to protect students from unnecessary disruption caused by an abrupt resignation and departure. Wayne pointed out that in In re Certificate of Montalbano, EDU 3588-00, Initial Decision (April 24, 2001), adopted, Comm'r (June 11, 2001), <http://njlaw.rutgers.edu/collections/oal/>, a one-year suspension was imposed on a teacher who left after twelve days' notice to become a police officer. The teacher tried to make a schedule of coverage and discussed classroom duties with the replacement teachers; he completed the marking-period grades; and he sent notice of an opening to surrounding colleges. Still, the Commissioner saw fit to impose the full penalty. This was based on the disruption to the students caused by his departure.

The Board distinguished Board of Education of Clinton v. Burgess, 1983 S.L.D. 183, by pointing out that in that matter, the board failed to fulfill its promise to hire an immediate replacement when there was one available. It also distinguished Board of Education of Black Horse Pike Regional v. Mooney, 1984 S.L.D. 810, where the Board had secured a replacement at the time of the respondent's departure from the district.

The District asserted that it was the District, rather than the respondent, who mitigated the damages. The respondent chose to start the school year because he failed the FBI physical. Mr. Im chose to wait until October to retake the physical, rather

than September, because he thought he would be more physically ready to pass. The assertion that he left his teaching materials was of no moment, since he had no need for them, having left the profession. He did not find a replacement for himself, nor is it clear that he talked to the replacement teachers before he left. His assertion that the Board was on notice because of his prior request for leave was of no consequence, since he did not leave at that time. The District argued that it was the District that mitigated the damages by having the remaining teachers teach an extra course and hiring a retired substitute teacher to teach one of the chemistry sections. It was the high-school principal who managed to find a replacement for Mr. Im. However, because of the sixty-day requirement, he could not begin until January. As a result of Mr. Im's departure, the students had three to four different teachers during the period from October to January. Even the respondent's witness, Ms. Marturano, conceded that the departure of a teacher always has an impact on students.

As to the admissibility of the computer printout from the U.S. Department of Justice website that Im has sought to introduce into evidence, "9-5.100—Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ('Giglio Policy')," the District puts forth several arguments. The District asserts that introduction of the printout would cause undue prejudice and confusion, as it is entirely irrelevant to the issue of mitigation, which is the subject of the hearing. Further, Wayne asserts that the "[r]espondent had two years to produce a case, a witness, testimony, anything to support the allegation that an adverse finding would impact his potential ability to testify on behalf of the FBI," but all it has done is to produce this printout, which is pure hearsay and irrelevant to the issue of penalty. The District distinguished Giglio v. United States, supra, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104, which was relied upon by the respondent. It pointed out that Giglio dealt with a criminal matter in which it was determined that the credibility of a witness was in question. The Government's case depended entirely on the co-conspirator's testimony and, therefore, his credibility was at issue. The printout cited by respondent states that a Government witness would have to reveal, for possible impeachment purposes:

> (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness;
>
> (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness;
>
> (c) prior inconsistent statements; and
>
> (d) information that may be used to suggest that a witness is biased.

The printout also states, "[t]his policy is not intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It is also not intended to have the force of law. United States v. Caceres, 440 U.S. 741[, 99 S. Ct. 1465, 59 L. Ed. 2d 733] (1979)."

The District argues that the only effect of the statement in the printout is that the respondent would have to disclose to the prosecutor in a case that he had failed to give appropriate notice to his prior employer when he joined the FBI. It would be pure speculation to deduce from this document that revelation of his failure to give sixty days' notice would affect Mr. Im's ability to testify.

Further, the District argued that the document should be excluded under the residuum rule. Under N.J.A.C. 1:1-15.5(b), hearsay is admissible only if there is some legally competent evidence to support each ultimate finding of fact. According to the District, the respondent has provided absolutely nothing to support his allegation that imposing a penalty on him will have any impact on his ability to perform his job as an FBI agent.

Arguments of the Respondent

The respondent countered the District's argument on the admissibility of the website printout by saying that its objection to admissibility on hearsay grounds was completely baseless. According to the respondent, the residuum rule has nothing to do with the admissibility of evidence. Rather, it relates to the circumstances under which admitted evidence can support an ultimate finding of fact. N.J.A.C. 1:1-15.5(a) gives

the judge the right to exclude hearsay evidence, it does not authorize exclusion of hearsay evidence pursuant to the residuum rule, N.J.A.C. 1:1-15.5(b). Instead a judge may exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either necessitate undue consumption of time, or create substantial danger of undue prejudice or confusion. N.J.A.C. 1:1-15-1(c). The respondent argued that since neither of these circumstances exists, the document is admissible. In addition, since the respondent testified as to the existence of the "Giglio Policy" and its impact on his ability to function in his job, the testimony serves to satisfy the residuum rule.

Further, Mr. Im argued that the policy sought to be admitted is publicly published on the Justice Department's website. As such, it would be admissible in a Superior Court proceeding because it falls within an exception to the hearsay rule. N.J.R.E. 803(c)(8) "prevents the exclusion of public records from evidence based on the Hearsay Rule." There can be no argument that the document generated from the website is not a public record. In addition, the respondent argued that the exhibit qualifies as a business record under N.J.R.E. 803(c)(6) and 801(d) and is therefore admissible under those rules as well.

Mr. Im made a number of arguments to demonstrate that it would be inappropriate to impose a penalty on him. The respondent asserted that

> the issue before this agency is NOT whether Mr. Im's mid-year departure can be shown to have caused some harm which cannot be mitigated by the circumstances of his leaving. The only issue is whether his leaving **with less than 60 days' notice** caused more harm than if he had left after 60 days, and if so, whether that harm is mitigated by the circumstances of his leaving.

Mr. Im pointed out that, contrary to the District's initial position, Wayne did not lose any money as a result of Im's departure. In fact, if one compared the cost of paying Mr. Im his salary and benefits versus paying the permanent teachers for one additional class per day and hiring one substitute, the District suffered no financial loss.

Further, the students did not suffer any detriment by the respondent leaving before sixty days, as opposed to his staying until the statutory deadline. Mr. Im asserted that there was only one complaint from a parent, and that student would have suffered more had he developed a stronger bond with the resigning teacher. Mr. Im pointed out that he left all of his teaching materials in good order, and in fact almost all the teachers did not even need the materials, since they were using their own materials to teach the chemistry courses.

As for Mr. Im, he actually lost financially by taking the position with the FBI. He also pointed out that the administrators at the school and fellow teachers supported his decision to join the FBI. The respondent questioned the superintendent's position that it was necessary to enforce the sixty-day rule because of his concern that other teachers might also leave early if there were no consequences. He asserted that leaving by teachers mid-year is rare, and that the decision to pursue charges was an unreasonable punishment by a new superintendent bent on intimidation.

Im cited Burgess, supra, 1983 S.L.D. 183, and Mooney, supra, 1984 S.L.D. 810, to support his position that sanctions should not be imposed. In Burgess no penalty was imposed even though Burgess left his teaching position to earn more money in private industry. The only distinction was that Mr. Im, because he was at Quantico, could not be available to consult with the teachers who took over for him. Im sought to distinguish Montalbano, supra, EDU 3588-00, Initial Decision (April 24, 2001), adopted, Comm'r (June 11, 2001), <http://njlaw.rutgers.edu/collections/oal/>, by saying that Montalbano could have waited until another position at the police department became available, rather than leaving without proper notice. Here, Mr. Im argued, he would have jeopardized his chance of entering any future class at the FBI training center, or sequestration could have occurred again before he got an opportunity to begin his training.

LEGAL ANALYSIS

The evidentiary rules applicable to hearings before the Office of Administrative Law are outlined at N.J.A.C. 1:1-15.1 to -15.12. N.J.A.C. 1:1-15.1, entitled "General rules," provides in pertinent part:

> (b) Evidence rulings shall be made to promote fundamental principles of fairness and justice and to aid in the ascertainment of truth.
>
> (c) Parties in contested cases shall not be bound by statutory or common law rules of evidence or any formally adopted in the New Jersey Rules of Evidence except as specifically provided in these rules. All relevant evidence is admissible except as otherwise provided herein. A judge may, in his or her discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either:
>
> 1. Necessitate undue consumption of time; or
>
> 2. Create substantial danger of undue prejudice or confusion.

N.J.A.C. 1:1-15.5, entitled "Hearsay evidence; residuum rule" provides:

> a. Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.
>
> b. Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

Therefore, the initial criterion for the admission of evidence before the Office of Administrative Law is a determination of the relevancy of the proposed evidence.

Relevant evidence is defined in the rules as meaning "evidence having any tendency in reason to prove any material fact." N.J.A.C. 1:1-2.1. "To determine relevancy, a judge must focus 'on the logical connection between the proffered evidence and a fact in issue. If the evidence offered makes the inference to be drawn more logical, then the evidence should be admitted unless otherwise excludable by a rule of law.'" State v. Goodman, 415 N.J. Super. 210, 225 (App. Div. 2010) (citation omitted). However, although all relevant evidence is admissible, relevant evidence may be excluded if its probative value is substantially outweighed by the risk that its admission will either (1) necessitate undue consumption of time or (2) create the danger of undue prejudice or confusion. N.J.A.C. 1:1-15.1(c). Moreover, although hearsay evidence is admissible before the Office of Administrative Law, there must be some legally competent evidence to support each ultimate finding of fact. N.J.A.C. 1:1-15.5(b); DeBartolomeis v. Bd. of Review, 341 N.J. Super. 80 (App. Div. 2001). The underlying rationale of the rule is that an administrative determination should "not rest upon evidence which the unsuccessful party was *incapable* of impeaching or rebutting." In re Application of Howard Sav. Bank, 143 N.J. Super. 1, 8–9 (App. Div. 1976).

Petitioner objects to the admission of the Giglio Policy into evidence because it avers that its admission would cause undue prejudice and confusion, as it is entirely irrelevant to the issues of mitigation, and because it contends that the document has no foundation and is completely speculative. Respondent, on the other hand, avers that the petitioner's objection to the admissibility of the Giglio Policy on hearsay grounds is completely baseless. Respondent argues that admitting the Giglio Policy would not result in any undue consumption of time and there is nothing prejudicial or confusing about it. Respondent seeks its admission as evidence of the impact that an adverse sanction ruling would have on his duties as an FBI agent. Respondent also avers that the Giglio Policy is a policy of the Justice Department that is publicly published on its website. As such, respondent argues that the document falls within the accepted public-records exception to the hearsay rule pursuant to N.J.R.E. 803(c)(6) and (8).

Initially, it is important to recognize that the question of relevancy must be distinguished from that of sufficiency and weight. Evidence, though weak, may be relevant if it tends to prove the issue. The purpose of the hearing is to give the

respondent a full opportunity to present evidence of mitigation to determine whether a certificate suspension is appropriate. Respondent asserts that the Giglio Policy should be admitted and relied upon (together with other evidence, such as his testimony) as evidence of the impact that an adverse sanction ruling will have on his duties as an FBI agent. Petitioner objects to its admission based upon its claim that the Giglio Policy is irrelevant on the issue of mitigation. Petitioner's position fails to recognize that the impact a disciplinary action has on a teacher's career has been held to be a valid consideration in determining the proper penalty to be imposed when disciplining teachers. Although it concerned a tenured teacher that was appealing his dismissal for conduct unbecoming a teacher, the Appellate Division's admonition to the Commissioner regarding the penalty warranted by the teacher's actions in In re Tenure Hearing of Fulcomer, 93 N.J. Super. 404 (App. Div. 1967), is germane to the present matter. The court stated:

> We hold no brief for the teacher's conduct in this case. . . .
>
> Although such conduct [restraining a student] certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances. . . . **However, consideration should be given to the impact of the penalty on appellant's teaching career, including the difficulty which would confront him, as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in this State** . . . .
>
> . . . We observe that the local board recognized that Fulcomer's teaching record was good and his teaching ability unquestioned. He had not been disciplined in any manner by the board prior to the date of the incidents involved in these charges, and he had consistently received pay raises each year.
>
> The matter is therefore remanded to the Commissioner of Education for the purpose of making an affirmative decision as to the proper penalty to be imposed. Such penalty should be based upon the Commissioner's findings as to the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the teacher's conduct may have had

> on the maintenance of discipline and the proper administration of the school system.
>
> [Fulcomer, 93 N.J. Super. at 421–22 (citation omitted) (emphasis added).]

Therefore, the issue presented by respondent's attempt to introduce the Giglio Policy into evidence is not one of relevance, but instead one of the sufficiency and weight to be accorded the policy. This issue is related to petitioner's objection to the admission of the Giglio Policy based upon its claim that it is hearsay. Respondent argues that petitioner's objection on hearsay grounds is completely baseless. He argues that the document falls within the accepted public-records exception to the hearsay rule pursuant to N.J.R.E. 803(c)(6) and (8).

As defined by the New Jersey Rules of Evidence, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801. Respondent argues that the Giglio Policy should be admitted as evidence of the impact that an adverse sanction ruling will have on his duties as an FBI agent.

N.J.R.E. 803(c)(6) provides that the following statements are not excluded by the hearsay rule, whether or not the declarant is available as a witness:

> **Records of regularly conducted activity.** --A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

And N.J.R.E. 803(c)(8) provides that the following statements are not excluded by the hearsay rule, whether or not the declarant is available as a witness:

> **Public records, reports, and findings.** --Subject to Rule 807, (A) a statement contained in a writing made by a public official of an act done by the official or an act, condition, or event observed by the official if it was within the scope of the official's duty either to perform the act reported or to observe the act, condition, or event reported and to make the written statement, or (B) statistical findings of a public official based upon a report of or an investigation of acts, conditions, or events, if it was within the scope of the official's duty to make such statistical findings, unless the sources of information or other circumstances indicate that such statistical findings are not trustworthy.

The Giglio Policy was adopted by the Justice Department in the regular course of its business. The Rules of Evidence provide that a "business includes activities of governmental agencies." N.J.R.E. 801(d). Both N.J.R.E. 803(c)(6) and (8) are "intended to cover admissibility of documents that are objectively reliable, were not prepared for a specific defendant, and have a sufficient guarantee of trustworthiness. State v. Hix, No. A-4616-05 (App. Div. May 29, 2009), <https://njlaw.rutgers.edu/collections/courts/>. Under both N.J.R.E. 803(6) and (8), any objection to the admissibility of a business or public record must be supported by some evidence that the record is not trustworthy. Ibid. Petitioner contends that the document has no foundation. However, pursuant to N.J.R.E. 902, extrinsic evidence of authenticity as a condition precedent to admissibility is not required of official publications, books, pamphlets, or other publications "purporting to be issued by public authority." N.J.R.E. 902(e). Because the Giglio Policy was adopted by the Justice Department in the regular course of its business and within the scope of its duties; it was not prepared for a specific defendant; it is publicly published on its website; and petitioner is not challenging its accuracy, the Giglio Policy falls within the hearsay exceptions for public records. N.J.R.E. 803(6) and (8). And it is self-authenticating. N.J.R.E. 902(e).

CONCLUSIONS OF LAW

Petitioner objects to the admission of the Giglio Policy as being irrelevant to the issue of mitigation. The question of relevancy, however, must be distinguished from

that of sufficiency and weight. Evidence, though weak, may be relevant if it tends to prove the issue. The purpose of the hearing is to give the respondent a full opportunity to present evidence of mitigation to determine whether a certificate suspension is appropriate. Respondent seeks the policy's admission as evidence of the impact an adverse sanction ruling would have on his duties as an FBI agent. In Fulcomer, supra, 93 N.J. Super. 404, the impact a penalty would have on a teacher's career was recognized as being a valid consideration in determining the appropriate sanction. Therefore, respondent should have the opportunity to introduce the Giglio Policy on the issue of what sanction should be imposed. However, it will be accorded little weight, because respondent failed to introduce any additional evidence to buttress his assertion that the imposition of a one-year penalty will have any different effect on his ability to testify or perform his job than a shorter suspension period. The Certification of Eric Parisi, besides being hearsay, does not mention the Giglio Policy. All it states with regard to the effect that a penalty would have on Im's ability to perform his duties as an FBI agent is:

> I am advised that the suspension of Special Agent Im's teaching license would require a finding of "unprofessional" conduct. It would appear that such a consequence should be avoided in the absence of overwhelming proof of the alleged existence of truly unprofessional conduct.[5]

Mr. Im's testimony did nothing to shed light on the effect that a lesser penalty, or no penalty at all, would have on his ability to testify or to keep his job as a criminal investigator. Im testified that he was advised that under Giglio, if he had to testify in a criminal trial he would have to disclose to the government attorney that he had been found to have acted unprofessionally by leaving his job without proper notice.[6] Why a finding of "unprofessional conduct" would require him to disclose under Giglio is questionable, since it has nothing to do with credibility. But even if his testimony were to be believed, there is absolutely no evidence that a lesser penalty would impact his ability to testify or to retain his job as a criminal investigator. Therefore, there is no

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[5] The respondent did not call Agent Parisi to the stand to be questioned as to what he meant by his statement.

[6] Besides being hearsay, Mr. Im's testimony on this issue is completely self-serving.

credible evidence to substantiate the assertion that the imposition of a lesser penalty or no penalty at all would affect his ability to remain an FBI criminal investigator.

The Commissioner has discretion pursuant to N.J.S.A. 18A:28-8 to impose an appropriate sanction of up to a one-year suspension of a teacher's teaching certificate for unprofessional conduct in resigning their position without giving the required sixty days' notice.

It was clear from the testimony of the District's witnesses that, while the disruption to Mr. Im's students was not catastrophic, there were definitely consequences to his leaving early. While permanent teachers took on all but one of Mr. Im's classes, because of scheduling difficulty for labs, each student had three to four teachers from September until January.[7] While it is true, as the respondent argued, that there would have been a disruption no matter when Im left, the District would have had more time to try to find a replacement for Im and some of the disruption could have been alleviated had he waited the sixty days. In addition, at least one parent complained that the quality of the teaching of the substitute teacher was not up to the standards of the permanent teachers, and the principal had to talk to the substitute about the quality of his teaching. Mr. Im argued that he left all of his materials for the replacement teachers, and therefore credit should be given for his efforts. It appears that Mr. Im was a very capable and organized teacher. However, there was testimony that Mr. Im did not tell either the principal of the school or the replacement teachers that he had left the materials for them. While there was testimony that Mr. Im's materials were available to all the chemistry teachers, this was not due to any special effort on his part to help the teachers at the time of his precipitous departure. Rather, it was a result of his organization throughout the years. As far as his communicating with the students prior to his departure, Mr. Im said that he kept contact with some of the students because he wrote college letters of recommendation for a few of them. There was no testimony that he spoke to his classes before his departure to explain what was happening. The principal of the school, Mr. Palczewski, who was sympathetic toward Im, acknowledged that Im did not find a replacement for himself, nor did he recall Im offering to do so. A

[7] The students either had a substitute teacher or a regular teacher who took on additional classes. Also, because of scheduling, different te4achers had to fill in for the labs.

replacement was found because a newly hired teacher had a friend who decided to apply for the opening. Mr. Palczewski also testified that at the time Im left, he was not aware that the respondent had left his materials for the replacement teachers. Nor did Im talk to the principal about the students and any special needs.

N.J.S.A. 18A:26-10 provides that "[a]ny teaching staff member employed by a board of education . . . who shall, without the consent of the board . . . , cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year." See also N.J.A.C. 6A:9-17.9. The Commissioner has held that the central purpose of N.J.S.A. 18A:26-10 is "to provide notice to the school so that a suitable replacement can be hired without adversely impacting students." Penns Grove-Carneys Point Bd. of Educ. v. Leinen, 94 N.J.A.R.2d (EDU) 405, 407.

The decision to suspend a teaching certificate pursuant to N.J.S.A. 18A:26-10 is discretionary and the Commissioner has historically evaluated all circumstances specific to an individual case. As a general rule, however, with rare exception, the Commissioner has imposed suspensions for the one-year maximum period. Mooney, supra, 1984 S.L.D. at 821; In re Suspension of the Teaching Certificate of Capshaw, EDU 12318-06, Initial Decision (April 30, 2007), modified, Comm'r (June 12, 2007), <http://njlaw.rutgers.edu/collections/oal/>; East Amwell Twp. Bd. of Educ. v. Acken, 1986 S.L.D. 2803. In this matter, there are factors that weigh on both sides of the ledger. While the District had had prior notice of the possibility of Mr. Im's leaving, those notices were vitiated by his subsequent disclosure that he had failed the physical and therefore would not be leaving. As the principal pointed out, the District could not advertise to fill a position until it was actually available. While the respondent's argument that the superintendent brought the charges out of vindictiveness or an attempt to assert his own power as the new administrator may have some validity, the fact is that the statute permits the bringing of charges in situations like this one. Mr. Im left on incredibly short notice, leaving the District to scramble for replacements. While Mr. Im was free to do so, that did not mean that there were not consequences to his actions. Mr. Im could have chosen to retake the physical in September and not begin

the school year. However, he chose to wait, for his own benefit, until he felt that he would be more likely to pass. He also could have chosen to wait until the following year to take the physical. It is true that another freeze could have been instituted and he might not have been able to get the FBI job. He made the decisions he made based on his own self-interest. While it is true that the District did not suffer financial harm due to Mr. Im's departure and Mr. Im did not receive a windfall from his new job, the impact on the students also has to be considered. The purpose of the statute was to protect the students from unnecessary disruption caused by the precipitous departure of a teacher. Here, while the disruption was somewhat mitigated by the fact that seasoned teachers, who were teaching the same curriculum as Mr. Im, took his place in all but one section, there was still disruption, as Mr. Im's own witness testified. Ms. Marturano testified that she thought the disruption would have been greater for the students if Mr. Im stayed the sixty days because the students would have developed a bond with him. On the other hand, if he had stayed sixty days, it could have given the District time to make a smooth transition to a new teacher.

Mr. Im has relied on Burgess, supra, 1983 S.L.D. 183, and Mooney, supra, 1984 S.L.D. 810, for the proposition that sanctions should not be imposed. However, as the District pointed out, these cases can be distinguished from the present matter. In Burgess the school district failed to fulfill its promise to hire an immediate replacement when one was available. Similarly, in Mooney the Board had a candidate for replacement of the respondent on his anticipated release date. This case more closely mirrors Montalbano, supra, EDU 3588-00, Initial Decision (April 24, 2001), adopted, Comm'r (June 11, 2001), <http://njlaw.rutgers.edu/collections/oal/>, where a tenured teacher accepted a position with the Ridgefield Police Department and gave twelve days' notice. The respondent tried to distinguish Montalbano by saying that Montalbano could have waited sixty days and sought a position at that time. In fact, we do not know if the position would have been available for Montalbano in sixty days. Likewise, while Mr. Im might have worried that another sequestration might have arisen, there is nothing in the record to demonstrate that a sequestration was contemplated by the agency.

Weighing all of the mitigating factors, I **CONCLUDE** that a six-month suspension of the respondent's teaching certificate is warranted at this time.

ORDER

Based on the above findings of fact and conclusions of law, I **ORDER** that the respondent's teaching certificate be suspended for a period of six months.

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

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

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

February 24, 2017

DATE

Carol I. Cohen

CAROL I. COHEN, ALJ

Date Received at Agency: February 24, 2017

Date Mailed to Parties: February 24, 2017

db

APPENDIX

List of Witnesses

For Petitioner:

Mark Toback

Kenneth Palczewski

For Respondent:

Chae Im

Diane Marturano

Joint Stipulation of Facts and Exhibits

J-1 Teaching Certification of Chae Hyuk Im

J-2 Tenure Recommendation memos

J-3 2006-07 Employment contract of Im

J-4 2007-08 Employment contract of Im

J-5 2008-09 Employment contract of Im

J-6 May 15, 2014 salary notice

J-7 July 23, 2016 leave request

J-8 August 5, 2014 Board Committee report

J-9 Certification of Eric A. Parisi

J-10 August 15, 2014 email as to fitness testing

J-11 October 6, 2014 email regarding October fitness test

J-12 October 10, 2014 FBI acceptance letter

J-13 October 9, 2014 Notice of Board Meeting

J-14 October 15, 2014 resignation letter

J-15 Teaching materials on disk

J-16 Certification of Claudia Olivo

J-17 November 13, 2014 Wayne Board of Education Agenda

J-18 2007-08 annual teaching evaluation of Im

J-19 2008-09 annual teaching evaluation of Im

J-20 2009-10 annual teaching evaluation of Im

J-21 2010-11 annual teaching evaluation of Im

J-22 2011-12 annual teaching evaluation of Im

J-23 2012-13 annual teaching evaluation of Im

J-24 November 24, 2013 classroom observation of Im

J-25 December 11, 2013 classroom observation of Im

J-26 Wayne District policy 3141

102-17

OAL DKT. NO. EDU 01163-17
(EDU 12760-16 ON REMAND)
(EDU 05774-16 PRIOR REMAND)
AGENCY DKT. NO. 61-2/16

J.T., ON BEHALF OF MINOR CHILDREN, J.T., A.T., AND B.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record, proposed settlement agreement and release, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's January 23, 2017 determination that the prior settlement agreement did not comply with *N.J.A.C.* 6A:3-1.13, as it was neither signed by the Board's attorney, nor contained a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf. Since the settlement agreement now contains a copy of the Board resolution approving the settlement, the Commissioner can approve the within agreement in its present form.

Additionally, the Commissioner notes that the settlement makes reference to a monthly payment intended to begin on August 15, 2016. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

Subject to the foregoing, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/06/17

Date of Mailing: 4/06/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

J.T. on behalf of minor children, J.T., A.T. and B.T., Petitioner,	OAL DKT. NO. EDU 01163-17 AGENCY DKT. NO. 61-2/16
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY Respondent.	ON REMAND OAL DKT. NO. EDU 05774-16

J.T., parent of minor children, J.T., A.T. and B.T. petitioner, pro se

Deryls Gutierrez, Esq., for respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: February 22, 2017 Decided: February 23, 2017

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

On January 25, 2017, this matter was remanded to the Office of Administrative Law (OAL) for revision of the settlement agreement pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A signed copy of the Revised Settlement Agreement and Release indicating the terms of settlement was forwarded to the undersigned on February 22, 2017 and is attached hereto.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

February 23, 2017

DATE

JEFFREY A. GERSON, ALJ

2-27-17

Date Received at Agency:

FEB 27 2017

Date Mailed to Parties:

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SETTLEMENT AGREEMENT AND RELEASE

J.T. o/b/o J.T., A.T. and B.T. v. South Brunswick Board of Education, Middlesex County,
Agency Docket No. 61-2/16
OAL Docket No.: EDU 05774-2016N

This Settlement Agreement ("Agreement") is made this ____ day of June, 2016, by and between Petitioner J.T. ("J.T.") o/b/o J.T., A.T., and B.T. ("Children"), and Respondent/Cross-Petitioner South Brunswick Board of Education ("Board") (hereinafter collectively referred to as the "Parties").

WHEREAS, on or about February 26, 2016, J.T. filed a Pro Se Residency Appeal with the Commissioner of Education, which was docketed as 61-2/16 ("Petition"), challenging the Board's August 8, 2016 determination that J.T.'s Children did not reside in South Brunswick during the 2015-16 school year; and

WHEREAS, on or about April 12, 2016, the Board filed an Answer to J.T.'s Petition and also filed a Cross-Petition for tuition costs for J.T.'s Children; and

WHEREAS, the matter was transmitted to the Office of Administrative Law for a hearing before the Honorable Jeffrey Gerson, A.L.J. on June 20, 2016, which was docketed as EDU 05774-2016N; and

WHEREAS, the Parties intend to adopt, by way of compromise, without any admission of liability, all claims which were either raised or could have been raised in the Petition and Cross-Petition ; and

NOW THEREFORE, in consideration of the foregoing and of the mutual agreements contained herein, and intending to be legally bound, the Parties agree as follows:

1. This Agreement sets forth all the terms and conditions of the Parties' agreement.
2. J.T. agrees to pay the Board a total sum of thirteen thousand dollars ($13,000.00).

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OFFICE OF ADMIN. LAW

a. Said amount shall be paid by J.T. over the course of sixty-one (61) monthly installment payments.

b. All monthly payments by J.T. shall be in the form of a check or money order made payable to the "South Brunswick School District."

c. All monthly payments shall be sent by J.T. to:

South Brunswick School District
P.O. Box. 181
Monmouth Junction, New Jersey 08852
Attention: School Business Administrator

d. The first payment by J.T. shall be in the amount of one thousand dollars ($1,000.00), and is due to the Board on or before August 15, 2016.

e. The remaining balance of twelve thousand dollars ($12,000.00) shall be paid to the Board in sixty (60) monthly installments of two hundred dollars ($200.00) each, beginning in September 2016. Each of these monthly sixty (60) payments is due to the Board on or before the 5th of each month.

f. If the initial monthly payment is not received by the Board by August 25, 2016, or if any subsequent payment is not received by the Board by the 15th of the respective month, the Board shall send J.T. a letter via certified and regular mail informing J.T. of his default of this Agreement. If J.T.'s default is not cured within five (5) days of the date of the Board's letter, the Board shall apply to the Office of Administrative Law or New Jersey Superior Court for a default judgment in the amount of thirty thousand dollars ($30,000), minus the amount already paid by J.T., if any. If it becomes necessary for the Board to seek a default judgment, J.T. agrees that the Board shall be entitled to counsel fees and costs associated with that application.

g. J.T. understands that his obligation to pay the full sum of thirteen thousand dollars ($13,000.00) in accordance with this Agreement shall remain in effect even if J.T. and/or his Children does not reside in South Brunswick.

3. J.T. has informed the Court that he is in the process of renting an apartment in South Brunswick, and that his Children will be residing with him in the South Brunswick apartment. As such, J.T. agrees to provide the Board with a copy of the fully executed lease agreement if and when he registers his Children for school in accordance with Paragraph 4.

4. J.T. understands that he is required to register his Children in the South Brunswick School District for the 2016-17 school year, provide sufficient proof of residency and comply with all Board Residency/Registration requirements and policies and student residency laws at all times.

5. In exchange for the promises set forth above, J.T. agrees to dismiss the instant Petition and the Board agrees to dismiss its Cross-Petition.

6. Additionally, J.T. agrees to and hereby releases and gives up any and all claims and rights which he may have against the Board (including any of its officers, employees, agents and representatives). This releases all claims of J.T. and his Children, including those of which J.T. is not aware and those not expressly mentioned in this Release. This Release applies to claims resulting from anything which has happened up until and through the date of execution of this Agreement by J.T.

7. The Parties agree that this Agreement, and all of its terms, are and will remain confidential to the maximum extent possible by law. J.T. is expressly forbidden from discussing this Agreement with any person, other than his accountants, tax advisers, and attorney ("permitted disclosures"), and any other individual or entity as necessary to

implement the Agreement or to which he is legally obligated to respond ("legally-required disclosures").

8. This Agreement may not be modified, altered, changed, discharged, terminated or waived, except upon express written consent of the Parties.
9. This Agreement shall not serve as a precedent for any other matter.
10. The Parties acknowledge that they have entered into this Agreement voluntarily and hereby sign it without duress or coercion, and with the opportunity to consult counsel.
11. This Agreement shall be governed by the laws of the State of New Jersey.
12. The Parties agree that this Agreement may be signed in counterparts and that facsimile of signatures will have the same force and effect as original signatures.
13. The Agreement is subject to the formal approval of the Board

PETITIONER
GIROLAMO TOMASELLI (A/K/A JERRY TOMASELLI)

By: _____

Dated: 8/31/16

RESPONDENT/CROSS-PETITIONER
SOUTH BRUNSWICK PUBLIC SCHOOLS

By: _____

Dated: 2/6/2017

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OFFICE OF ADMIN. LAW

1.17 **Approve Settlement & General Release** – That the Board of Education approve the attached Settlement Agreement and General Release between J.T. o/b/o J.T., A.T. and B.T vs. South Brunswick Board of Education – Agency Docket No. 61-2/16 – OAL Docket No.: EDU 05774-2016N.

2 PERSONNEL - Administration recommends that the following personnel items be approved:

2.1 **Accept Resignation** – That the Board of Education accept the following resignations:

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A. Resignations

Name	Assignment	Location	Effective Date
Amanda Roberts	Teacher	Crossroads South	03/24/17
Amanda Rosenberg	Director of Professional Development	Board Office	08/31/17
Janean Vivadelli	Teacher	SBHS	03/24/17

B. For the Purpose of Retirement

Name	Assignment	Location	Effective Date
Robert Andreotta	Teacher	Crossroads South	03/01/17

Yes: Mr. Harry J. Delgado, Dr. Stephen F. Parker, Mr. Martin Abschutz, Mrs. Azra Baig, Mr. Barry Nathanson, Mr. Deven M. Patel, Mr. Patrick Del Piano, Mr. Arthur Robinson and Mr. Peter St. Vincent

No: None

Abstentions: None

CERTIFICATION THAT THIS IS A TRUE EXCERPT OF THE MINUTES OF THE SOUTH BRUNSWICK BOARD OF EDUCATION MEETING HELD ON 2/6/17
THADDEUS THOMPSON
BUSINESS ADMINISTRATOR/
BOARD SECRETARY

103-17

103-17L

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

April 7, 2017

Mark A. Tabakin, Esq.
Weiner Law Group, LLP
629 Parsippany Road
P.O. Box 0438
Parsippany, New Jersey 07054

Kerri A. Wright, Esq.
Porzio Bromberg & Newman P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, New Jersey 07962-1997

Re: *Board of Education of the City of Englewood, Bergen County v. Board of Education of the Borough of Englewood Cliffs, Bergen County, Agency Docket No. 31-2/17.*

Dear Counsel:

I have reviewed the Petition for Declaratory Ruling in the above-captioned matter, together with the respondent's purported answer to the petition. Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that this matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq*.

Accordingly, petitioner's request for declaratory ruling is declined; this matter shall be transmitted forthwith to the Office of Administrative Law.

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

KH/MKD/JKH

11-4-17

CAPEHART & SCATCHARD, P.A.
142 West State Street
Trenton, New Jersey 08608
609.394.2400
BY: William R. Burns
Attorney Identification Number 018892001
ATTORNEYS FOR BURLINGTON COUNTY INSTITUTE OF TECHNOLOGY

IN THE MATTER FO THE TENURE HEARING OF JUDITH EVANS, BURLINGTON COUNTY INSTITUTE OF TECHNOLOGY, BURLINGTON COUNTY	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION Agency Docket Number: 318-12/16 SETTLEMENT AGREEMENT AND WITHDRAWAL OF TENURE CHARGES

This matter having been brought before the Commissioner of Education on December 16, 2016, by the PETITIONER, Burlington County Institute of Technology, against RESPONDENT, Judith Evans and;

WHEREAS, PETITIONER alleged that RESPONDENT engaged in unbecoming conduct as a certificated and tenured employee of the Burlington County Institute of Technology; and

WHEREAS, PETITIONER alleged that RESPONDENT, a tenured faculty member, engaged in a pattern of inappropriate conduct by operating a concession stand from 2010 or 2011 until 2015 at Burlington County Institute of Technology Boys Basketball games in violation of Board Policy; and

WHEREAS, RESPONDENT has denied and continues to deny the allegations; and

WHEREAS, RESPONDENT operated the concession stand with the full knowledge of School District administrators, specifically the building principal, but was not previously subjected to discipline as a result of her operating the concession stand; and

WHEREAS, Counsel for PETITIONER and RESPONDENT attended an initial conference with Arbitrator Lewis R. Amis; and

BCIT Initials

JE Initials

WHEREAS, during the initial conference the Arbitrator indicated that the PETITIONER would have a difficult time proving the allegation of unbecoming conduct as set forth in the complaint; and

WHEREAS, the Arbitrator indicated that even assuming the PETITIONER was able to prove the facts alleged in the complaint, in all likelihood PETITIONER would not be able to sustain its burden to terminate RESPONDENT for multiple reasons including the facts that RESPONDENT operated the concession stand for five (5) years without supervisory notice that she acted in violation of Board Policy and served PETITIONER for 22 years without discipline; and

WHEREAS, based on the totality of the circumstances PETITIONER has requested to withdraw of the Tenure charges subject to the following conditions; and

WHEREAS, the withdrawal and dismissal of the Tenure charges is in accordance with the public interest as it will reduce the financial burden on the PETITIONER, eliminate the need and required expense to prosecute the charges, and facilitate the return of a highly experienced certificated faculty member; and

WHEREAS, this Settlement is being submitted in accordance with N.J.A.C. 6A:3-5.6.

NOW THEREFORE this matter in difference having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the tenure charges are hereby withdrawn and the matter is hereby dismissed, without costs against any party, with prejudice, subject to the following terms and conditions:

1. PETITIONER hereby withdraws the tenure charges against RESPONDENT.

BCIT Initials

JE Initials

2. The parties agree that the withdrawal of the tenure charges is in accordance with the public interest and prefer the mutual resolution of the tenure charges without the cost and risk of protracted litigation.
3. PETITIONER will issue a letter to RESPONDENT indicating that RESPONDENT violated Board Policy relating to her operation of the Burlington County Boys' Basketball Team Concession Stand and the PETITONER expects RESPONDENT and all BCIT employees to abide by Board Policy. ARBITIRATOR Amis will have final approval of said letter.
4. RESPONDENT shall be reinstated and shall return to work on Monday, February 27, 2017, to the same position, though different campus, that she held at the time the tenure charges were filed. On February 27, 2017, RESPONDENT shall report to Burlington County Institute of Technology Medford Campus.
5. RESPONDENT has entered into this Agreement freely and voluntarily.
6. RESPONDENT has a full understanding of her rights.
7. RESPONDENT has not lost her position as a result of the filed tenure charges; therefore, there appears to be no basis for the Commissioner or PETITIONER to refer this matter to the State Board of Examiners for any action in regard to RESPONDENT'S certifications.
8. PETITIONER agrees to make the RESPONDENT whole as to any and all entitlements owed, and any and all payments made as a result of such charges, including but not limited to the restoration of all vacation, sick, and personal days, as well as reimbursement for any COBRA payments made by RESPONDENT and such

other benefits as set forth in the applicable collective bargaining agreement to which the Respondent is entitled.

9. The Parties consent to the terms and conditions of this Agreement and agree to be bound by same.

The PETITIONER and RESPONDENT consent to the entry and form of the within Agreement both as to fact and content.

Theresa L. Margiotta
Burlington County Institute of Technology
Board Secretary and Business Administrator

Date: 3/29/17

William R. Burns, Esq.
Burlington County Institute of Technology
Board Solicitor

Date: 3/22/17

Judith Evans, RESPONDENT

Date: 2/22/17

Andrew M. Schwartz, Esq.
Attorney for RESPONDENT

Date: _____

APPROVED:

Lewis R. Amis,
Arbitrator

Date: 4/3/2017

BCIT Initials

JE Initials

CAPEHART & SCATCHARD, P.A.
142 West State Street
Trenton, New Jersey 08608
609.394.2400
BY: William R. Burns
Attorney Identification Number 018892001
ATTORNEYS FOR BURLINGTON COUNTY INSTITUTE OF TECHNOLOGY

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WHEREAS, RESPONDENT operated the concession stand with the full knowledge of School District administrators, specifically the building principal, but was not previously subjected to discipline as a result of her operating the concession stand; and

WHEREAS, Counsel for PETITIONER and RESPONDENT attended an initial conference with Arbitrator Lewis R. Amis; and

BCH Initials

JE Initials

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WHEREAS, the Arbitrator indicated that even assuming the PETITIONER was able to prove the facts alleged in the complaint, in all likelihood PETITIONER would not be able to sustain its burden to terminate RESPONDENT for multiple reasons including the facts that RESPONDENT operated the concession stand for five (5) years without supervisory notice that she acted in violation of Board Policy and served PETITIONER for 22 years without discipline; and

WHEREAS, based on the totality of the circumstances PETITIONER has requested to withdraw of the Tenure charges subject to the following conditions; and

WHEREAS, the withdrawal and dismissal of the Tenure charges is in accordance with the public interest as it will reduce the financial burden on the PETITIONER, eliminate the need and required expense to prosecute the charges, and facilitate the return of a highly experienced certificated faculty member; and

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BCIT Initials

JE Initials

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6. RESPONDENT has a full understanding of her rights.
7. RESPONDENT has not lost her position as a result of the filed tenure charges; therefore, there appears to be no basis for the Commissioner or PETITIONER to refer this matter to the State Board of Examiners for any action in regard to RESPONDENT'S certifications.
8. PETITIONER agrees to make the RESPONDENT whole as to any and all entitlements owed, and any and all payments made as a result of such charges, including but not limited to the restoration of all vacation, sick, and personal days, as well as reimbursement for any COBRA payments made by RESPONDENT and such

BCIT Initials

JE Initials

other benefits as set forth in the applicable collective bargaining agreement to which the Respondent is entitled.

9. The Parties consent to the terms and conditions of this Agreement and agree to be bound by same.

The PETITIONER and RESPONDENT consent to the entry and form of the within Agreement both as to fact and content.

Theresa L. Margiotta
Burlington County Institute of Technology
Board Secretary and Business Administrator

Date: 3/22/17

William R. Burns, Esq.
Burlington County Institute of Technology
Board Solicitor

Date: 3/22/17

Judith Evans, RESPONDENT

Date: 2/22/17

Andrew M. Schwartz, Esq.
Attorney for RESPONDENT

Date:_____

APPROVED:

Lewis R. Amis,
Arbitrator

Date: 4/3/2017

BCIT Initials

JE Initials

106-17

OAL DKT. NO. EDU 01996-17
AGENCY DKT. NO. 24-2/17

BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ, for the reasons thoroughly set forth in the recommended Order.

The ALJ denied petitioner's request for emergent relief and dismissed the matter on the merits by way of an Order on Emergent Relief, finding that the Commissioner does not have jurisdiction to hear the case. The Commissioner afforded the parties the opportunity to file exceptions pursuant to *N.J.A.C.* 1:1-18.4. The parties did not file exceptions.

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief and dismissing the case for lack of jurisdiction, is adopted as the final decision in this matter for the reasons expressed therein. This case is hereby dismissed with prejudice.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/13/17
Date of Mailing: 4/13/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 01996-17

AGENCY DKT. NO. 24-2/17

BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP,

Petitioner,

v.

CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,

Respondent.

Steven J. Edelstein, Esq., for petitioner (Schwartz, Simon, Edelstein & Celso, attorneys)

Robert L. Tarver, Jr., Esq., for respondent

Record Closed: February 27, 2017 Decided: February 28, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

The Board of Education of the City of Orange Township (petitioner) filed an emergent motion in connection with the adoption of a Referendum question which was

adopted by the voters of the City of Orange Township to move from an appointed Board of Education to an elected Board of Education as placed on the ballot by the City Council of Orange Township. As the acts of the City Council as a legislative body are involved herein, the City Council is the respondent in this matter and not the City of Orange Township itself.

PROCEDURAL HISTORY

On February 3, 2017, petitioner filed a Verified Petition with the Commissioner of the New Jersey Department of Education, along with a request for emergent relief. On February 8, 2017, the emergent matter was filed, along with the Verified request, with the Office of Administrative Law (OAL). The emergent relief request was first scheduled for oral argument on February 17, 2017, and was adjourned at the request of the respondent's attorney. The matter was rescheduled for February 22, 2017, and was again adjourned at the request of the petitioner's attorney. Oral argument was conducted on February 27, 2017.

In this emergent matter, petitioner submitted a Verified Petition and an application for emergent relief. On November 8, 2016, the voters of the City of Orange Township approved a Referendum question. The Referendum sought to change the Board of Education from an appointed entity to an elected entity. Petitioner claims that the Referendum was worded incorrectly and inconsistently, the interpretive statement was unlawful and that the financial consequences are disastrous to the school district.

As a side issue, and not related to any substantive issues in this case, the Deputy City Attorney, who represents the City of Orange Township, attempted to file a letter, dated February 23, 2017, with only a Certification from the Township Mayor, Dwayne D. Warren, which was addressed to the Commissioner of Education with copies sent to the undersigned and the respective attorneys. The letter states that the Deputy City Attorney "represents defendant, City of Orange Township in connection with the above matter." As stated herein above, the City of Orange Township itself is not a party to this action and did not seek to intervene in this case and thus has no standing to file paperwork in this case. As such, the paperwork submitted by the Deputy City Attorney was not accepted

and did not play a role in the ultimate decision on this application. The attorney for the City of Orange Township was permitted to speak at the hearing on February 27, 2017, but agreed that he would not add anything different from the arguments presented by Mr. Edelstein on behalf of the City of Orange Township Board of Education. Both Mr. Edelstein and Mr. Tarver agreed that despite the error in the caption, the true parties of interest in this matter are the City of Orange Township Board of Education and the City Council of Orange Township.

FACTUAL DISCUSSION

The Orange School District (District) is comprised entirely of the City of Orange Township. Prior to November 8, 2016, the District was a Type 1 school district. As such, when it was necessary to bond for capital projects, an appropriate Resolution would be passed by the Board of School Estimate and thereafter, the City would enact an appropriate Bond Ordinance, relying on the credit of the City.

On July 6, 2016, the Council passed a resolution calling for a referendum at the next general election to be held on November 8, 2016, for the City of Orange Township to change from that of an appointed school board to an elected school board effective immediately. With the first school board election to be held during the November 2017 general election.

The Resolution also contained this language in the main body of the Resolution: "BE IT FURTHER RESOLVED that upon the commencement of the November, 2017, general election, this resolution shall take full force and effect forthwith." On November 8, 2016, the following question appeared on the ballot in the City:

CITY OF ORANGE TOWNSHIP
MUNICIPAL PUBLIC QUESTION

> Shall the Board of Education of the City of Orange Township be changed from a board that is appointed by the Mayor, to a Board that is elected by the residents of Orange, effective immediately, with the first school board election to be held during the November 2017 general election.

INTERPRETIVE STATEMENT

> Presently the mayor appoints members to serve on the City's Board of Education. If changed to a board of elected members, the residents will have more control over who serves on the board of education.

The Interpretive Statement was neither approved by nor contained in a Resolution passed by the Council. The voters of the City were never advised prior to the election on November 8, 2016:

1) that the District would be changes from Type 1 District to a Type II District;
2) that the Board of School Estimate would be eliminated;
3) that future bonding for capital projects would have to be approved by public referendum;
4) that future bonding for capital projects would be based on the credit of the District rather than on the City;
5) that the size of the Board would increase from seven to nine;
6) that the first election of board members would take place in March of 2017; and
7) that the Resolution of the Board of School Estimate for capital improvements passed in March of 2015 would, as a practical matter, become null and void and that financing of the capital improvements would be back to square one.

Petitioner argues that the failure of the respondent to properly inform the voters and the public about the above issues violates the letter, spirit and intent of the law that the vote on the Referendum on November 8, 2016 must be declared null and void.

On November 14, 2016, the Council passed, on the first reading, Ordinance 65-2016, entitled:

> Bond School District by the City of Orange Township, in the County ordinance providing for improvements to various School buildings and grounds on behalf of the Orange Board of Education Public of Essex, New Jersey, appropriating $3,700,000 bonds or notes of the City to finance the cost thereof.

The minutes indicate that the Clerk read the Ordinance with an amended amount of $2,506,000. On December 20, 2016, the Ordinance was passed by the Council unanimously on its second reading.

LEGAL DISCUSSION

Jurisdiction by the Commissioner of Education

A necessary preliminary issue which must be addressed is whether the Commissioner of Education has jurisdiction to hear this matter. Respondent, the City Council of the City of Orange Township, argues that the Commissioner of Education lacks such jurisdiction and the petitioner, the City of Orange Township Board of Education, argues that the Commissioner of Education has such jurisdiction.

The applicable statute addressing jurisdiction is N.J.S.A. Title 18A:6-9 which provides in part:

> Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioners.

However, when defining what actions constitute controversies and disputes under the school laws, the statute specifically excludes the conduct of school elections by stating:

> For purposes of this Title, controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws. N.J.S.A. 18A:6-9.

Thus the issue as presented is whether the Referendum switching the Board of Education from a Type I school district to a Type II school district arises under the exception of jurisdiction under Title 18A.

In addition, Black's Law Dictionary defines "election" as:

> The act of choosing or selecting one or more from a greater number of persons, things, courses, or rights. The choice of an alternative. The internal, free and spontaneous separation of one thing from another, without compulsion, consisting in intention and will. The selection of one person from a specified class to discharge certain duties in a state, corporation or society. With respect to the choice of persons to fill public office or the decision of a particular **public question** or public policy the term means in ordinary usage the expression by vote of the will of the people of a somewhat numerous body of electors.
>
> Black's Law Dictionary 464-465 (7th ed. 1999) (emphasis added).

Petitioner, in its submission of February 23, 2017, argues that this matter remains under Title 18A and that the 1995 statutory revisions did not remove from the Commissioner of Education under that Title. The petitioner states that this case is not a dispute over a school election. Petitioner further states that the effects of the passed Referendum are far-reaching and that the voting public was essentially unaware of those effects including eliminating the Board of Estimate and invalidating previously approved funding for the schools. Petitioner goes on to attack the procedure which took place on this public question. It states that this matter is predominantly a Title 18A issue even though some of the issues are Title 19 issues and that its selection of the venue to litigate this matter should be given deference unless no such jurisdiction exists.

Petitioner's position only serves to reinforce that this matter is predominately a Title 19 issue regarding the procedure surrounding this school election. And any alleged violations of the procedural process for school elections are to be brought in Superior Court. N.J.S.A. 19:28-1. The petitioner makes broad allegations that the "residents were unaware that they were voting to convert the Board to a Title II district" and that "the referendum directly impacted bond financing for the educational needs of Orange students." Petitioner cites the fact that the Commissioner of Education has jurisdiction to review bond ordinances to finance school projects and may order the issuance of bonds regardless of public approval. Plainly, the referendum is not a bond ordinance, nor does it deal with the direct issuance of bonds.

Based on the plain reading of the above definition of an election and the exclusion regarding the conduct of school board elections, it is clear that the Commissioner of Education does not have jurisdiction to hear this case and, instead, it should be brought in the Superior Court of New Jersey. Even accepting as true the allegations of errors in the Referendum process, the petitioner is clearly with a remedy by application in the Superior Court despite its argument that it is without any remedy. I am also concerned about the petitioner's failure to act in a timely matter. The Resolution was considered and passed by the City Council of Orange Township on July 6, 2016, calling for a Referendum question to be placed on the ballot for the voters to express their will regarding a change of the type of school district in Orange. The general election was held on November 8, 2016 and the voters passed the Referendum and approved the change of form. This matter was not filed with the Office of Administrative Law until February 8, 2017 with no other action being taken by the petitioner prior to this or any other venue.

Based on the finding reached in this case, there is no need to fully address the standard for emergent relief (N.J.A.C. 6A:3-1.6) and further set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) and argued by the respective parties in their submissions in favor and opposed to the relief requested in the petitioner's petition and application for emergent relief.

For the foregoing reasons, I **CONCLUDE** that petitioner has failed to demonstrate that this venue has the proper jurisdiction to hear this case. Consequently, the petitioner's request for emergency relief is denied and this matter if dismissed.

ORDER

Having concluded that petitioners are not entitled to the requested emergent relief, it is hereby **ORDERED** that the petitioner's request for emergency relief be DENIED and that the Commissioner of Education does not have jurisdiction to hear this appeal and thus this matter if hereby **DISMISSED**.

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

February 28, 2017
DATE

MICHAEL ANTONIEWICZ, ALJ

jb

107-17

Y.Y., ON BEHALF OF MINOR CHILDREN, W.Y. AND D.Y.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,

RESPONDENT,

AND

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF BERGEN COUNTY, BERGEN COUNTY,

INTERVENOR.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Pro se petitioner appealed the determination of the respondent Board that her children, W.Y. and D.Y., are not entitled to a free public education in North Arlington schools. Petitioner contended, *inter alia*, that she has three separate residences in New Jersey, but is legally domiciled in North Arlington. The respondent Board of Education of North Arlington argued that Y.Y. is not legally domiciled within the school district, and filed a motion for summary decision, as well as a counterclaim for tuition. Petitioner filed opposition to the motion for summary decision, asserting that there are genuine issues in dispute which warrant an evidentiary hearing. The Board of Education of the Vocational Schools of Bergen County filed a motion to intervene, as one of petitioner's children attends vocational school at the expense of the North Arlington school district.

The ALJ found, *inter alia*, that: there are no material facts at issue in this matter, and the case is ripe for summary decision; written certifications submitted by the Board in support of its motion for summary decision – from the Board's Superintendent of Schools, the Business Administrator for the district, and a former neighbor who lived near petitioner's residence in Kearny, Hudson County – all attested to the apparent residency of petitioner and her sons in Kearny; and petitioner failed to submit anything to refute the factual assertions of the Board or the documentary evidence contained in the Board's certifications. Accordingly, the ALJ concluded that petitioner is a resident of Kearny, not North Arlington, awarded summary decision to the Board, and ordered that petitioner reimburse the Board for tuition in the total amount of $21,883.94 for the 2014-2015, 2015-2016, and 2016-2017 school years.

Upon review, the Commissioner found, *inter alia*, that: there are genuine issues of material fact herein; therefore, summary decision is not appropriate; petitioner submitted numerous documents to support her claim of residency in North Arlington, and filed an affidavit certifying that she "...has three residences in the state of New Jersey and is domiciled in North Arlington, New Jersey"; and the ALJ failed to consider the evidence in the light most favorable to petitioner, the non-moving party. Accordingly, the Commissioner rejected the Initial Decision and remanded the matter to the OAL for further proceedings.

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

April 17, 2017

OAL DKT. NO. EDU 09260-16
AGENCY DKT. NO. 149-5/16

Y.Y., ON BEHALF OF MINOR CHILDREN, W.Y. AND D.Y.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF BERGEN COUNTY, BERGEN COUNTY,	:	
INTERVENOR.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner and the North Arlington Board of Education (Board) – pursuant to *N.J.A.C.* 1:1-18.4 – and the petitioner's reply thereto. The Board's reply was untimely filed and was therefore not considered by the Commissioner. Petitioner's reply to the Board's reply was also not considered, as *N.J.A.C.* 1:1-18.4 does not allow such a filing.

In her exceptions, petitioner argues that the ALJ erred in granting summary decision to the Board because there are genuine issues of material fact, which render summary decision inappropriate. Petitioner contends that the ALJ viewed the facts in the light most favorable to the Board, rather than the non-moving party, and made numerous credibility determinations. Petitioner contends that through a hearing, the ALJ would have been able to

hear testimony and make credibility determinations, but petitioner did not have the opportunity for a hearing. Additionally, petitioner points out that the ALJ failed to consider the documents she submitted, including tax bills, certificate of occupancy, voter registration, utility bills, W-2 statement, and bank statements. Petitioner maintains that while she has three residences, her domicile is in North Arlington; yet the ALJ failed to mention that she owns property in North Arlington, and avoided using the term "domicile" in his Initial Decision. The ALJ instead considered evidence of petitioner using her Kearny residence, but petitioner maintains that she has the right to use that property. Petitioner further emphasizes that the ALJ failed to consider case law involving the domicile of individuals who own multiple residences.

Petitioner also argues that the ALJ's assessment of tuition was incorrect. For example, petitioner contends that D.Y. only attended sixth grade for ten days, rather than the 127 days found by the ALJ. Petitioner contends that the information relied upon by the ALJ in the Marano Certification, Exhibit 4, is unclear as to how many days D.Y. attended school. Finally, petitioner challenges the ALJ's denial of her motion to suppress the Board's evidence, and argues that the ALJ has a conflict of interest.

In its exceptions, the Board argues that the ALJ correctly found that petitioner is not a resident of North Arlington and, as such, is liable for tuition for the period of her children's ineligible attendance. However, the Board contends that the ALJ failed to factor into consideration the payments that the Board has made to the Bergen County Technical School for W.Y.'s attendance for the months since the Board submitted its motion. Specifically, the Board contends that it is entitled to reimbursement for the additional payments made on February 28 and March 27, 2017.

In reply to the Board's exceptions, petitioner argues that the Board's calculation of tuition is false.

Upon review, the Commissioner agrees with petitioner that there are genuine issues of material fact herein, and summary decision should not be granted in this circumstance. A motion for summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue of material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b). In evaluating such a motion, the ALJ must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 540 (1995).

The ALJ found that there was no material fact in dispute. "Petitioner did not submit anything to refute the factual assertions, or the documentary evidence" in the certifications submitted by the Board. (Initial Decision, at 10) The ALJ noted that "[p]ointedly, there is no rebuttal at all to the observations of the North Arlington Police Department, Mr. Gilmore, Mr. O'Connor, or to the Kearny Police Department incident reports, all of which amply demonstrate that Petitioner is a resident of Kearny, New Jersey." (Initial Decision, at 10-11)

The Commissioner notes that in opposition to the Board's motion for summary decision, petitioner submitted the following evidence to support her position that her domicile is in North Arlington: (1) the deed to her North Arlington property; (2) property tax bills; (3) a certificate of occupancy; (4) electric/gas bills and Verizon bills; (5) voter registration; (6) grand

juror summons with payment stubs for grand jury service; (7) home health aide certification; (8) photos of her North Arlington property; (9) correspondence regarding Verizon Fios service; (10) W-2; and (11) bank statements. Petitioner subsequently submitted an affidavit, certifying that – among other things – "Petitioner has three residences in the state of New Jersey and is domiciled in North Arlington, New Jersey." (Petitioner's affidavit, dated January 17, 2017, at ¶5)

Considering the standard for summary decision, petitioner's certified statement that she is domiciled in North Arlington – in addition to the documentary evidence that petitioner submitted – creates a genuine issue of material fact as to petitioner's domicile. Although the Board submitted certifications and evidence in support of its position that petitioner is domiciled in Kearny, the ALJ was required to consider the evidence in the light most favorable to petitioner, as the non-moving party. When viewing the evidence in that manner, there is a genuine issue of material fact that prevents this matter from being decided by way of summary decision. Instead, at a hearing on the merits, the ALJ will be able to make credibility determinations as to the witnesses and weigh all of the evidence presented before deciding the matter.

Accordingly, the Initial Decision of the OAL is rejected – for the reasons expressed herein – and the matter is remanded to the OAL for further proceedings.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/17/17

Date of Mailing: 4/17/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 09260-16
AGENCY REF. NO. 149-5/16

Y.Y. ON BEHALF OF MINOR CHILDREN,
W.Y. AND D.Y.,
Petitioners,
vs.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,
Respondent,
and
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF BERGEN COUNTY,
Intervenor.

Y.Y., Petitioner, pro se

Jennifer M. Herrmann, Esq., for Respondent (Methfessel & Werbel, attorneys)

William C. Soukas, Esq., for Intervenor (Nowell, P.A., attorneys)

Timothy D. Cedrone, Esq., for movant Town of Kearny (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: January 23, 2017 Decided: February 28, 2017

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the residency decision of Respondent. The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on June 22, 2016 as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A prehearing conference was held on July 12, 2016, and a prehearing Order was entered by the undersigned on July 13, 2016.

An amended prehearing Order was entered by the undersigned on August 19, 2016.

The Board of Education of the Vocational Schools in Bergen County filed a motion to intervene on August 1, 2016. Respondent filed its response to said motion on August 3, 2016, wherein it indicated it had no objection to said motion being granted. Petitioner did not file a response to said motion. An Order granting the motion was entered by the undersigned on August 17, 2016.

Respondent filed a motion for leave to amend its Answer, and include a Counterclaim, on August 22, 2016. Petitioner filed a letter in opposition to said motion on August 22, 2016. An Order granting the motion was entered by the undersigned on August 23, 2016. Respondent filed an Amended Answer and Counterclaim seeking tuition reimbursement, dated August 23, 2016.

Respondent filed a motion for Summary Decision dated November 1, 2016. Petitioner was granted an extension of time to respond to said motion, with the consent

of Respondent, until December 1, 2016. Interpleader filed a brief in support of its interests on December 2, 2016.

The Town of Kearny filed a motion to Quash a Subpoena issued by Petitioner. Said Motion was filed on November 16, 2016. Respondent, Petitioner, and Interpleader filed no response thereto.

Respondent filed a motion to Quash a Subpoena issued by Petitioner. Said motion was filed on November 28, 2016. Respondent requested a telephone conference as well. A telephone conference was held on November 29, 2016, wherein the undersigned advised the parties that discovery was closed and that no further discovery requests shall be made. Petitioner was also given until January 2, 2017, to file their opposition to Respondent's motion for summary decision.

Petitioners filed their response to Respondent's motion to Quash a Subpoena on December 12, 2016.

By Order dated December 28, 2016, the motions to quash subpoenas filed by the Town of Kearny and Respondent were granted; and, Petitioner's request for discovery was also granted.

Petitioner filed a brief in opposition to Respondent's motion for summary decision on January 3, 2017. Respondent filed its reply thereto on January 17, 2017. Petitioner filed a certificate of mailing and an affidavit on January 23, 2017.

Petitioner filed a motion to suppress evidence on January 9, 2017.

FACTUAL DISCUSSION

Respondent, in support of its motion for summary decision, filed the following:

1. Certification of Dr. Oliver W. Stringham, Superintendent of the North Arlington Public Schools (District), wherein Dr. Stringham asserts he sent a letter, dated November 2, 2015, to Petitioner at xxx Park Place, Kearny, New Jersey, and xx Union Place, North Arlington, New Jersey. (Exhibit 1.) In said letter Dr. Stringham advised Petitioner that her children, D.Y. and W.Y., could continue their enrollment in the District until the Board of Education (Board) could review evidence and make a determination as to residency. (Exhibit 1, p. 1.) Petitioner was invited to a closed hearing before the Board on November 16, 2015. (Exhibit 1, pp. 2-3.)

2. Certification of Kathleen Marano, Business Administrator for the District, wherein Ms. Marano outlined the District's concern over Petitioner's residency. Part of her duties includes attending all Board meetings and record minutes of the meetings. Petitioner was requested to provide proof of residency by North Arlington Middle School Principal Nicole Russo, at the instruction of Dr. Stringham. The Board reviewed documents provided by Petitioner, including a utility bill for the North Arlington house in the amount of $54, which the Board believed to be too low. (Exhibit 1.) The Board also reviewed a police report prepared by North Arlington Police Department Detective Anthony Scala. (Exhibit 2.) Detective Scala, on September 16 and 17, 2015, observed a vehicle registered to Petitioner parked in the same spot for two consecutive days in front of the North Arlington house. On September 17, 2015, at 6:30 a.m. Detective Scala observed Petitioner and a teenage male leave 105 Park Place in Kearny, New Jersey, and enter a vehicle registered to Petitioner and travel to an unknown location. (Exhibit 2.) Approximately an hour later he observed D.Y. exit the Kearny residence and enter a Toyota Sienna with an elderly man, who dropped D.Y. off at school in North Arlington. Detective Scala informed Petitioner of his observations and Petitioner admitted that she drove W.Y. to school from the Kearny residence. Ms. Marano also states the Board was advised of surveillance video taken in February and April 2016 showing Petitioner and her sons engaging in activities of daily living at the Kearny residence, including departing for school in North Arlington. The Board also reviewed screen shots of the video. (Exhibit 3.) At the residency hearing on

December 14, 2015, the Board requested that Petitioner allow a Board member, the Board attorney, with Petitioner and her attorney, to visit her residence in North Arlington. Petitioner refused and requested another hearing date. The new date was May 2, 2016. After fifteen minutes, Petitioner left the meeting as the Board was not immediately available to her. This determined that Petitioner and her sons did not reside in North Arlington. D.Y. and W.Y. were dis-enrolled on May 4, 2016. W.Y. continues to attend Bergen County Technical Schools at the District's expense. Mr. Marano then outlined tuition costs for both W.Y. and D.Y. (Exhibits 5, 6, and 7.)

3. Certification of Matthew Gilmore, who resided at xxx Park Place, Kearny, New Jersey, the house adjacent to Petitioner's Kearny residence. Mr. Gilmore no longer resides at this address, but his mother continues to reside there. Mr. Gilmore reviews the surveillance video obtained from the Park Place address. The video shows Petitioner, her husband, and two sons engaging in activities of daily living at Petitioner's Kearny residence. The undersigned viewed the video in its entirety. Additionally, Mr. Gilmore sets forth his personal observations of Petitioner during the time he resided at xxx Park Place, where he consistently saw Petitioner and her two sons leave their Kearny residence early in the morning at various times during the year.

Respondent, in opposition to the motion for summary decision, filed the following:

1. Affidavit of Petitioner wherein Petitioner merely states there are genuine issues in dispute which warrant an evidentiary hearing.

FINDINGS OF FACT

1. The North Arlington Board of Education is a School District in the County of Bergen.

2. The Township of Kearny is in Hudson County.

3. D.Y. attended fourth grade in the District for eighty-four days for the 2013/2014 school year. (Marano Certification, ¶22, Exhibit 4, NASD 0291-292.)

4. In the 2013/2014 school year the pupil tuition rate for grades one through five was $11,307. (Marano Certification, Exhibit 4, NASD 0293.)

5. D.Y. attended fifth grade in the District for 168 days for the 2014/2015 school year. (Marano Certification, Exhibit 4, NASD 0289-290.)

6. In the 2014/2015 school year the pupil tuition rate for grades one through five was $10,844. (Marano Certification, Exhibit 5, NASD 0294.)

7. D.Y. attended sixth grade in the District for 127 days for the 2015/2016 school year. (Marano Certification, Exhibit 4, NASD 0287-288.)

8. In the 2015/2016 school year the pupil tuition rate for grades six through eight was $12,290. (Marano Certification, Exhibit 5, NASD 0295.)

9. In the 2014/2015 school year the District paid Bergen County Technical Schools (Bergen Tech) $8,568 on behalf of W.Y. (Marano Certification, Exhibit 5, NASD 00235-245.)

10. In the 2015/2016 school year the District paid Bergen Tech $7,081 on behalf of W.Y. Marano Certification, Exhibit 6, NASD 00246-249.)

11. As of October 28, 2016, In the 2016/2017 the District has paid Bergen Tech $940 on behalf of W.Y. (Marano Certification, Exhibit 7, NASD 00296-29.7)

12. The District has received an invoice from Bergen Tech for W.Y. in the amount of $841. (Marano Certification, Exhibit 7, NASD 0297.)

13. W.Y. attends the Bergen Tech presently. He has attended Bergen Tech for the 2014/2015, 2015/2016 and 2016/2017 school years. (Marano Certification, Exhibit 4, NASD 0235-245, 0246-249, 0296-297.)

14. North Arlington Police Department surveillance of Petitioner's residences in North Arlington and Kearny on September 16 and 17, 2015, shows Petitioner and her two sons residing at the Kearny residence. Petitioner admitted to North Arlington Police that she did drive W.Y. to school. (Marano Certification, Exhibit 2.)

15. Kearny Police Department incident reports dated May 7, 2014, May 23, 2014, September 15, 2014, June 18, 2015, and July 26, 2016, show Petitioner and her two sons residing at the Kearny residence over an extended period of time. (Herrmann Certification, Exhibits B, C, D, E, and H.)

16. The report of private investigator James O'Conner, retained by the District shows Petitioner driving her son to Bergen Tech from the Kearny residence on October 13, 2016, at approximately 7:03 a.m.

17. Matthew Gilmore's Certification establishes that Petitioner and her two sons resided at their Kearny residence at least since 2014 through the present via both his personal observations and the video obtained from his mother's surveillance camera.

18. A review of the video surveillance clearly shows Petitioner, her husband, and her two sons residing at the Kearny residence at the times the video was made: February 25, 2016; April 4, 2016; April 5, 2016; April 18, 2016; July 13, 2016; July 14, 2016; July 15, 2016; July 18, 2016; September 8, 2016; and, September 17, 2016. (Gilmore Certification, Exhibits 1, 2, 3, 3a, 3b, 4, 4a, 4b, 4c, 4d, 5, 5a, 5b, 5c, 5d, 5e, 6, 6a, 6b, 6c, 7, 7a, 7b, 7c, 7d, 8, 8a, 8b, 8c, 8d, 8e, 9, 9a, 9b, 9c, 9d, 9e, 10, 10a, and 10b.)

19. The District informed Petitioner via letter from Dr. Stringham that the District does not believe she resides in North Arlington and afforded her the opportunity to appear before the Board. Said letter also informed Petitioner of her right to appeal to the Commissioner of the Department of Education, and that D.Y. and W.Y. could remain in the District pending the outcome of the appeal. (Stringham Certification, Exhibit 1.)

20. The District, also via letter from Dr. Stringham, informed Petitioner that she may be assessed the costs of tuition for D.Y. and W.Y. should she not prevail on the residency appeal. (Stringham Certification, Exhibit 1.)

21. A residency hearing was held on December 14, 2015, at which time a Board requested of Petitioner that a Board member, the Board attorney, Petitioner and Petitioner's attorney visit the North Arlington residence. Petitioner refused. Petitioner requested another hearing date. (Marano Certification, ¶13, ¶14, and ¶15.)

22. A residency hearing was held before the Board on May 2, 2016, wherein the Board determined that Petitioner did not reside in North Arlington. (Marano Certification, ¶15, ¶19.)

23. Petitioner left before the residency hearing commenced, approximately fifteen minutes after arriving. (Marano Certification ¶16 and ¶17.)

24. D.Y. and W.Y. were dis-enrolled on May 4, 2016. (Marano Certification, ¶20.)

25. Petitioner had previously filed a Residency Appeal on October 6, 2015. (Herrmann Certification, Exhibit A.)

26. Petitioner resides in Kearny, New Jersey, Hudson County, and has since at least the 2014/2015 school year to the present.

27. During the 2014/2015 school year there were twenty-three days of compensable ineligible attendance (May 23, 2015, through June 24, 2015) for a total of $1,385.52 for D.Y. and $1,094.80 for W.Y. (Marano 2nd Supp. Cert. ¶3.)

28. During the 2015/2016 school year there were 129 days of compensable ineligible attendance (September 2015 through May 2, 2016) for a total of $8,808.12. (Marano Certification, Exhibit 4.)

29. During the 2015/2016 school year Respondent paid Bergen County Technical Schools $7,081.00 on behalf of W.Y. (Marano Certification, Exhibit 6.)

30. During the 2016-2017 school year Respondent paid Bergen County Technical Schools $3,514.00 to date on behalf of W.Y. (Marano 2nd Supp. Cert., Exhibit 8.)

LEGAL ANALYSIS AND CONCLUSION

Petitioner's Motion to Suppress

Initially, I will address the Petitioner's motion to suppress evidence. The concept of suppressing evidence, called the exclusionary rule, is found in criminal proceedings, and is used where law enforcement runs afoul of the Fourth Amendment to the United States Constitution. See Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961); Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

The Fourth Amendment of the U.S. Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The exclusionary rule is rare in administrative proceedings. See New Brunswick v. Speights, 157 N.J. Super. 9 (App. Div. 1978). I cannot find anything that would invoke the exclusionary rule in the instant matter. The evidence complained of consists mostly of video surveillance obtained from Petitioner's neighbor in Kearny, New Jersey, and a North Arlington Police Department report. Both were obtained without need for a warrant. The other evidence Petitioner seeks to suppress, outlined in the brief in support of the motion, and also did not violate any rights of Petitioner.

Petitioner raises four additional points in the motion to suppress, all of which are without basis and do not merit discussion herein.

It must be noted herein that this matter is an administrative proceeding where the rules of evidence are relaxed. In an administrative hearing all relevant evidence is admissible. See Delguidice v. New Jersey Racing Comm'n, 100 N.J. 79 (1985).

I **CONCLUDE** that Petitioner's motion to suppress evidence should be denied.

Standard for Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

In the instant matter there is no material fact in dispute. Petitioner did not submit anything to refute the factual assertions, or the documentary evidence in Certifications of Kathleen Marano, Dr. Oliver Stringham, Matthew Gilmore, and Jennifer Herrmann, Esq. Pointedly, there is no rebuttal at all to the observations of the North Arlington Police Department, Mr. Gilmore, Mr. O'Connor, or to the Kearny Police Department

incident reports, all of which amply demonstrate that Petitioner is a resident of Kearny, New Jersey.

Further, Petitioner does not dispute what is clearly shown on the video evidence obtained from home surveillance camera of her neighbor in Kearny. Rather, Petitioner sought to have the same excluded.

I **CONCLUDE** that there is no dispute as to a material fact and that Respondent's motion for summary decision should be granted.

Right to a Free Public Education

N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a) sets forth the right of a student to a free public education, which in pertinent parts states:

> Public schools shall be free to the following persons over five and under twenty years of age:
>
> a. Any person who is domiciled within the school district[.]

Consideration in proving residency for purposes of establishing eligibility for school district placement is found at N.J.A.C. 6A:22-3.4(a),

> (a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:
>
> 1. Property tax bills, deeds, contracts of sale, leases, mortgages, signed letters from landlords and other evidence of property ownership, tenancy or residency;
>
> 2. Voter registrations, licenses, permits, financial account information, utility bills, delivery receipts, and other evidence of personal attachment to a particular location;
>
> 3. Court orders; State agency agreements; and other evidence of court or agency placements or directives;

> 4. Receipts; bills; cancelled checks; insurance claims or payments; and other evidence of expenditures demonstrating personal attachment to a particular location or to support the student;
>
> . . .
>
> 6. Affidavits, certifications and sworn attestations pertaining to statutory criteria for school attendance, from the parent, guardian, person keeping an "affidavit student," adult student, person(s) with whom a family is living, or others as appropriate;
>
> . . .
>
> 8. Any other business record or document issued by a governmental entity.
>
> (b) A district board of education may accept forms of documentation not listed in (a) above, and shall not exclude from consideration any documentation or information presented by a person seeking to enroll a student.
>
> (c) A district board of education shall consider the totality of information and documentation offered by an applicant, and shall not deny enrollment based on failure to provide a particular form of documentation, or a particular subset of documents, without regard to other evidence presented.

In S.S. ex rel. A.S. and A.S. v. Board of Education of the Township of Marlboro, Monmouth County, EDU 192-12, Initial Decision (August 26, 2013), http://njlaw.rutgers.edu/collections/oal, evidence submitted by an investigator hired by the Marlboro New Jersey School District to determine whether certain minor children who were enrolled in the school district in fact were domiciled therein within the meaning of N.J.A.C. 6A:22-3.1(a) was sufficient to establish that the children in fact were not domiciled in the district during the period in question and, instead, supported a conclusion that the minors resided at their grandmother's home in Edison New Jersey. Even though their mother had submitted documentation of the type described in N.J.A.C. 6A:22-3.4(a) that supported her claim that the minors were domiciled in Marlboro, the circumstances of the mother's employment, which included late hours, was such that the minors were properly found to be residing with their grandmother. On that basis, the administrative law judge recommended that the Department of Education find the mother liable for tuition for the minors.

In the instant matter the District provided substantially more than the report of an investigator hired by the District. Submitted were a North Arlington Police Department report wherein the police observed Petitioner at the Kearny residence; several Kearny Police Department incident reports involving Petitioner and a neighbor at the Kearny residence; and, video surveillance showing Petitioner, her husband, and her two sons coming and going from the Kearny residence and performing activities of daily living. The inescapable conclusion is that Petitioner resides in Kearny.

If a school district discovers that a non-resident child is attending one of its schools, the district may act to remove the child. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.3. If so, the chief school administrator must first issue a notice of ineligibility. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.2, -4.3. The notice shall inform the parent of the right to a hearing before the school district and the right to appeal the school district's decision to the Commissioner of Education. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-5.1. The notice shall also inform the parent whether the district's policy allows for continued attendance, with or without tuition, for students who move out of the district during the course of the school year. N.J.A.C. 6A:22-4.2(b)(7)(i). If, on appeal to the Commissioner, the parent fails to demonstrate his child's entitlement to attend the schools of the district, the parent may be liable for tuition for any period of ineligible attendance. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.2; N.J.A.C.6A:22-6.2, -6.3. Petitioner received adequate notice via a letter from the District Superintendent, Dr. Stringham. Petitioner's claim of a denial of due process must fail.

According to N.J.A.C. 6A:22-6.3(a), "[t]uition assessed pursuant to the provisions of this section shall be calculated on a per student basis for the period of a student's ineligible enrollment, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23-3.1."

Petitioner alleges that the District acted in an arbitrary, capricious and unreasonable manner in her appeal to the Commissioner of Education.

An action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Thus, in order to prevail, Petitioner "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. and E.H. ex rel. K.H. v. Bd. of Educ. of the Bor. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014) (citation omitted), <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (April 10, 2014). Also, a board's decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, Comm'r (April 25, 2013), <http://njlaw.rutgers.edu/collections/oal/>.

Petitioner asserts nothing in the brief addressing these issues. Moreover, I cannot ascertain anything remotely arbitrary, unreasonable or capricious in the record regarding District's actions in this matter.

I **CONCLUDE** that Petitioner failed to demonstrate that D.Y. and W.Y. are entitled to attend the District's schools, that Petitioner is liable for tuition for the period of ineligible attendance and that Petitioner's appeal should be dismissed.

ORDER

Based upon the forgoing, it is **ORDERED** that Respondent's motion for summary decision is **GRANTED**; and,

It is further **ORDERED** that Petitioner's motion to suppress evidence is **DENIED**; and,

It is further **ORDERED** that Petitioner's appeal is **DISMISSED** with prejudice; and,

It is further **ORDERED** that Petitioner reimburse Respondent tuition as follows:

- 2014-2015 school year, $1,385.52 for D.Y. and $1,094.80 for W.Y. for a total of $2,480.32.
- 2015-2016 school year, $8,808.12 for D.Y. and $7,081.00 for W.Y. for a total of $15,889.12.
- 2016-2017 school year, $3,514.50 for W.Y.

Total tuition to be reimbursed by Petitioner to Respondent totals $21,883.94.

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

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

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

Feb. 28, 2017
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: February 28, 2017

Date Mailed to Parties: MAR 1 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

APPENDIX

List of Moving Papers

For Petitioner:

Brief in opposition to Motion for Summary Decision dated January 2, 2017, with Exhibits 1 through 21

Affidavit of Petitioner dated January 23, 2017

Motion to suppress evidence dated January 9, 2017, with Exhibits 1 through 8

For Respondent:

Motion for Summary Decision dated November 1, 2016

Brief in support of Summary Decision motion dated November 1, 2016, with Exhibits A through Q

Certification of Jennifer M. Herrmann, Esq., dated November 1, 2016

Certification of Matthew Gilmore dated August 2016 with Exhibits 1 through 10c[1]

Certification of Dr. Oliver W. Stringham dated November 4, 2014, with Exhibit 1

Certification of Kathleen Marano dated October 28, 2016 with Exhibits 1 through 7

Respondent's reply brief to Petitioner's brief, dated January 10, 2017, with Exhibit R

Second Supplemental Certification of Kathleen Marano dated February 8, 2017, Exhibit 8

For Intervenor:

Letter brief dated December 1, 2016

Certification of Howard Lerner, Ed.D., with Exhibits a through E

[1] Exhibits for Mr. Gilmore's certification are found on the computer flash drive containing video or Petitioner's Kearny property.

IC 5-17

THE BANYAN SCHOOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FINANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – the Banyan School (Banyan), a private school for children with disabilities – appealed the determination of the respondent Office of School Finance (OSF) to classify certain employee payments in the 2012-2013 school year as "non-allowable bonuses". Banyan additionally sought to alter its tentative tuition rates to address the budgetary shortfall created by these disallowed 2012-2013 payments. Banyan filed its appeal with the Department of Education on April 23, 2015. The Department contended that the appeal must be dismissed for failure to file within the 90-day timeframe required by *N.J.A.C.* 6A:3-1.3(i). The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue in this matter, and the case is ripe for summary decision; OSF issued its final decision regarding the disallowance at issue here in a letter to petitioner dated June 30, 2014; petitioner's contention that this letter invited Banyan to pursue further discussions on the matter – and that no other communication was received prior to a March 18, 2015 letter that could be construed as notice of a final determination or Banyan's right to appeal – is without merit; no compelling circumstances exist in this case to relax the 90-day rule; additionally, petitioner failed to state a claim upon which relief may be granted. Accordingly, the ALJ concluded that the petition must be dismissed with prejudice.

Upon review, the Commissioner concurred with the ALJ that the petition is appropriately dismissed for failure to adhere to the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). In so deciding, the Commissioner found that the petitioner was required to file its appeal no later than 90 days from the date of receipt of respondent's final determination, which in this case was communicated to Banyan in a letter from OSF dated June 30, 2014. Banyan did not file its petition until April 23, 2015. Accordingly, the appeal was dismissed.

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

April 18, 2017

OAL DKT. NO. EDU 08696-15
AGENCY DKT. NO. 89-4/15

THE BANYAN SCHOOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FINANCE,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, along with petitioner The Banyan School's (Banyan) exceptions – filed pursuant to *N.J.A.C.* 1:1-18.4 – and respondent New Jersey State Department of Education, Office of School Finance's (OSF) reply thereto.

In its exceptions, Banyan argues that the Administrative Law Judge (ALJ) erred in failing to address the merits of its claims – i.e., the correctness of respondent's determination regarding allowable costs. Banyan reasons that the ALJ's failure to address the merits of Banyan's case is reversible error because the employee's payments were improperly treated as bonuses when they were instead made pursuant to the employee's contracts. Further, Banyan contends that that the 90-day limitations period should be relaxed in accordance with *N.J.A.C.* 6A:3-1.16, because strict adherence would result in injustice as OSF failed to respond to Banyan's inquiries. Banyan argues that the ALJ's reliance on *Polaha v. Buena Regional School District*, 212 *N.J. Super.* 628 (App. Div. 1986) – for the proposition that when parties are engaged in ongoing conversations, the limitations period may be tolled – was misguided, as the case law does not specify the number of contacts parties must have, but rather the nature of the communications. Here, Banyan maintains

that it reasonably expected OSF to respond to its communications and understood that the parties were engaged in ongoing discussions, which should have warranted the relaxation of the 90-day limitations period.

In reply, OSF argues that the ALJ correctly found that OSF's June 30, 2014 letter was a "clear-cut refusal" to revise its determination, and therefore Banyan's petition was time-barred. (Initial Decision at 7) OSF contends that the ALJ properly found that the circumstances did not warrant a relaxation of the limitations period as Banyan and OSF were not engaged in ongoing discussions. OSF disputes Banyan's argument that it understood the parties to be engaged in ongoing discussions, pointing out that Banyan made no attempt to discuss the matter with OSF for seven months, nor did OSF's June 30, 2014 letter invite any further discussion on the matter. Additionally, OSF argues that the ALJ correctly did not address the legal merits of Banyan's claims because the matter was filed out of time and failed to state a claim. OSF also maintains that the ALJ correctly refused to relax the limitations period because Banyan does not have a right to appeal the 2014-2015 tuition rate, as the regulations only permit such an appeal where the tentative tuition rate would cause undue financial hardship on the school. Accordingly, OSF argues that the Initial Decision should be adopted.

Upon review, the Commissioner concurs with the ALJ that the instant petition is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). The Commissioner agrees with the ALJ that OSF's June 30, 2014 letter was a definitive refusal to revise its published 2014-2015 tentative tuition rate. The Commissioner is also in accord with the ALJ that there is no compelling reason to relax the 90-day limitations period. As such, according to *N.J.A.C.* 6A:23A-18.10 and *N.J.A.C.* 6A:3-1.3(i), Banyan had 90 days from June 30, 2014 to file a petition of appeal and failed to do so until April 23, 2015.

Accordingly, the Initial Decision – to the extent that it dismisses the petition as untimely – is adopted as the final decision in this matter, for the reasons stated therein. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/18/17

Date of Mailing: 4/18/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 08696-15
AGENCY DKT. NO. 89-4/15

THE BANYAN SCHOOL,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FINANCE,
Respondent.

Vito A. Gagliardi, Jr., Esq., and **Janelle Edwards-Stewart**, Esq., for petitioner (Porzio, Bromberg, and Newman)

Caroline Jones, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: July 19, 2016 Decided: January 18, 2017

BEFORE **ELIA A. PELIOS** ALJ:

STATEMENT OF THE CASE

Petitioner, The Banyan School (Banyan), a private school for children with disabilities, appeals a determination by respondent the Office of School Finance (OSF) within the Department of Education, to classify payments made to one employee in the 2012-2013

school year as a non-allowable bonus. Additionally, if the Department's determination is not affirmed, Banyan seeks to alter its tentative tuition rates to address the budgetary shortfall then created.

The Department contends that petitioner failed to file the appeal within the ninety-day timeframe required by N.J.A.C. 6A:3-1.3(i), and that as there is no mechanism for granting the relief that petitioner seeks, the appeal also should be dismissed for failure to state a claim upon which relief can be granted.

PROCEDURAL HISTORY

Petitioner's appeal was received at the Department of Education on April 23, 2015. The Department determined to treat the matter as a contested case, and was transmitted to the Office of Administrative Law (OAL), where it was filed on June 15, 2015. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The matter was assigned to Administrative Law Judge John F. Russo, Jr. The parties filed cross-motions for summary decision, which had not been addressed at the time that ALJ Russo left the OAL for the Superior Court in late December 2015. On January 4, 2016, the matter was transferred to the undersigned. Oral argument, which was adjourned from April 21, 2016, at the parties' request, occurred on July 18, 2016. The record then closed.

FACTUAL DISCUSSION

The parties disagree on which of the communications from the OSF counts as a final ruling. They also differ on the correctness of the OSF determination regarding allowable costs, and the related question of tuition treatment of those costs.

With regard to the "final ruling," the parties agree on the following facts. In general, as an approved private school for students with disabilities, petitioner charges tuition fees to public school districts that send students with learning disabilities to Banyan's lower school (for children in kindergarten through eighth grade) and its high school. The regulatory scheme set forth in N.J.A.C. 6A:23A-18.2 provides for recovery of actual costs incurred by approved schools during the school year. The regulations provide a projected cost, known as

a "tentative tuition rate," because an approved school cannot know its actual costs before the year begins. Thus, for each school year, the OSF sets the maximum tentative tuition rate for each approved school. These rates typically are established in January of the preceding school year, based upon the audited financial statements of the prior year. For example, the school year 2013-2014 rate would be established in January 2013, based on the audit of school year 2011-2012. The tentative rate is calculated by inflating the prior year's audit information by twice the spending-growth limitation of 2.5 percent. However, if the OSF is challenging any portion of the prior year's audit, the rate for that particular school is not released in January. Instead, the OSF issues a letter to the school, outlining its issues and requesting revisions. On receiving the revisions, the OSF provides a certified rate letter.

By letter dated April 30, 2014, the OSF issued a letter to petitioner stating that payment made to one employee during the 2012-2013 school year constituted a non-allowable bonus. Banyan was directed to file a revised audit report within thirty-five days, or have the OSF place it on conditional approval and preclude it from accepting new students. By letters dated May 8, 2014, and May 27, 2014, petitioner's accountant, Ronald Zuckerman, responded with a justification of the costs, asking the OSF to reverse its determination and to adjust the tentative 2014-2015 tuition rates accordingly. In a letter dated June 30, 2014, the OSF stated:

> As of April 30, 2014, the Department of Education published the 2014-2015 maximum tentative tuition rate for Banyan's Lower School ("Lower School").

It went on to note:

> . . . The information presented by Mr. Zuckerman does not change the determination of those non-allowable costs. . . . Absent compelling information, the Office of School Finance does not 'revise' its published 2014-2015 tentative tuition rate.
>
> Additionally, as you are aware a tentative rate is an interim rate, and may increase upon year end calculation of the certified actual cost per student. If the tentative tuition rate is less than the final tuition rate charged, the Lower School's management may charge each sending district board of education all or part

> of the difference; thereby allowing the recovery of the difference between the tentative and final tuition rates charged.
>
> [Gagliardi Certif., Exh. B.]

The letter says nothing about a right of appeal.

Later, in response to a letter of March 11, 2015, from Vito A. Gargliardi, Jr., Esq., counsel to the petitioner, the OSF stated that it received his letter:

> . . . regarding the 2014-2015 tentative tuition rate for Banyan School (Lower) and seeking information on a formal appeal. In response to your May 27, 2014, inquiry on this matter, I issued a letter on June 30, 2014, on behalf of former Assistant Commissioner Corso, which detailed the Office of School Finance's position. The provisions regarding a formal appeal of this decision are contained in applicable code and specifically, N.J.A.C. 6A:23A-18.10.
>
> [Id., Exh. C.]

As regards the substance of Banyan's appeal—whether the employee payments constituted unreimbursable bonuses—the respondent has not offered any information to rebut the certification of Ronald Zuckerman, the Board's accountant, regarding the circumstances surrounding the payments. (Zuckerman Certif., Exh. C.) Therefore, all of the following constitutes undisputed **FACT**.

The employee whose compensation was challenged by the OSF was given notice that her employment would be terminated at the close of the 2012-2013 school year. In response, the employee indicated to school personnel that she would begin to exhaust all her available leave time, which amounted to nine personal days and forty-three vacation days, which together had a value of $22,389.12. (Id., ¶¶ 11, 12, and 14.) Had she done so, Banyan would have been forced to hire a substitute administrator for the remainder of the year. As recorded in the minutes of the Banyan Board of Trustees, the employee was paid for her leave "as a concession for . . . remaining at the school through June 30, 2013." (Zuckerman Certif., Exh. A.) Her contract stated that either party could terminate without cause, upon sixty days' written notice of intention to terminate. The Banyan minutes also noted that if termination is not for cause, the employee "shall be entitled to either the notice

required hereunder or the applicable pro rata compensation and benefits for the notice period at Banyan's option." (Id., Exh. C.) Banyan's employee handbook stated that staff members could bank up to fifteen days of personal leave, and depending on their status, would receive between eight and twelve days of personal leave annually. It allowed the banking of "unlimited vacation time," but also stated that "vacation time will only be reimbursed upon retirement or for medical reasons." (Zuckerman Certif., Exh. B.)

In its initial letter of April 30, 2014, the OSF noted that the employee received the $22,389.12, in addition to her regular salary, and that the handbook stated that vacation time was reimbursed upon retirement or for medical reasons. Since neither of the conditions for vacation reimbursement was met, the OSF took the position that payment of those funds constituted a bonus. (Console Certif., Exh. A.)

Additionally, the OSF said the per-diem payment amount was in error—it was $430.56, when it should have been $360.92. Thus, "the amount of $19,140.81 has been considered non-allowable costs when calculating the 2014-2015 tentative tuition rate." (Id., Exh. B.) In his letter of May 8, 2014, to the OSF, Zuckerman took issue with the per-diem payment, noting that the Essex County per diem, which was appropriate to use, was $612.27, well above the $430.56 the school had used. (Zuckerman Certif., Exh. AA). The OSF appears never to have addressed this particular argument.

According to Zuckerman, although the OSF letter made no mention of a second faculty member, who was paid $16,393.50, in the 2012-2013 year, and $21,858.00, in the 2013-2014 year, in connection with a retirement related to medical reasons, "it appears that its mislabeling of her payout has not been fully resolved, as no notice, corrected report, or monies have been properly forwarded." (Zuckerman Certif., ¶19.) Altogether, this meant that "Banyan's unrestricted funds must necessarily be reduced by $36,248.00 in order to cover the [unapproved] expenses for year ended June 30, 2013, and $22,795.00 for year ended June 30, 2014," or a total of $59,043.00. (Id., ¶21.) Additionally, "Banyan will be required to refund $19,228.00 to schools for year end June 30, 2013, and $41,775.00 for year end June 30, 2014," or a total of $61,003.00. (Id., ¶22.) With regard to Zuckerman's concerns about the second employee, the OSF appears never to have responded in writing

to this concern—it neither verified the existence of a disagreement, nor stated that it had not disapproved that payment.

LEGAL ANALYSIS

Summary decision may be granted when "the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The rule further provides that an adverse party must respond by affidavit setting forth specific facts showing that there is a genuine issue which can only be determined at an evidentiary hearing. Ibid. The OAL rule is modeled on New Jersey Court Rule 4:46-2. The New Jersey Supreme Court has explained that when deciding a motion for summary judgment under R. 4:46-2,

> . . . a determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).]

Here, the parties have agreed on all the facts, although they dispute their legal significance. Therefore, I **CONCLUDE** that the matter is appropriate for summary decision.

The OSF argues that Banyan failed to appeal timely, and therefore its petition must be dismissed. N.J.A.C. 6A:23A-18.10(a), which address appeals of decisions regarding the calculation and approval of the tentative tuition rate, and conditional approval status pursuant to N.J.A.C. 6A:23A-18.9(i), states that these determinations may be appealed in accordance with N.J.A.C. 6A:3.

N.J.A.C. 6A:3-1.3(i) states that to initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws,

> [t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

The OSF issued its decision to petitioner on or about June 30, 2014. Therefore, the OSF argues, Banyan was required to file a petition of appeal on or before September 29, 2014, to meet the time requirements.

Banyan contends that the OSF letter of June 30, 2014, "invites Banyan to pursue further discussions and specifically indicates that these discussions should be had within its forum." It further contends that no communication prior to the March 18, 2015, letter gave notice of either final determination or Banyan's right to appeal. Therefore, the operative date for final decision was March 18, 2015, and Banyan filed within the ninety-day time frame.

Additionally, Banyan argues that the Commissioner should use his authority under N.J.A.C. 6A:3-1.16 to relax or dispense with procedural rules "in any case where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice."

With regard to the adequacy of notice, in Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572 (1993), the Supreme Court held that an unofficial and informal note stating that two positions had been created and filled was sufficient to trigger the start of the ninety-day period in which Kaprow could assert his tenure rights. The Court explained that "adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Kaprow, supra, 131 N.J. at 587. Here, the June 2015 letter from the OSF said that the information presented by Mr. Zuckerman did not change its determination on non-allowable costs, and that the lower school rate was posted in April. It also said that "[a]bsent compelling information the Office of School Finance does not 'revise' its published 2014-2015 tentative tuition rate." I **CONCLUDE** that this was a clear-cut refusal, fulfilling the notice requirement.

In relation to relaxing the ninety-day rule, the case law makes clear that this occurs only under exceptional circumstances or if there is a compelling reason to do so. Id. at 590. In Polaha v. Buena Regional School District, 212 N.J. Super. 628, 635 (App. Div. 1986), the Appellate Division relaxed the ninety-day rule where evidence demonstrated that the petitioner and the respondent engaged in ongoing discussion in an attempt to "agree on an acceptable position."

Here, Banyan offered no evidence of numerous phone calls or communications between June 30, 2014, and February 2015. There is only the letter of February 2015, which mentioned the appeal information in a routine letter, answering a question from the District, that included a question on appeal rights. Thus, I **CONCLUDE** that because petitioner waited six months to make further inquiry, and nearly seven months, until April 23, 2015, to file its appeal, the petition must be dismissed as out of time.

Although dismissal for lack of timeliness is sufficient to decide the dispute, for completeness' sake, the issue with the mechanism for relief is addressed below.

The regulatory structure for determining tuition rates has two distinct pieces. The first, which is prospective, is the tentative tuition rate. The second is retrospective, occurring at the conclusion of the school year on June 30, when actual costs are known. The appeal language for tentative tuition rates in N.J.A.C. 6A:23A-18.10 states:

> (a) The decision of the Assistant Commissioner, Division of Finance regarding the calculation of the tentative tuition rate pursuant to N.J.A.C. 6A:23A-18.2(j), regarding the approval of a tentative tuition rate pursuant to N.J.A.C. 6A:23A-18.3 and regarding conditional approval status pursuant to N.J.A.C. 6A:23A-18.9(i), may be appealed in accordance with N.J.A.C. 6A:3.
>
> (b) The decision of the Assistant Commissioner, Division of Finance in regard to certification may be appealed in accordance with N.J.A.C. 6A:3.

The OSF contends that the language "calculation of the tentative tuition rate" only allows for complaints that the school faces undue financial hardship because "calculation" is limited by "pursuant to N.J.A.C. 6A:23A-18.2(j)," which states, "The Commissioner may approve a

higher tentative tuition rate for any year in which the approved private school for students with disabilities can prove to the satisfaction of the Commissioner that the maximum tentative tuition rate for the year is not adequate and would cause an undue financial hardship on the private school." The section goes on to require such claims to be made by "no later than January 31 preceding the beginning of the ensuing school year." N.J.A.C. 6A:23A-18.2(j)(1). It also states:

> 1. In the event of such hardship claim, the approved private school for students with disabilities shall submit its request for a higher tentative tuition rate for the entire school year to the Assistant Commissioner, Division of Finance no later than January 31 preceding the beginning of the ensuing school year. The approved private school for students with disabilities shall submit such request with appropriate documentation, which shall include, but may not be limited to, the following information:
>
> i. A budget reflecting projected costs, working capital fund or surcharge, estimated enrollment and the requested tuition rate based on this information;
>
> ii. A detailed explanation of the need for increases in excess of those already provided in the tentative tuition rate calculation; and
>
> iii. A financial report which is properly completed and in the format prescribed by the Commissioner for the six months of operations ending December 31 immediately preceding the school year. This report format is available at the Division of Finance, PO Box 500, Trenton, New Jersey 08625-0500.
>
> [Ibid.]

Banyan argues that even if it failed to demonstrate a hardship by January 31, that does not mean it has no remedy for the disputed amount. Petitioner points to the OSF's own explanation of the retrospective part of the process. At the close of the school year, which is June 30, approved schools have until November to provide audited financial statements that "reflect the certified actual cost(s) per students." N.J.A.C. 6A:23A-18.9(c).

> Once the year-end audit is complete, [the] OSF reviews the financial statements provided by the [approved schools] to

> ensure compliance with applicable regulations. If the [school's] financial statements are compliant [the] OSF issues . . . 'a Certified Rate Letter' identifying the CACPS [certified actual cost per student] rate for the prior year. N.J.A.C. 6A:23-18.2(k). The [school] can either bill the sending school districts for the difference between the CACPS rate and the tentative rate, or if the CACPS is lower than the tentative rate already paid, the [school] issues refunds to the sending districts. N.J.A.C. 6A:23A-18.2(a); N.J.A.C. 6A:23A-18.2(m).
>
> [Resp. Br. at 2-4.]

This language, however, refers to N.J.A.C. 6A:23A-18.10(b), which is an appeal of the certified rate letter, which is not the subject of this particular appeal. Therefore, I **CONCLUDE** that the petition must be dismissed for failure to state a claim upon which relief may be granted, as there is no appeal of tentative rates outside of the hardship provision, the school's two May submissions do not use the word "hardship," and the submissions do not include all of the information necessary to make a hardship claim. Moreover, a hardship application was due no later than January 31, 2016, and must have included a financial report for the six months of operations ending December 31, immediately preceding the school year.

ORDER

For both of the reasons cited above—failure to comply with the ninety-day rule for appeals, and failure to state a claim upon which relief may be granted—the petition is hereby **DISMISSED WITH PREJUDICE**.

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

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

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

January 18, 2017
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: January 20, 2017

Date Mailed to Parties: January 20, 2017

nd

CLINTON BARLOW, III,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF TRENTON	:	
RESPONDENT.	:	

SYNOPSIS

Pro se petitioner filed a petition with the Commissioner in November 2014, seeking permission to enter Trenton Central High School to collect recyclable junk trash prior to the demolition of the school. The matter was transmitted to the OAL, where it was filed in January 2015.

The ALJ to whom the case was reassigned on January 23, 2017 placed a telephone call to the petitioner, and received the information that the school had already been demolished and there was no recyclable junk trash to collect. The ALJ sent a letter to the petitioner on January 23, 2017, outlining the history of the matter, attaching a withdrawal form for petitioner to sign and return. The ALJ's letter made clear that if petitioner did not respond by March 1, 2017, the matter would be dismissed as moot. As no response was received as of March 7, 2017, the ALJ ordered the matter dismissed on the grounds of mootness.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter for the reasons stated therein.

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

April 18, 2017

OAL DKT. NO. EDU 01399-15
AGENCY DKT. NO. 331-11/14

CLINTON BARLOW, III,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF TRENTON	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Administrative Law Judge's (ALJ) recommended decision for the reasons expressed therein. Accordingly, the petition is hereby dismissed as moot.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/18/17
Date of Mailing: 4/18/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01399-15
AGENCY DKT. NO. 331-11/14

CLINTON BARLOW, III,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON,
Respondent.

Clinton Barlow, III, petitioner, pro se

Adam S. Herman, Esq., for respondent Board of Education of the City of Trenton (Adams, Guitierrez & Lattiboudere, L.L.C., attorneys)

Record Closed: March 7, 2017 Decided: March 7, 2017

BEFORE **LAURA SANDERS**, Acting Director & Chief ALJ:

On November 17, 2014, petitioner Clinton Barlow, III, filed a petition with the Commissioner of Education seeking permission to enter Trenton Central High School to collect recyclable junk trash prior to the schools demolition. Respondent's answer to the verified complaint was received by the Department of Education on January 30, 2015. The Department of Education transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on January 29, 2015. N.J.S.A. 52:14B-1 to

-15; N.J.S.A. 52:14F-1 to -13. The matter was originally assigned to Administrative Judge Sarah G. Crowley, who on April 27, 2015, held a telephone prehearing conference and issued a prehearing order. It was determined on that call that Judge Crowley may recuse herself concerning a law suit brought against Mercer County by Mr. Barlow, unrelated to this matter, as Judge Crowley had worked for the Mercer County Counsel's office prior to her appointment as an ALJ. Judge Crowley did recuse herself and the matter was then re-assigned to Judge Schuster on May 4, 2015. As Judge Schuster is preparing to retire on April 1, 2017, the matter was then reassigned to the undersigned on January 23, 2017.

A telephone call made to petitioner yielded the answer that the high school had already been demolished and there was no recyclable junk trash to collect. The undersigned wrote to petitioner on January 23, 2017, outlining the history of the matter to date and asked that he sign and return the withdrawal form that was attached thereto. The letter stated that if I did not hear from him by March 1, 2017, I would dismiss the matter as moot. As of March 7, 2017, there has been no further communication from petitioner. Therefore, it is **ORDERED** that the appeal by Clinton Barlow, III, is **DISMISSED** on grounds of mootness.

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

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

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

March 7, 2017
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: March 7, 2017

Date Mailed to Parties: March 7, 2017

/caa

110-17

STATE OF NEW JERSEY – DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Arbitration Between:

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

"Petitioner

and

VA'LORIE JAMES

"Respondent"

OPINION AND AWARD ON MOTION FOR SUMMARY DISMISSAL

Agency Docket No. 181-6/16
[Va'Lorie James]

BEFORE
ARNOLD H. ZUDICK
ARBITRATOR

Appearances:

For the Petitioner
Robert Tosti, Esq.
Purcell, Mulcahy, Hawkins,
Flanagan & Lawless, LLC

For the Respondent
Nicholas Poberezhsky, Esq.
Caruso Smith Picini, P.C.

PROCEDURAL HISTORY

This is a Decision on the Respondent's Motion for Summary Dismissal. On April 11, 2016, Dr. Mario Santos, Principal of the Petitioner's East Side High School, served the Respondent (James) pursuant to *N.J.S.A.* 18A:6-11, with a Notice of Tenure Charges. Santos alleged that the Respondent was guilty of being chronically absent, being absent without leave, and being chronically tardy, all of which he claimed warranted James' dismissal or reduction of salary. Santos also alleged that James is guilty of conduct unbecoming a teaching staff member for refusing to follow the Petitioner's (District) "sign in" procedures and for failing to fulfill her proctor responsibilities for State required testing. Santos claimed such conduct constituted insubordination.

On or about May 15, 2016, Respondent submitted a response to those charges. On June 27, 2016, the Petitioner's State District Superintendent having considered the charges, supporting evidence and the Respondent's submission, concluded that the charges, if credited, were sufficient to warrant Respondent's dismissal or reduction of salary, and he (the Superintendent) certified the charges to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-11 for a hearing in accordance with *N.J.S.A.* 18A:6-16.

Based upon the Superintendent's June 27, 2016 certification, the Respondent was suspended pursuant to *N.J.S.A.* 18A:6-14 effective June 28, 2016. That suspension was without pay for 120 calendar days from that date. It is unclear whether the suspension continued with pay beginning on the 121st day after such certification and/or whether or when James returned to work.

On July 25, 2016, the Department's Bureau of Controversies and Disputes (Bureau) determined that the charges, if true, were sufficient to warrant dismissal or reduction in salary and it referred the matter to Arbitrator David Gregory pursuant to *N.J.S.A.* 18A:6-16.

Although the sequence of events is not entirely clear thereafter, apparently, Arbitrator Gregory preferred to consider the matter through motion rather than conduct a hearing which prompted the Respondent to file its original Motion for Summary Dismissal on or about September 19, 2016. By letter of October 21, 2016 to the Bureau, the Petitioner expressed its reluctance to proceed by "motion only" and requested the case be transferred to another arbitrator.

Apparently, subsequent to the Petitioner's October request the parties engaged in settlement discussions. By January 25, 2017, however, the Petitioner notified the Bureau that settlement had not been reached and it renewed its request that the case be assigned to a new arbitrator.

This matter was formally assigned to me on February 16, 2017. On or about that date I received the Respondent's revised Motion for Summary Dismissal. After a request for an extension of time to which the Respondent consented, the Petitioner filed its response to that Motion on March 20, 2017.

BACKGROUND

The Respondent was a tenured social worker with the District in 2016 when on January 15, 2016, the Petitioner filed tenure charges against her alleging chronic absenteeism, tardiness and conduct unbecoming for allegedly failing to follow District signing in and out procedures encompassing the 2007-2008, 2008-2009 and 2014-2015

academic years. The District alleged that during the 2008-2009 and 2014-2015 school years James was warned several times about her excessive absenteeism and tardiness, and that her conduct could lead to disciplinary action. The District also alleged James engaged in conduct unbecoming by failing to appear to fulfill her proctor responsibilities for scheduled testing. The District's allegation included a claim that James was tardy 31 times by June 1, 2009 in the 2008-2009 school year; that she was tardy approximately 20 days by January 2015 in the 2014-2015 school year; and, that by May 2015 she had 18 absences in the 2014-2015 school year.

On February 18, 2016, the Respondent filed her answer to the January 2016 tenure charges. The Respondent alleged that since her hire in 2001, she never earned less than a "satisfactory" or "effective" annual evaluation or observation rating. The Respondent's answer alleged James stays late after class and performs volunteer work and it labeled the charges as arbitrary and capricious. It argued that the claims of James' alleged excessive absenteeism, tardiness and unbecoming conduct during 2014-2015 should be excluded from the tenure charges because all such issues were previously resolved between the parties. It also argued that the allegations of absences and tardiness in 2007-2008 and 2008-2009 were trivial and too far removed to support tenure charges.

The Petitioner did not certify the January 2016 tenure charges to the Commissioner and no further proceedings or action were taken on those charges. The charges giving rise to the Respondent's February 2017 Motion in this case were filed on April 11, 2016, which were similar to but more expansive than the charges filed against her in January 2016 which were not certified. In the April 2016 charges the Petitioner essentially alleged the same charges as it had in the January or original charges, that

James was chronically absent and chronically tardy, but it also added allegations covering the 2007-2008 through the 2015-2016 school years up to and including March 17, 2016. The Petitioner alleged that by March 2008 James had been absent 9 days to that point in the 2007-2008 school year and was warned about excessive absenteeism and not following proper sign in procedures in 2008. The April 2016 charges also alleged that in 2009 James was tardy 31 times by June of that year and that she had been warned about "unauthorized punching", or signing in at a different location without permission that same year.

The April 2016 charges alleged that James was absent 351 days or an average of 39 days per year since 2007. In those charges the Petitioner included the following list of days tardy for James:

School Year	Days Tardy	School Year	Days Tardy
2007-2008	44	2012-2013	13
2008-2009	71	2013-2014	56
2009-2010	70	2014-2015	38
2010-2011	106	2015-2016	20 (until 3/17/16)
2011-2012	101		

Those charges further alleged that James was late 38 days in the 2014-2015 school year and was warned in January 2015 about being tardy 20 days. The Petitioner alleged that after a March 2, 2015 agreement to fine James one days pay for excessive absenteeism and tardiness it warned her again for excessive absenteeism

The April 2016 charges also alleged that on May 14, 2015, James was warned about both excessive absenteeism and tardiness and she was docked a day's pay for allegedly being absent without leave (AWOL) on that day. The charges noted that James was warned discipline, including tenure charges would be filed against her.

The Petitioner concluded its April 2016 charges alleging that: James was warned about failing to comply with sign-in and out procedures in 2008 and 2009; she was warned on November 24, 2014 that her unauthorized punches could lead to discipline; and, that she had failed to fulfill her proctor responsibilities on April 30 and May 5, 2015.

In its May 13, 2016 Answer to the April charges, the Respondent argued that the number of absences and days tardy alleged by the Petitioner were misleading and inaccurate. It claimed that many of the alleged absences actually were summer days and it claimed that 286 of the 351 days of alleged absences were incorrect.

The Respondent also claimed that many of the absences alleged by the District included time not subject to discipline such as FMLA time. The Respondent alleged James had 126 occasional absences from 2007-2008 through 2015-2016 or an average of 14 absences per year.

The Respondent also noted that 204 of the alleged days tardy from 2007-2008 through 2015-2016 were within 5 minutes of the start of school. Respondent acknowledged 31 days tardy during 2008-2009, but claimed James needed to provide care for her mother prior to the start of classes. Respondent also claimed that most of her absences in 2014-2015 were taken for legitimate medical reasons and she denied being AWOL on May 14, 2015.

Finally, the Respondent denied she failed to fulfill the proctor assignment and she denied being insubordinate.

POSITIONS OF THE PARTIES ON THE MOTION

RESPONDENT

The Respondent presented five arguments to support its Motion. In Point I it argued that all of the tenure charges be dismissed with prejudice because the Petitioner failed to comply with *N.J.S.A.*18A:6-13.

That statute provides as follows:

> Dismissal of charge for failure of determination by board.
> 18A:6-13. If the board does not make such a determination within 45 days after receipt of the written charge, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon.

The Respondent contends that pursuant to the above statute the District is prohibited from pursuing the April tenure charges against James because it took no action on the charges filed in January 2016 within the time provided by the Statute. Noting that the initial charges were filed on January 15, 2016 and answered on February 18, 2016, the Respondent argued that the District was required to certify charges by April 4, 2016.

Arguing that the District simply disregarded the original tenure charges, the Respondent contends that the District was attempting to circumvent the rules by refilling tenure charges in April 2016 based upon the same underlying allegations of excessive absenteeism, tardiness and conduct unbecoming that it alleged in the January 2016 charges. According to the Respondent, the TEACH NJ statutory requirements must be strictly followed and enforced, and it claims that arbitrators have enforced such compliance with the statute's deadlines. Noting that *N.J.S.A.* 18A:6-13 uses the word "shall"; the Respondent argues its wording indicates a mandatory intent that charges be dismissed when no further proceedings were taken thereon.

The Respondent argues that based upon the statute's wording her rights were violated by the District's re-filing of charges in April. Therefore, it contends that those charges should now be dismissed with prejudice by operation of law.

In Point II of its Motion the Respondent, relying upon the Doctrine of Industrial Double Jeopardy, argued that since James' salary was docked on March 2, 2015 by a Memorandum of Agreement (MOA) between the parties, and because her pay was docked again on May 14, 2015 for allegedly being AWOL, that she cannot be punished a second time for the same offenses that have already resulted in discipline. The Respondent relied upon arbitration decisions governed by TEACH NJ to support its argument. See, *In re Jill Buglovsky*, Agency Docket No. 265-9/12, final decision (12/21/12) confirmed, *Buglovsky v. Randolph Twp. B.E.*, Docket No. MRS-C-13-13 (7/16/13); *In re Nikita Clarke-Huff*, Agency Docket No. 290-9/15, final decision (11/16/15); and, *In re John Carlomagno*, Agency Docket No. 180-8/13, final decision (12/20/13).

The MOA referred to above was an agreement between the District and James and the Newark Teachers Union signed on March 2, 2015. It noted that James had (to that point) arrived late on 27 occasions during the 2014-2015 school year and had been conferenced and warned regarding her excessive tardiness. The parties to the MOA agreed that James would be fined one days pay ($458.32) which was for March 2, 2015, which would constitute full and final resolution of all issues regarding James' unsatisfactory attendance during the 2014-2015 school year. The docking of her pay for allegedly being AWOL on May 14, 2015 obviously occurred after the MOA was signed.

The Notice provision near the end of the MOA puts James on notice that future excessive tardiness:

> . . . will result in more harsh disciplinary consequences up to, and including, withholding of increments, tenure charges and removal from employment.

The MOA concludes with a paragraph explaining the "Binding Nature of Agreement" which states that neither James nor her Union can appeal the MOA and that Section concludes with the following pertinent language:

> . . . all issues encompassed by the within Agreement are fully and forever resolved by and between the parties.

In the *Buglovsky* case the teacher had been charged with inappropriate conduct and misuse of a board computer and internet during work time over a period of years. For conduct occurring during the 2008-2009 school year she received a written reprimand on April 27, 2009. Additional charges alleged similar and continued misconduct through 2011-2012. Relying on the decision in *Desly Getty*, OAL Docket No. EDU 08750-08 (6/14/09), and with support found in Elkouri and Elkouri, *How Arbitration Works*, 5th Ed. pp. 923-925 (1997), the Arbitrator applied a double jeopardy theory and dismissed the 2008-2009 charges for which the teacher had already been disciplined. The Arbitrator in *Buglovsky* also found that certain employee conduct that the Board allowed to continue without discipline was no longer actionable due to the passage of time and the employee's subsequent good behavior.

In the *Clarke-Huff* case a teacher's increment was withheld in 2011 based upon absenteeism extending between 1996 and a point in 2011. The teacher's absenteeism continued from a point in 2011 through the 2014-2015 school year and the Board filed tenure charges in part based upon all of her absenteeism. The Arbitrator sustained the

Respondent's Motion to Dismiss the charges related to the absenteeism for which she had already been disciplined based upon a double jeopardy theory and barred the Board from seeking additional discipline on those matters.

In the *Carlomagno* case, charges were filed and certified during 2013 based upon the employee's conduct during the 2011-2012 and 2012-2013 school years. Relying upon both Brand and Biren, *Discipline and Discharge in Arbitration*, 2nd Ed. p.54 (2008) and Elkouri and Elkouri, *How Arbitration Works*, 7th Ed., Ch. 15.3F and the decisions in *Buglovsky,* and *I/M/O Tenure Hearing of Frank Flood, Cumberland County Technical Education Center,* Docket No. 95-5/13 (7/29/13), the Arbitrator held that under the double jeopardy theory the teacher could not be disciplined again for certain aggressive and unprofessional conduct in December 2012 for which he had already been disciplined. The Arbitrator in the *Flood* case noted that while the prior disciplined conduct could be considered for progressive discipline purposes for future discipline, the prior disciplined conduct could not be subject to additional discipline.

Emphasizing that the District's withholding of James' salary on March 2 and May 14, 2015 was a significant form of discipline covering 2014-2015, and because the Respondent noted that the District did not claim any infractions subsequent to James' May 14, 2015 suspension, it argued that charges focusing on her attendance record must be dismissed.

In Point III of her Motion, Respondent argues that all the claims of excessive absenteeism and tardiness preceding the MOA signed in March 2015 must be dismissed with prejudice based upon the Doctrine of *Res Judicata*. Basically, the Respondent is arguing that by entering into the MOA, James agreed to an unpaid suspension in

exchange for not being further disciplined for any attendance issues preceding its ratification, and that since any prior attendance issues have been resolved, then *res judicata* prevents the District from pursuing any more discipline of James based upon her prior attendance/tardiness issues.

The Respondent further argued in its brief that based upon the wording of the MOA "James would be subject to disciplinary action only for future instances of excessive absenteeism and tardiness". The language the Respondent appears to refer to near the end of the MOA is as follows:

> Ms. James is placed on notice that future excessive tardiness will result in more harsh disciplinary consequences up to, and including, withholding of increments, tenure charges and removal from employment.

In Point IV of her Motion the Respondent argues that the tenure charges must be dismissed with prejudice based upon the Doctrines of Estoppel, Laches and Waiver because the District failed to address James' alleged attendance issues from 2008-2009 through the 2013-2014 school years contemporaneously to when the alleged offenses were allegedly committed. The Respondent argues that too much time has passed for James to be able to defend her record back to 2008. It claims she would be unable to recall or prove the circumstances of every alleged tardy or absence issue which would prejudice her ability to defend against the charges.

Relying on *Buglovsky, supra*, the Respondent argued that the Arbitrator in that case dismissed attendance related charges dating back five years that were not previously prosecuted because those charges were too far removed from the alleged offense.

Finally, in Point V of her Motion the Respondent argued that the tenure charges must be dismissed with prejudice based upon the Doctrine of Unclean Hands because the

District failed to follow the disciplinary protocol under the Attendance Improvement Plan regarding James' alleged excessive absenteeism and tardiness. The Respondent explained that the District mostly failed to hold conferences, issue warning notices or recommend disciplinary action as the Plan provided. Respondent alleges that despite the District's claim that James was tardy 348 times from 2009-2010 to 2013-2014, no conferences were held, no warning letters issued and no disciplinary action was recommended. By failing to take such timely action in accordance with the Plan the Respondent argues that the District denied James her due process protections.

The Respondent seeks dismissal of all charges with prejudice and an order reimbursing James for salary and benefits that had been withheld.

PETITIONER

The Petitioner presented four arguments in opposition to the Respondent's Motion. In Point I of its response the Petitioner addressed the procedural argument the Respondent made regarding the impact in this case of the 45 day rule in 18A:6-13 on the District's failure to certify the original charges filed against James in January 2016. The Petitioner explained that after the original charges were filed it uncovered a history of poor attendance and, therefore, expanded its charges.

The Petitioner argued that the original charges simply were not litigated and that *N.J.S.A.* 18A:6-13 did not prevent the filing of the new charges. It cited two cases to support its argument. *In The Matter of the Tenure Hearing of Debra Suitt-Green, State Operated School District of the City of Newark*, OAL Docket No. EDU 7071-96 (October 14, 1997), the District did not find probable cause to certify charges against a teacher. The District subsequently filed charges against the same teacher based upon both the

incidents listed in the prior charges in combination with new incidents. The Respondent moved to dismiss the case relying on *N.J.S.A.* 18A:6-13 and arguing that based upon the Statute the District could not re-file charges based upon incidents previously considered and not certified. The ALJ rejected the Motion and found such prior incidents could be reconsidered. The Commissioner affirmed.

In *The State Operated School District of the City of Newark v. Victoia Jakubiak*, OAL Docket No. EDU 3961-97 (December 22, 1998), charges were initially filed on December 9, 1996 but were not certified. The charges were re-filed – same as before – on February 19, 1997. The Respondent sought to dismiss those charges based on its reading of 18A:6-13. The ALJ, citing to *Suitt-Green*, denied the Respondent's Motion in that case. The Petitioner here seeks the same result here.

In Point II of its response to the Motion, the Petitioner here argued that the limited release language contained in the MOA does not prevent the 2014-2015 charges from being considered in this case. The Petitioner noted that the parties' collective agreement permits fines and penalties and that the MOA language expressly contemplates potential future disciplinary action including termination. Petitioner further argued that James was disciplined in May 2015, subsequent to the MOA and that there was no basis to conclude that the totality of James' attendance record could not be reviewed in a tenure case merely because a minor penalty had been previously agreed upon.

In Point III of its response to the Motion, the Petitioner emphasized that this case is about excessive absenteeism and that there are many cases by the Commissioner and arbitrators holding that even legitimate absences when numerous can be the basis for termination. The Petitioner cited Commissioner decisions: *In the Matter of the Tenure*

Hearing of Alicia Dugan, School District of the City of Jersey City 6/14/12 (#244-12); *In the Matter of the Tenure Hearing of Lisa Rosa, School District of the City of Jersey City* 9/1/11 (#368-11); *In the Matter of the Tenure Hearing of Frances R. Metallo, School District of the City of Union City* 5/12/03 (#244-03); and, arbitration decisions: *Burke and the State Operated School District of the City of Camden*, Docket No. 5-1/13 (March 30, 2015); *Stapleton and the Jersey City Board of Education*, Docket No. 284-9/12 (March 20, 2013); and, *Lenore Francis and the Jersey City Board of Education*, Docket No. 285-9/12 (January 10, 2013) to support its position that excessive absenteeism, even if based upon legitimate reasons, are grounds for termination.

The Petitioner also cited to well known treatises used in arbitration to support that position. Elkouri and Elkouri, *How Arbitration Works*, p. 822 (6th Edition); and Brand and Biren, *Discipline and Discharge in Arbitration*, 2nd Edition, p. 124 (2008).

In the presentation of Point III the Petitioner appears to argue that I should consider the merits of James' absences and how she reacted and communicated concerning those absences.

In Point IV of its response to the Motion, the Petitioner emphasized the strong public interest in monitoring teacher attendance and it argued that a full factual hearing is warranted here despite the asserted legal defenses in order to consider and weigh the facts and legal issues.

DISCUSSION

In considering all the above arguments, I remind the parties that currently the merits of the allegations against James – no matter how egregious they may appear – are not before me for determination. Rather, based upon the Respondent's Motion my

jurisdiction at this time is limited to determining what if any allegations in the April tenure charges may proceed to a hearing *de novo*. Consequently, despite the Petitioner's specific allegations, many of which the Respondent has disputed, I will not resolve the viability of those allegations in this Decision. I will, instead, only determine which, if any, allegations may proceed to hearing.

In Point I of its Motion the Respondent argued that all of the charges filed by the District in April 2016 be dismissed because the District allegedly violated *N.J.S.A.* 18A:6-13 by failing to certify to the Commissioner within 45 days all the original charges it filed against James in January 2016. In its brief, the Respondent argued that tenure charges along with an employee's response must be presented to a board of education to decide whether probable cause exists to warrant the employee's dismissal or reduction in salary and if so, the charges must be certified to the Commissioner. The language in *N.J.S.A.* 18A:6-13, however, does not contain such specific requirements.

In fact, the language in that Statute does not require a board to make any determination. It merely says that if a board does not make a determination – presumably whether or not to certify charges to the Commissioner – within 45 days (of when the charges were filed), then the charges that were filed be deemed dismissed and no further proceeding or action be taken thereon – presumably on the charges filed at that time. The pertinent statutory language appears to be a mechanism to automatically dismiss tenure charges if a board has not acted on them within 45 days – presumably to prevent such charges from lingering for an extended period of time. The ending language in that Statute "no further proceeding or action shall be taken thereon" appears to refer back to the charge(s) that was (were) dismissed and appears to have been intended to ensure that

no further action be taken on that which was dismissed, once again to prevent those charges from lingering and creating doubt for the respondent. But the language in 18A:6-13 does not say a board cannot re-file previous charges. That is, the Statute does not say a board cannot serve a new filing on a respondent which includes charges that had been contained in an earlier dismissed filing.

The *Suitt-Green* and *Jakubiak* decisions support that view, holding that charges previously dismissed by operation of 18A:6-13 may be re-filed and reconsidered in subsequent charges particularly if the new charges are filed in close proximate time to the original charges. The same result was reached in *I/M/O Tenure Hearing of Sabino Valdes, Union City School District*, OAL Docket No. EDU 3620-1 (8/9/01), confirmed *Valdes v. City of Union City Board of Education,* Docket No. A-1337-04T3 (App. Div. 1/22/07), certification denied (5/15/07).

In *Valdes* the ALJ held that the Board's failure to certify charges within the time provided in *N.J.S.A.* 18A:6-13 required those charges be dismissed. But he also held that lacking any judicial decisions to the contrary and based upon Department of Education decisions, such dismissals are without prejudice to the right of the Board to re-file such charges. The Appellate Division agreed. Noting that the Board did not rule on the merits of the initial charges and the re-filing occurred within a reasonable time, the Court held:

> We conclude that so long as an employee has not been prejudiced by a re-filing of charges within a reasonable period of time, the passage of the statutory time period from the filing of the initial charges should be viewed as a dismissal without prejudice. (slip opinion p. 5).

That same result is appropriate here. After the initial tenure charges were filed on January 15, 2016, the District continued to examine James' records and re-filed the charges on April 11, 2016. I find that the January charges were dismissed by operation of

law (*N.J.S.A.* 18A:6-13) but without prejudice, and that the re-filing in April occurred within a reasonable time of the initial filing. Other than the fact that the Respondent needed to continue to litigate over this matter, and noting that James has either continued to work or at least been paid (after 120 days of suspension) the Respondent did not demonstrate that it was otherwise prejudiced by the re-filing of charges.

Consequently, based upon the above discussion I find that the January 2016 tenure charges were dismissed without prejudice. Thus, the District did not violate *N.J.S.A.* 18A:6-13 by re-filing tenure charges in April 2016. Accordingly, the Respondent"s Motion for Summary Dismissal based upon its first Point is denied.

In Point II of its Motion the Respondent, relying on a theory of double jeopardy, vigorously argued that tenure charges based upon any of her conduct in the 2014-2015 school year be dismissed because she has already been disciplined for such conduct as evidenced by: 1) the MOA signed on March 2, 2015 which docked her pay; and, 2) the subsequent additional docking of her pay on May 14, 2015. The Respondent essentially made the same argument relying on a *res judicata* theory in Point III of her Motion. Respondent relied upon *Buglovsky*; *Clarke-Huff* and *Carlomango* to support her argument.

The concept of double jeopardy in the labor relations context has been frequently applied. *Discipline and Discharge in Arbitration* at p. 54 explains:

> Fundamental concepts of justice and fairness require that once an employee has been disciplined for misconduct, the employee will not again be subject to discipline for the same offense. ...Double jeopardy concepts also preclude increasing the penalty for a violation after discipline has been imposed.

In its response to the Motion, the Petitioner argued that the MOA contained "limited release language" which it claims does not prevent consideration of all tenure charges. The Petitioner's argument appears to be based on several things: 1) the language in the Notice Section of the MOA that future excessive tardiness will result in more harsh disciplinary consequences; 2) the fact that James was disciplined for conduct on May 14, 2015, subsequent to the MOA; and 3) apparently because – in the Petitioner's words – the "minor penalty" (presumably the one day docking of pay) could not block the review of the totality of James' attendance record.

Although the MOA seems to primarily concern tardiness, I find that the third specific agreement listed therein broadened the purpose of the MOA to include absenteeism. The pertinent language provides:

> 3. The parties acknowledge that this Agreement constitutes full and final resolution of all issues regarding Ms. James unsatisfactory attendance during the 2014-2015 school year.

The Petitioner seemed to dismiss the Respondent's double jeopardy argument by claiming that the MOA language was limited and that the Respondent's argument was unsound for several reasons. First; because the collective negotiations agreement presumably covering James, permits fines or penalties as an exception to tenure charges; second, because the MOA expressly contemplates potential future discipline; third, because James was disciplined again in May 2015; and fourth, because the agreed upon penalty was minor.

Those arguments are not persuasive to defeat Respondent's Motion. Although the MOA does state that future excessive tardiness will result in more harsh discipline, that document clearly and unequivocally also states that said Agreement:

> . . .constitutes full and final resolution of all issues regarding Ms. James unsatisfactory attendance during the 2014-2015 school year.

If the District did not intend that Agreement to cover all of James' attendance issues for the entire 2014-2015 school year, which I believe was intended to cover tardiness and absenteeism, I would think it would not have agreed to that specific language in that Agreement. The discipline for May 14, 2015 while "attendance" related, was for allegedly being AWOL which differs from tardiness or approved absenteeism, it did not negate the "attendance" language in the MOA. In fact, the discipline in May 2015 demonstrated that the District was willing and capable of taking action against James contemporaneously with an alleged infraction, something it clearly choose not to do in the years preceding 2014-2015.

The Petitioner in its brief also spent considerable time arguing why excessive absenteeism is a legitimate basis for dismissing a teacher even when the absences were "justified" and "approved". I don't doubt the Petitioner's argument in that regard or the cases cited in support thereof, but that is more an argument over the merits of the allegations in the charges and potential discipline therefrom, none of which is before me at this time. As explained earlier, I am only determining here, what, if any, allegations may proceed to hearing.

Having considered the parties' positions as well as the decisions and legal treatises cited above I find the double jeopardy concept as well as *res judicata* apply in this case, at least with respect to all attendance - tardy and absentee - allegations against James for all of the 2014-2015 school year as specifically stated in the MOA. Similarly,

double jeopardy applies for the alleged AWOL event of May 14, 2015 for which James was docked a full days pay.

Double jeopardy and *res judicata*, however, do not apply to alleged sign-in or out procedures or proctor failures that may have occurred in the 2014-2015 school year because the MOA was, by its own terms, limited to attendance issues for that year which, I find, only included absenteeism and tardiness. Nor did those legal concepts apply to the 20 alleged tardy days in the 2015-2016 school year alleged in the April tenure charges because the MOA was limited to 2014-2015.

Consequently, based upon the MOA and the docking on May 14, 2015, the Motion is sustained regarding all attendance – absentee and tardy – allegations and the AWOL allegation against James for the 2014-2015 school year. The District may not proceed to hearing on any of those charges/allegations. However, the Motion is denied regarding: 1) the alleged November 24, 2014 warning about unauthorized punches; 2) James alleged failure to perform proctor duties on April 30 and May 5, 2015; and, 3) the allegation that James was tardy 20 times during the 2015-2016 school year. The Petitioner may proceed on those charges/allegations but may not expand on those specific charges.

Based upon its application of *Buglovsky*, the Respondent in Point IV of its Motion essentially argued that the District's inaction until 2016 waived any right it may have had to proceed on the 2008-2009 through 2013-2014 charges/allegations against James. I agree for the same reasons expressed in that decision. Although the Petitioner in Point IV of its response to the Motion argued public interest considerations for wanting a hearing on all of the charges it filed in April 2016, I note it was the District's burden to proceed

with timely charges which would have protected both the public interest and James' due process rights.

In this case the District has sought to litigate over absenteeism and tardiness allegedly occurring as much as eight years before the filing of the 2016 tenure charges. Here, one could infer that if James had as poor an absence/tardy record as alleged – and one which the District determined was unacceptable – the District would have taken vigorous action against James much sooner, certainly at various times during the 2008-2009 through 2013-2014 time period. But other than warning James, it does not appear that the District thought James' record serious enough to take further action during that time. James was allowed to continue working even during the time when she was allegedly continuing to accumulate an absence and tardy record. Either the District was derelict in its duty to earlier file tenure charges, or it had determined that James' conduct – though troublesome – did not justify such action. I tend to believe the latter. In either case, it appears to me that James' conduct in 2014-2015 was the catalyst for the 2016 charges and that the allegations of excessive absences/days tardy prior thereto was merely added for effect.

When considering the fact that the District, through the 2015 MOA, resolved what was alleged to have been a significant number of absences and days tardy during the 2014-2015 school year with only a one day salary penalty, and did not even address any of the alleged absenteeism and tardiness occurring prior thereto, I infer that the District did not appear to consider that such prior conduct justified serious discipline. With that in mind, and noting the significant delay between the alleged prior absences and days tardy and the filing of the instant charges, it appears to me that it would be fundamentally

unfair and violate James' due process to proceed now on conduct arising prior to the 2014-2015 school year. The District had amply opportunity between 2008-2009 and 2013-2014 to contemporaneously proceed on charges concerning conduct during those years. Having failed to do so during the appropriate time period, it waived the right to add charges from those years to the 2014-2015 charges in this case. I, therefore, sustain the Motion with respect to all allegations of conduct occurring prior to the 2014-2015 school year. The Petitioner may not proceed on any charges prior to that year.

Accordingly, based upon all of the above I issue the following:

AWARD

The Respondent's Motion for Summary Dismissal is sustained in part and denied in part.

A. The Motion is sustained regarding:

1. All alleged conduct occurring during the 2008-2009 through the 2013-2014 school years.
2. All alleged absenteeism and tardiness occurring during the 2014-2015 school year.
3. The alleged AWOL conduct occurring on May 14, 2015.

B. The Motion is denied regarding:

1. Respondent's allegation that the tenure charges could not be re-filed.
2. The alleged November 24, 2014 warning about unauthorized punches.
3. James' alleged failure to perform proctor duties on April 30 and May 5, 2015.
4. The allegation James was tardy 20 times during the 2015-2016 school year.

C. I retain jurisdiction over a possible Remedy for the matters dismissed in Section A, and retain jurisdiction for the matters remaining in Section B, numbers 2, 3, and 4. A conference call will be arranged with the parties to determine the further processing of this case.

Arnold H. Zudick
Arbitrator

Dated: April 17, 2017
Morrisville, PA

Commonwealth of Pennsylvania}
County of Bucks }

On this 17th day of April 2017, before me personally came and appeared Arnold H. Zudick to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Susan M. Zudick
Notary Public

AWARD

The Respondent's Motion for Summary Dismissal is sustained in part and denied in part.

A. The Motion is sustained regarding:

1. All alleged conduct occurring during the 2008-2009 through the 2013-2014 school years.
2. All alleged absenteeism and tardiness occurring during the 2014-2015 school year.
3. The alleged AWOL conduct occurring on May 14, 2015.

B. The Motion is denied regarding:

1. Respondent's allegation that the tenure charges could not be re-filed.
2. The alleged November 24, 2014 warning about unauthorized punches.
3. James' alleged failure to perform proctor duties on April 30 and May 5, 2015.
4. The allegation James was tardy 20 times during the 2015-2016 school year.

C. I retain jurisdiction over a possible Remedy for the matters dismissed in Section A, and retain jurisdiction for the matters remaining in Section B, numbers 2, 3, and 4. A conference call will be arranged with the parties to determine the further processing of this case.

Arnold H. Zudick
Arbitrator

Dated: April 17, 2017
Morrisville, PA

Commonwealth of Pennsylvania}
County of Bucks }

On this 17th day of April 2017, before me personally came and appeared Arnold H. Zudick to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Susan M. Zudick
Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
SUSAN M. ZUDICK, Notary Public
Falls Twp., Bucks County
My Commission Expires September 2, 2018

111-17

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Arbitration Hearing of:

Joann Smith, State Operated School District of the City of Paterson

---

Before: Thomas D. Hartigan, Arbitrator

Agency Docket No. 2-1/17

Appearances:

For the District: Deborah J. Bracaglia, Esq.
Apruzzese, McDermott, Mastro & Murphy, P.C.

For Respondent: Gail Oxfeld Kanef, Esq.
Oxfeld Cohen, P.C.

AWARD

The parties have entered into an Employment Separation Agreement (copy enclosed) in resolution of the above referenced matter. I have reviewed the Agreement and found it to be in compliance with N.J.A.C. 6A:3-5.6. As indicated in Item 3 of the Agreement, page two, "The parties mutually irrevocably and unconditionally waive, release and forever discharge any and all claims or rights, whether known or unknown which they have or may have against each other, personally and officially, individually and collectively...."

The Separation Agreement came about after extensive discussions at which the nature of the charges were fully presented and known to Ms. Smith. Both parties have freely entered into this Agreement and both have signed the Agreement. As noted on page five (5) of the Agreement, Ms. Smith acknowledged her

understanding of the agreement which had been negotiated by her attorney with her knowledge and consent. Both parties have acknowledged, page one (1) of the Agreement, that the Agreement is in their mutual interest and I find it to be in the public interest.

Thomas D. Hartigan

Thomas D. Hartigan, Arbitrator
April 14, 2017

LAW OFFICES
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April 13, 2017

VIA Email to gok@oxfeldcohen.com
And Regular Mail

Gail Oxfeld Kanef, Esq.
Oxfeld Cohen, P.C.
60 Park Place, Suite 600
Newark, New Jersey 07102

RE: In the Matter of Tenure Charges against Joann Smith and State Operated School District of the City of Paterson

Dear Ms. Kanef:

With regard to the above-referenced matter, enclosed please find a fully executed Employment Separation Agreement. The Board of Education approved the Separation Agreement at their meeting last night, April 12, 2017.

I am advised by the District that Ms. Smith will receive all monies owed to her in the next payroll cycle, April 28th.

By copy of this letter I am forwarding a copy of the signed agreement to Arbitrator Hartigan so that he may close the case.

Please feel free to call me with any questions. Thank you for your cooperation in resolving this matter.

Very truly yours,

Deborah J. Bracaglia

Deborah J. Bracaglia

/djb
Enclosure
cc: Arbitrator Thomas D. Hartigan (Via Email and Federal Express; With Enclosure)
Robert Murray, Esq. (Via Email Only; Without Enclosure)
Luis Rojas (Via Email Only; Without Enclosure)

EMPLOYMENT SEPARATION AGREEMENT

This Employment Separation Agreement (the "Agreement") is made by and between JOANN SMITH ("SMITH") and the **STATE OPERATED SCHOOL DISTRICT OF PATERSON** (the **"BOARD"**). The signatories to this Agreement will be referred to collectively and/or jointly, as appropriate, as the "Parties."

WHEREAS, the BOARD and SMITH have consulted with each other, and with their respective counsel, and have determined that it would be in their mutual best interest that SMITH and the BOARD end their employer-employee relationship; and

WHEREAS, on the basis of the foregoing, SMITH will resign her tenured position, as a teaching staff member with the BOARD, effective April 30, 2017 and the BOARD, in turn, agrees to provide certain consideration to SMITH in connection with her transition from employment with the BOARD.

NOW, THEREFORE, in consideration of the mutual promises, covenants and obligations contained herein, the Parties agree as follows:

1. At the time of execution of this Agreement, SMITH will submit a letter of resignation of her position with the BOARD to be effective April 30, 2017. The letter of resignation shall be in the form attached hereto as **Appendix A** and is made part of this Agreement. It is understood that Smith's resignation from her position with the Board is final, binding and irrevocable. The Board will maintain SMITH on paid administrative leave under the terms of the CBA with the Paterson Education Association until April 30, 2017, including back pay for the period of her unpaid

suspension. Her contractual health benefits shall continue through April 30, 2017. Thereafter, SMITH may obtain health coverage through COBRA.

2. Neither the BOARD nor SMITH, nor anyone acting on behalf of SMITH, shall take any adversarial action against each other arising out of SMITH's employment with the BOARD, whether by grievance, complaint, litigation, investigation or otherwise. To that end, the parties mutually release each other from and against any and all claims and potential claims arising out of or in connection with their mutual employment relationship except for any workers compensation, unemployment or disability related claims that SMITH may have. By signing this Agreement, SMITH represents that she is unaware of any facts that would give her a basis for a claim for workers' compensation or disability benefits.

3. The parties mutually irrevocably and unconditionally waive, release and forever discharge any and all claims or rights, whether known or unknown, which they have or may have against each other, personally and officially, individually and collectively, against past and present Board members, officers and administrators, its agents and employees, personally and officially, as well as their successors and assigns, including, but not limited to any and all claims for attorney's fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this settlement, and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal

Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retraining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any and all other claims for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims for health insurance continuation coverage under and pursuant to the Consolidated Omnibus Budget Reconciliation Act (referred to hereinabove as "COBRA"), the New Jersey Workers Compensation Act, any claim to unemployment benefits to which a party may be entitled and her right to enforce the terms of this Agreement.

4. The BOARD will also grant SMITH permission to make arrangements with the building administration to enter her place of employment for the purpose of removing any of her personal records and belongings and returning any property belonging to the BOARD. SMITH agrees that on or before March 1, 2017, she will return to the BOARD all BOARD property including, but not limited to, keys, identification cards, computers, etc.

5. The BOARD shall continue to provide contractual medical, dental, prescription and vision health insurance benefits to SMITH through April 30, 2017. SMITH will be

eligible to continue health insurance benefits thereafter at her expense through COBRA.

6. SMITH agrees that she will not seek reemployment with the BOARD now or in the future, and if she does, she understands that the BOARD will not be obligated to consider her for re-employment. SMITH further agrees that she and/or anyone acting on her behalf has no right to challenge and will not challenge or otherwise institute an action over the BOARD's failure to process or consider any such application for reemployment or reinstatement.
7. SMITH agrees that she is not owed any further monies or benefits from the BOARD, whether by way of collective bargaining agreement, BOARD policy or otherwise, and the BOARD is not obligated to make any further payments to SMITH, except as expressly provided herein.
8. The Parties acknowledge that they have read the agreement and understand all of its terms, that they have consulted with counsel, and that their agreement is executed voluntarily, without duress, and with full knowledge of its legal significance.
9. This Agreement constitutes the complete agreement between the parties. It may not be altered or amended, except in writing, with the same formality as this agreement. SMITH acknowledges and agrees that this Agreement will not be enforceable until formally approved by Resolution of the Board of Education.
10. SMITH acknowledges that, pursuant to N.J.S.A. 17:1-6.3, the BOARD may be required to disclose this agreement to the Division of Pensions.

11. SMITH acknowledges that, pursuant to N.J.A.C. 6A:9B-4.3 and Child M. v. Fennes, 2016 WL 4473253 (App. Div. 2016) (unreported), this matter must be referred to the State Board of Examiners.

12. Employee acknowledges that she is releasing all rights and claims arising under the Age Discrimination in Employment Act. To satisfy the requirements of the Older Workers' Benefit Protection Act, 29 U.S.C. § 626(f), the parties agree as follows:

a. Employee acknowledges that she has read and understands the terms of this Agreement.

b. Employee is hereby advised to consult with an attorney prior to executing this Agreement. Employee represents that she has consulted with her attorney of record in the Action, Gail Oxfeld Kanef, Esq., and has received all advice she deems necessary concerning this Agreement.

c. Employee acknowledges that she has twenty-one (21) days to consider this Agreement, although she may, in the exercise of her own discretion, sign or reject it at any time before the expiration of the twenty-one (21) day period. Employee acknowledges that she has taken as much time as necessary to consider whether to enter into this Agreement, and has chosen to enter this Agreement freely, knowingly, and voluntarily.

d. For a seven (7) day period following the execution of this Agreement, Employee may revoke this Agreement by delivering a written revocation to the law firm of Apruzzese, McDermott, Mastro & Murphy, attorneys for Employer, 25 Independence Blvd, Warren, NJ 07059. This Agreement will not become effective or enforceable until after the end of this revocation period.

WHEREFORE, having fully read and understood the terms of this Agreement, the Parties sign their names below with the intention that they shall be bound by it.

JoAnn Smith
JOANN SMITH

2/27/17
Dated

STATE OPERATED SCHOOL DISTRICT OF PATERSON

By: Lynn W. Evans

2/20/17
Dated

STATE OF NEW JERSEY)

SS:

COUNTY OF BERGEN)

I CERTIFY that on February 27, 2017, JOANN SMITH personally came before me and acknowledged under oath, to my satisfaction, that this person:

(a) Is named in and personally signed this document; and

(b) Signed, sealed and delivered this document as her own act and deed.

Esther Jones

ESTHER LOLETA JONES
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 3/4/2018

STATE OF NEW JERSEY)

SS:

COUNTY OF PASSAIC)

I CERTIFY that on Dr. Donnie Evans personally came before me and acknowledged under oath, to my satisfaction, that he or she is the person:

(a) named in and personally signed the document; and

(b) is authorized by the **STATE OPERATED SCHOOL DISTRICT OF PATERSON** to execute this document;

(c) Signed, sealed and delivered the document in his or her official capacity as the act and deed of the **STATE OPERATED SCHOOL DISTRICT OF PATERSON**.

3/20/17

Attorney at Law
State of New Jersey

Appendix A

February 27, 2017

Donnie Evans, Ed.D., Superintendent
State Operated School District of the City of Paterson
90 Delaware Avenue
Paterson, NJ 07503

Dear Dr. Evans:

This letter will serve as my official notification to the State Operated School District of the City of Paterson that I hereby irrevocably resign my position effective April 30, 2017.

Sincerely,

JoAnn Smith

Joann Smith

PATERSON PUBLIC SCHOOL DISTRICT
ACTION FORM

1. All Board Resolutions must clearly state how that program/initiative relates to or is specifically connected to the Priorities and Goals contained in the Strategic Plan.
2. This Action Form must be in the State District Superintendent's office according to cutoff date before the meeting of the Board of Education.

Recommendation/Resolution: SETTLEMENT;

I HEREBY CERTIFY THE WITHIN TO BE A TRUE COPY

WHEREAS, J. S. is a tenured teacher in the District; and

WHEREAS, the State District Superintendent served Smith with a Notice of Tenure Charges and Supporting Statement of Evidence, executed under oath; and

WHEREAS, the Tenure Charges were certified to the Commissioner or Education; and

WHEREAS, J.S., through Counsel, submitted a response to such Tenure Charges, denying same; and,

WHEREAS, without any admission by either party as to the validity of the Tenure Charges, the District and J. S. have determined to amicably sever their relationship prior to an arbitration hearing being conducted;

NOW, THEREFORE, BE IT RESOLVED THAT the District and J. S. agree to sever their relationship in accordance with the terms of the Employment Separation Agreement and General Release presented for approval; and

BE IT FURTHER RESOLVED THAT, as part of that settlement, J. S. letter of resignation be and is hereby accepted with an effective date of April 30, 2017; and

BE IT FURTHER RESOLED THAT all action required to effectuate the settlement is authorized.

APPROVALS REQUIRED

1. Submitted by Mr. Luis Rojas, Executive Director of Labor Relations /Affirmative Action (Name, Title) — 3-27-17 (Date)

2. Approval by Divisional Administrator _____ (State District Superintendent, Deputy, Assistant Superintendent or Business Administrator) — _____ (Date)

3. Account No. _____

Certification of Funds – Business Administrator _____ (Signature) — 3/27/17 (Date)

Funds Available		Funds Not Available		Funds Not Needed		Non-Budget Item	

4. Verification by Legal Department, if required _____ — 3/27/17 (Date)

5. Approval - State District Superintendent _____ — 3/30/17 (Date)

6. Board Adoption Date April 12, 2017 Resolution Number G-1

Copies as follows:
White-To Board Office Green-To #5 Yellow-To Business Administrator Pink-To #1 Gold-To #2

May 2011

112-17

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
Case No: 1-1/17

In the Matter of the TENURE Hearing between the

The SOUTH HACKENSACK BOARD OF EDUCATION,

PETITIONER

and

CHRISTOPHER MASULLO,

RESPONDENT

BEFORE: **Ira Cure, Esq.**
Arbitrator

APPEARANCES

For the Petitioner School District:
Vittorio S. LaPira, Esq.
Fogarty & Hara, Esqs.

For the Respondent:
Ty Hyderally, Esq.
Sally A. Sattan, Esq.
Hyderally & Associates, P.C.

OPINION and AWARD

Pursuant to *N.J.S.A., 18A:6-16*, as amended by *P.L. 2012, c. 26 and P.L. 2015, c. 109* ("TEACHNJ"), the tenure charges brought by the South Hackensack Board of Education on behalf of the South Hackensack Public School District ("District") against Christopher Masullo ("Masullo") were referred to me for a hearing and decision. The charges were filed with the New Jersey Department of Education ("DOE") on January 3, 2017. An answer was filed by Mr. Masullo with the DOE on January 18, 2017. I was

appointed to hear this dispute on January 30, 2017. I conducted a hearing at Hillside Square, 8 Hillside Avenue, Montclair, New Jersey on March 6, and March 8, 2017.

Both parties were afforded a full opportunity to examine and cross-examine witnesses, submit evidence, and present arguments in support of their respective positions. The parties submitted briefs and the record was closed as of March 31, 2017. The evidence adduced and the positions and arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

Vittorio S. LaPira, of the firm of Fogarty & Hara, Esqs. represented the District. Ty Hyderally, Esq. and Sally A. Sattan, Esq. represented Mr. Masullo.

THE ISSUE:

The issue for arbitral determination is:

Has the District established that Mr. Masullo engaged in misconduct alleged in the charge brought against him? If so what shall be the penalty?

THE CHARGE[1]

> Christopher J. Masullo, a tenured teaching staff member in the employ of the South Hackensack Board of Education, engaged in conduct unbecoming a teaching staff member when he disconnected a loudspeaker in his Computer Lab classroom without permission, thus jeopardizing the health and safety of students and staff, since he could not hear emergency notifications (such as a school security drill or *actual* bomb threat, active shooter situation, etc.), and such action alone (and certainly when combined with Mr. Masullo's attempt to cover up his actions and his prior incidents of misconduct), *justifies dismissal from his teaching position.*

(Emphasis in the original).

[1] There are numerous specifications to the Charge which will not be set forth herein.

BACKGROUND

A. Mr. Masullo's History in the District

Mr. Masullo, a teacher for twenty years, was hired by the District in 2007. Mr. Masullo is a sixth-grade math teacher and is a computer teacher for students in grades Pre-K through 8. He teaches at the District's Memorial School.

Throughout most of Mr. Masullo's employment in the District, Dr. William DeFabiis ("DeFabiis") served as both District Superintendent of Schools and Principal of Memorial School. Dr. DeFabiis retired in June 2013, and was succeeded by the present District Superintendent and Principal, Dr. Gregorio Maceri.

Dr. DeFabiis testified that Mr. Masullo was an excellent teacher, and an invaluable staff member who took initiative and worked with staff members to solve problems with electronic technology. As Mr. Masullo's supervisor, Dr. DeFabiis prepared observation reports (Respondent Exs. 1, 2, 3 and 6), and performance reports concerning Mr. Masullo. (Respondent Exs. 4 and 5). These observation reports and performance reports were uniformly positive. Each of the observation reports concluded with the phrase "Keep up the good work!" The performance reports had three possible ratings for 38 separate criteria. These ratings were: satisfactory, needs improvement and unsatisfactory. In both 2013 and 2012, Dr. DeFabiis rated Mr. Masullo as satisfactory in each of the 38 criteria. In both years, Dr. DeFabiis recommended that Mr. Masullo receive a salary increment. (Respondent Exs. 4 and 5).

Dr. DeFabiis' testimony was not uniformly positive regarding Mr. Masullo's performance. Dr. DeFabiis testified that on two separate occasions he had a strict talk with Mr. Masullo about the teacher's interactions with other staff members[2].

On May 10, 2016, Dr. Maceri prepared a Teacher Summary Rating form for Mr. Masullo. That form contains twenty-seven different criteria concerning teacher performance. Dr. Maceri rated Mr. Masullo as proficient in one category, accomplished in sixteen categories, and distinguished in ten categories. There were no comments in the section entitled "Recommended Actions for Improvement." The final comment on the document stated in pertinent part: "Mr. Masullo is encouraged to continue his approach of locating and implementing new and innovative methods of improving student achievement." (Respondents Ex. 9).

B. Mr. Masullo's Classroom and the Loudspeaker

Because Mr. Masullo is a computer teacher for the District's Pre-K to 8th grade students, his primary classroom is the Computer Lab. The Computer Lab is in a glass enclosed room that adjoins the Memorial School Library. There are low ceilings in the Computer Lab, and there is no sound buffering or dampening system in the room.

Each classroom and office in the Memorial School has a loudspeaker embedded in the ceiling of the room. The loudspeaker is used to make school announcements, and to announce security drills including "bomb drills" and "active shooter drills." (There is a separate alarm system for fire drills). Security drills are announced in "plain language" over the loudspeaker. The person making the announcement would state "active shooter" or "bomb threat[3]." In addition, during the school day, if a visitor incorrectly rings the night

[2] One such discussion occurred in 2008.

[3] Pursuant to Department of Education guidelines, the individuals making the announcement rotate.

bell, the sound of the bell is transmitted through the loudspeaker system into each classroom including the Computer Lab.

Mr. Masullo testified that, because of the configuration of the Computer Lab, sounds emanating from the loudspeaker are extremely loud and disruptive. Mr. Masullo testified that he had chronic ear infections, and that because of a surgical procedure in 2013 to get rid of fluid in his ears, he was very sensitive to sounds. (A medical record detailing Mr. Masullo's auditory problems was introduced as Respondent's Ex. 10).

Mr. Masullo also testified that some of his students were on the autism spectrum, and that they reacted poorly to noises from the loudspeaker. Mr. Masullo testified that it took time to calm his students down after hearing the jarring noises of the loudspeaker.

On March 21, 2013, Mr. Masullo sent an email to Dr. DeFabiis concerning the loudspeaker. The email stated in pertinent part: "Can we do anything about the volume of the ceiling speakers? The sound of the bells and such are deafening in the Library and Computer Lab." (Respondent Ex. 7).

Dr. DeFabiis did not remember receiving the email, but did remember speaking to Mr. Masullo about the noise in the Computer Lab. Dr. DeFabiis testified that he made some inquiries and determined that because there was no volume control on the speaker there was no way to adjust the volume in the Computer Lab. Mr. Masullo also complained to Head Custodian James Parisi ("Parisi") and to Custodian Carmine Barricella ("Barricella") about the excessive noise in the Computer Lab. Mr. Parisi testified that he would not disconnect the loudspeaker unless he was authorized to do so by Dr. DeFabiis.

After Dr. Maceri became District Superintendent and Principal a meeting was held in his office with Mr. Masullo and Jeff Badre ("Badre"), an information technology

consultant, to discuss certain computer contracts. Mr. Masullo testified that at the meeting he observed Mr. Parisi disconnect the loudspeaker in Dr. Maceri's office because it was too loud. Mr. Parisi admitted that he had disconnected the loudspeaker in Dr. Maceri's office, but he did not remember if Mr. Masullo observed him performing that task.

At some point in 2015, after Mr. Masullo learned that Mr. Parisi disconnected the loudspeaker in Dr. Maceri's office, Mr. Masullo unilaterally decided to disconnect the loudspeaker in the Computer Lab. Mr. Masullo claimed that he was still able to hear the monthly security alarms even after the loudspeaker was disconnected. Mr. Masullo also testified that he told Anne Turtoro ("Turtoro") the Library/Media Specialist and Gifted and Talented Teacher whose work area in the library adjoined the Computer Lab, and Mr. Barricella that he disconnected the loudspeaker. Both Ms. Turtoro and Mr. Barricella testified and denied knowing that Mr. Masullo had disconnected the loudspeaker[4].

Ms. Turtoro testified that on two occasions in the Spring of 2015 and in September 2016 she alerted Mr. Masullo to an ongoing security drill. Ms. Turtoro testified that as she was leaving for these drills, she could see Mr. Masullo through the glass walls and that he did not seem to be preparing to take part in the security drills. Ms. Turtoro alerted Mr. Masullo to the drills, and Mr. Masullo and his classes took part in those drills without incident.

C. The Events of October 19, 2016 and the Aftermath

On October 19, 2016, Dr. Maceri initiated a security drill by announcing over the loudspeaker the phrase "bomb threat" three times. Except for Mr. Masullo's class, the entire building was evacuated and moved to staging areas adjacent to the school. Ms.

[4] There is no indication that Mr. Masullo ever told Dr. Maceri that he disconnected the loudspeaker.

Turtoro heard the alarm but, because of the configuration of the library, she left with a student she was working with without observing that Mr. Masullo and his class remained in the Computer Lab[5].

At the time of the drill, Mr. Masullo was working with Teacher Jessica Carroll's ("Carroll") third grade class. When Ms. Carroll noticed that her class had not come down for the drill, she alerted Dr. Maceri. After trying to determine if Mr. Masullo utilized a different staircase and was perhaps delayed, Dr. Maceri went into the building to look for Mr. Masullo. Fifteen minutes after the drill began, Dr. Maceri found Mr. Masullo teaching his class of nineteen students. When confronted by Dr. Maceri, Mr. Masullo said that he had not heard the drill. Dr. Maceri left to conclude the drill and arrange for the students to return to the building. Dr. Maceri then directed Mr. Parisi to check on the loudspeaker in the Computer Lab.

Teacher Assistant Gina Jiries ("Jiries") was working with Mr. Masullo at the time of the security drill. Ms. Jiries testified that she did not learn about the drill until Dr. Maceri came to the Computer Lab. Ms. Jiries testified that Dr. Maceri directed her to stay in the Computer Lab until the other students returned to the school. Ms. Jiries said some of the students were upset about missing the drill, and that she calmed them down. Ms. Jiries stated that Mr. Masullo asked her if she was going to escort the students to their next class. Ms. Jiries stated that, at that point, she told Mr. Masullo that she would be remaining in the Computer Lab as directed by Dr. Maceri. Ms. Jiries testified that she then observed Mr. Masullo leave the Computer Lab and return with a ladder. Mr. Masullo then placed the

[5] The Library surrounds the Computer Lab in the form of a horseshoe, and if Ms. Turtoro was in a particular spot in the Library, she would not be able to see the Computer Lab or be able to determine if Mr. Masullo was preparing to take part in a drill.

ladder under the loudspeaker and Ms. Jiries observed Mr. Masullo remove a tile from the ceiling. Ms. Jiries testified that she was not sure what Mr. Masullo was doing on the ladder. When Ms. Turtoro returned to the Library, Ms. Jiries determined that the drill had concluded as such Ms. Jiries escorted her students to their next class. Later that day, Ms. Jiries escorted another class to the Computer Lab, and noticed that Mr. Masullo was on the ladder again.

Dr. Maceri informed Mr. Parisi that Mr. Masullo's class never heard the drill announcement. Dr. Maceri directed Mr. Parisi to correct the problem. When Mr. Parisi got to the Computer Lab accompanied by Dr. Maceri, the ladder left by Mr. Masullo was under the loudspeaker. Mr. Parisi climbed the ladder, removed the ceiling tile and discovered that the loudspeaker had been disconnected. Mr. Parisi informed Dr. Maceri that the loudspeaker had been disconnected, and Dr. Maceri directed Mr. Parisi to call the vendor to have it repaired.

Later, on October 19th, Mr. Masullo called Mr. Parisi's cell phone and informed Mr. Parisi that he reconnected the loudspeaker. Mr. Masullo called Mr. Parisi once more and asked if Mr. Parisi knew who disconnected the loudspeaker. On October 20, 2016, Mr. Masullo called Mr. Parisi and inquired about what was going on. Mr. Parisi testified that he told Mr. Masullo that, "some people" had seen Mr. Masullo on the ladder, and Mr. Parisi counseled Mr. Masullo to tell the truth to Dr. Maceri.

Also on October 20, 2016, Dr. Maceri made further inquiries concerning the events of the previous day and Mr. Masullo's failure to respond to the drill. Dr. Maceri spoke to Ms. Jiries and Ms. Turtoro. Dr. Maceri then convened a meeting attended by Mr. Masullo, South Hackensack Education Association ("Association") President Lori Murphy

("Murphy") and Association Vice-President Kelly Marella ("Marella")[6]. Dr. Maceri questioned Mr. Masullo about the disconnection of the loudspeaker. Mr. Masullo initially denied that he disconnected the loudspeaker, and suggested that he received permission from Dr. DeFabiis to disconnect the loudspeaker. Upon hearing this, Dr. Maceri said that he would call Dr. DeFabiis to confirm whether, Dr. DeFabiis gave Mr. Masullo permission to disconnect the loudspeaker. Mr. Masullo testified that he brought up Dr. DeFabiis only to indicate that Dr. DeFabiis was aware of the issue with the loudspeaker. Eventually, Mr. Masullo admitted that he did not have Dr. DeFabiis's permission to disconnect the loudspeaker. Mr. Masullo confessed that he had disconnected the loudspeaker.

At the conclusion of the meeting, Dr. Maceri demanded that Mr. Masullo resign and stated that if Mr. Masullo did not have tenure he would fire Mr. Masullo immediately. Mr. Masullo refused to resign. Dr. Maceri immediately suspended Mr. Masullo. On November 2, 2016, NJEA/Uniserv Field Representative Richard Lockke ("Lockke") met with Mr. Masullo, Ms. Murphy, Ms. Marella, and Dr. Maceri in an effort to convince Dr. Maceri to reinstate Mr. Masullo to his position. This effort was not successful.

Mr. Masullo testified that he understood the seriousness of his actions, and expressed a great deal of remorse. Mr. Masullo said he would never deliberately put his students at risk.

[6] The meeting was transcribed by Elizabeth Schaefer the School Secretary.

POSITIONS OF THE PARTIES

A. The District's Position

The District vigorously argues that the only acceptable penalty for Mr. Masullo's actions is termination. In reviewing the record evidence, the District notes that "Mr. Masullo disconnected the loudspeaker in the Computer Lab without authorization from, or notification to, the school administration."

The District also contends that, once Mr. Masullo realized he missed the drill on October 19, 2016, he compounded his errors by trying to cover up his actions. The District posits that Mr. Masullo tried to have Ms. Jiries leave the Computer Lab so that he could reconnect the loudspeaker. In addition, the District maintains that when Mr. Parisi first climbed the ladder in the Computer Lab to determine what was wrong, Mr. Masullo could have admitted that he disconnected the loudspeaker, but Mr. Masullo said nothing. In addition, even though Dr. Maceri directed Mr. Parisi to reconnect the loudspeaker, Mr. Masullo took that task upon himself. The District contends that this is further evidence that Mr. Masullo hoped that no one would find out who disconnected the loudspeaker. The District maintains that Mr. Masullo panicked and tried to cover up his actions.

The District goes on to argue that at the October 20, 2016 meeting with Dr. Maceri, Mr. Masullo tried to deflect his guilt by initially asserting that Dr. DeFabiis was aware that he had disconnected the loudspeaker. The District contends that Mr. Masullo only admitted his guilt when Dr. Maceri threatened to call Dr. DeFabiis. The District portrays disconnecting the loudspeaker as being done in secret, without authorization and states that Mr. Masullo's actions endangered the lives of students and staff.

The District characterizes the testimony of Mr. Masullo's treating therapist and

social worker Dr. James Silvestri ("Silvestri") as damning[7]. Dr. Silvestri testified that Mr. Masullo had a personality that liked to solve problems. The District characterized this personality trait as being consistent with Mr. Masullo's decision to take matters into his own hands and to disconnect the loudspeaker.

The District also strenuously contends that, in the event of a real bomb threat or shooting incident, the lives of Mr. Masullo's students would have been in jeopardy.

In applying the facts to the legal standards governing this proceeding, the District argues that termination is the only acceptable penalty. The District states that any teacher that puts students and staff members lives at risk does not deserve a second chance. The District concedes that there are not many cases on point but argues that:

> Behavior rising to the level of unbecoming conduct 'need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.'

(District Brief at 3, *quoting, In re Tenure Hearing of Motley,* No. EDU 7421-97 (Initial Decision May 5, 1999), *aff'd as modified,* No. 252-99 (Comm'r Aug. 4, 1999), aff'd *o.b.*, No. 38-99 (State Bd. Dec. 1, 1999) (slip op. at 15-16).

The District also notes that conduct unbecoming can embrace a wide range of conduct, and that unfitness for tenure may be shown by a single egregious incident. The District argues that a teacher "forfeits his/her protection of tenure when 'by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected'." (District Brief at 4, *quoting, In re Tenure Hearing of Bradley,* 1990

[7] Dr. Silvestri has been treating Mr. Masullo for anxiety issues since 2008.

S.L.D. 790, 816 (Initial Decision), (internal cite omitted) *adopted,* 1990 *S.L.D.* 818 (Comm'r 1990), *aff'd as modified,* 1991 *S.L.D.* 2521 (State Bd. 1991).

The District argues that an award upholding Mr. Masullo's termination would be consistent with other cases. The District points to one case where a teacher, like Mr. Masullo, disconnected a loudspeaker. The teacher's termination was upheld by the Commissioner[8].(District Brief at 38, *quoting, In re Tenure Hearing of Thomas,* No. EDU 05594-02 (Initial Decision August 14, 2002), *aff'd,* No. 361-02 (Comm'r Oct. 9, 2002). The District also notes that the Commissioner has upheld terminations of teachers for conduct unbecoming based on a single instance of egregious behavior; *see, e.g.* (District Brief at 39-40, *citing, In re Tenure Hearing of Chaki*, No. EDU 1529-11 (Initial Decision Oct. 24, 2011), *aff'd as modified*, No. 542-11 (Comm'r Dec. 12, 2011) (making derogatory remarks to a student; (District Brief at 43-42, *quoting, In re Tenure Hearing of Cooper* EDU 6550-00 (Initial Decision Feb. 2, 2001), *aff'd*, No. 104-01 (Comm'r March 22, 2001) (teacher terminated for telling student to kiss the teacher's "butt"). (District Brief at 43-44, *quoting, In re Tenure Hearing of O'Brien*, No. EDU 5600-11 (Initial Decision Oct. 11, 2011), *adopted*, No. 544-11(Comm'r Oct. 28, 2011), *aff'd,* No. A-2452-11 (App. Div. Jan. 11, 2013) (teacher terminated for calling students criminals on Facebook page). The District also notes that an arbitrator upheld terminations for a single instance of conduct unbecoming; *see, e.g.* (District Brief at 44, *quoting, In re Tenure Hearing of Bringhurst,* No.236-8/12 (Nov. 30, 2012) (Gifford Arb.) (teacher terminated for streaking)).

The District argues that under well settled labor arbitration principles an employee

[8] As will be discussed below, the teacher in question also wore earplugs and had a history of excessive absenteeism.

may be terminated for placing others at risk. Accordingly, the District asks that Mr. Masullo's termination be upheld.

B. Mr. Masullo's Position

Mr. Masullo contends that his actions did not have an "injurious effect" upon the school or its administration, and therefore his actions did not constitute "conduct unbecoming." Mr. Masullo notes that, under similar factual circumstances a school principal's license was suspended but not revoked. (Respondent's Brief at 3-4 citing, *In re Suspension of the Certificates of Steven Kramer,* No. A-4573-08T2, 2010 N.J. Super. Unpub. LEXIS 2588 (Super. Ct. App. Div., 2010)). In the *Kramer* case, the principal of a school had a malfunctioning fire alarm system that went off several times per month and disrupted the school. Without board approval, the principal switched the alarm to "test" which had the effect of disabling the alarm system's ability to alert the fire department. A fire occurred and because of changes to the alarm, notification to the fire department was delayed. Tenure charges were filed against the principal. The State Board of Examiners did not revoke the principal's license, but imposed a suspension of two and a half months.

Mr. Masullo contends that the holding in this case is instructive, and maintains that he acted reasonably to rectify a difficult situation. He asserts that the loudspeaker caused "pain, annoyance and disruption," and affected Mr. Masullo's ability to teach and, also had a deleterious impact on his students. Mr. Masullo notes that he had complained to Dr. DeFabiis and Dr. Maceri, and to the custodial staff. Mr. Masullo also justifies his actions because he has suffered auditory damage and the loudspeaker was making his hearing difficulties worse.

Mr. Masullo points to Dr. Silvestri's testimony which generally supports the

contention that Masullo lacked malicious intent, and that Mr. Masullo was trying to protect his students from the disruption caused by the loudspeaker.

Mr. Masullo notes that prior to October 19, 2016, he never previously missed a security drill, and that he believed that because there existed other loudspeakers were outside of the Computer Lab, he would have been alerted to the drill on October 19, 2016. Mr. Masullo states that previously Ms. Jiries had heard the drills and announcements. In addition, Mr. Masullo contends that Ms. Turtoro's testimony in which she stated that she had previously alerted Mr. Masullo to other security drills lacks credibility, and notes in this regard that prior to the October 19, 2016 incident, Ms. Turtoro never spoke about issues concerning the loudspeaker with either Mr. Masullo or school administrators. Mr. Masullo also contends that the announcement for the bomb drill lasted only a few seconds and that the record was unclear concerning who made the announcement.

Mr. Masullo points to the fact that he was generally regarded as a superior teacher who freely gave his time and money to help the Memorial School. Mr. Masullo notes that his record is devoid of any serious discipline. Mr. Masullo characterizes the events of October 19, 2016 as unique unfortunate occurrence and that there has never been any other instance where Mr. Masullo jeopardized the health and safety of students or staff. Mr. Masullo contends that the health and safety of his students was his paramount concern.

Regarding the events of October 19, 2016, Mr. Masullo denies that he was surreptitiously trying to hide the fact that he disconnected the loudspeaker. Mr. Masullo states that he admitted to Mr. Maceri and Mr. Parisi that he disconnected the loudspeaker. Mr. Masullo maintains that he never would have left the ladder out in plain sight if he had

been trying to hide the fact that the loudspeaker was disconnected. Mr. Masullo maintains that he never implied that Dr. DeFabiis gave him permission to disconnect the loudspeaker, and contends that he mentioned Dr. DeFabiis at the October 20, 2016 meeting to indicate that Dr. DeFabiis was aware of Mr. Masullo's complaints regarding the loudspeaker.

Mr. Masullo states that he has shown remorse for his actions. He also points to the testimony of Mr. Lockke, the NJEA/Uniserv representative, concerning the devastating impact that an adverse finding in this proceeding would have on Mr. Masullo's career. Mr. Masullo contends that an examination of his overall record should mitigate any penalty that might be imposed. (Respondent's Brief at 11-12 citing, *In re Tenure Hearing of Leslie Ann Ramos, School District of the City of Elizabeth, Union County,* DOE Docket No. 261-9/14 at 18 (Jan. 5, 2015); *In re Tenure Hearing of John Vingara, Somerset County Vocational Technical School District, Somerset County,* DOE Docket No. 121-4/16 at 56 (Jan. 17, 2017)).

Mr. Masullo notes that if the ultimate penalty is imposed there is a very good chance that his teaching license would be revoked, and that all of his training, including doctoral level courses in Instructional Technology, would be rendered useless.

Mr. Masullo also maintains that the penalty of discharge is too severe because he was not subjected to progressive discipline. Mr. Masullo concedes that on occasion a teacher's behavior may be so egregious that a single incident might justify the ultimate penalty of termination. However, he contends that the events of October 19, 2016 merited progressive discipline and not termination. (Respondent's Brief at 13 citing, *In re Tenure Hearing of Leonard Yarbourough, State Operated School District of the City of Newark,*

Essex County, New Jersey, DOE Docket No. 259-9/15-12/14 at 15 (May 24, 2016)).

Finally, Mr. Masullo argues that, if his actions constitute conduct unbecoming, dismissal is not the appropriate remedy and that he should be reinstated and made whole for his loss in pay, seniority, benefits and emoluments. Mr. Masullo, conceded that his conduct may have constituted a lapse in judgment but he contends it should be analyzed as a single incident. Mr. Masullo contends that he has recognized his wrongdoing and expressed his remorse, and that this should have a bearing on any penalty that might be imposed (Respondent's Brief at 18 citing, *In re Tenure Hearing of Maryellen Lechelt, Edison Township Board of Education,* DOE Docket No. 360-12/14 at 84 (June 30, 2015)). Mr. Masullo cites to numerous cases where arbitrators and administrative law judges have reduced the penalties of teachers for conduct that is more egregious than Mr. Masullo's. (Respondent's Brief at 18-20 and the cites therein).

In the alternative, Mr. Masullo asks that his suspension be reduced to 120 days or less.

DISCUSSION

A. The Legal Standard

The Education Tenure Act governing teacher tenure provides in pertinent part:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . .
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

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

Tenure is a "statutory right that may not be forfeited or waived." *Spiewak v. Rutherford Bd. of Educ.*, 90 N.J. 63, 77 (1982). Tenure is designed to protect employees from dismissal "for unfounded, flimsy or political reasons". *Wright v. Bd. of Educ. Of E. Orange*, 99 N.J. 112, 118 quoting *Zimmerman v. Newark Bd. of Educ.*, 38 N.J. 65, 72 (1962). Although an employee's lack of fitness may be "demonstrated by a series of incidents" it is well established that a single "flagrant" act may be sufficient to remove a tenured teacher from his or her position. *In re Tenure Hearing of Harriman*, No. EDU 3510-12 (Initial Decision Aug. 31, 2102), *adopted*, No. 408-12 (Comm'r Oct. 12, 2012) citing, *Redcay v. State Bd. of Educ.*, 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326, 327 (E. and A. 1944).

In order to find that an employee engaged in conduct which merits removal, that

employee is "entitled to an evaluation of the conduct in terms of its relationship to the nature of the office itself, and in that context, an appraisal of the actual or potential impairment of the public interest which may be expected to result from the conduct in question." *Sch. Dist. Of Parsippany-Troy Hills v. Hess,* 97 N.J.A.R. 2D (EDU) 34, 45 (citations omitted). Charges of unbecoming conduct are determined on a "case-by-case basis." *Santiago v. Bd. of Educ. Of Elizabeth,* No. EDU 7135-98 (Initial Decision Aug. 16, 2000) (slip op. at 4), *aff'd sub nom. In re Tenure Hearing of Santiago,* No. 330-00 (Comm'r Oct. 2, 200d), *aff'd o.b.,* No. 54-00 (State Bd. Mar 9, 2001).

In *In re Tenure Hearing of Fulcomer,* 93 N.J. Super. 404 (Super. Ct. App. Div. 1967), the Court established a number factors that should be considered when deciding whether a teacher should be dismissed for unbecoming conduct. Those factors include: 1) the nature and gravity of the offenses under all the circumstances involved; 2) the teacher's attitude – i.e. whether the acts were premeditated, cruel, or done with intent to punish; 3) any evidence as to provocation, extenuation or aggravation. In *Fulcomer,* the Court recognized that there may be circumstances which should be considered which may mitigate any penalty to be imposed on a respondent teacher. These factors include: 1) the teacher's ability, record and length of service[9]; 2) the teacher's disciplinary record; and 3) the "impact of the penalty on the [teacher's] career, including the difficulty which would confront him as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in the State."

[9] *Fulcomer* involved allegations of corporal punishment. The Court noted that the Respondent's "teaching record was good and his teaching ability unquestioned. [The Respondent] had not been disciplined in any manner by the Board prior to the date of the incidents" in question.

B. The *Fulcomer* Factors Applied to Mr. Masullo

Although there is no case precisely on point, both the District and Mr. Masullo were able to locate cases where pedagogues tampered with alarm systems. The District relies in part on *In re Tenure Hearing of Thomas,* No. EDU 05594-02 (Initial Decision August 14, 2002), *aff'd,* No. 361-02 (Comm'r Oct. 9, 2002). In *Thomas,* the teacher in question not only disconnected the loudspeaker in her classroom endangering students, but on three separate occasions wore earplugs, on one occasion failed to follow proper procedures in a fire drill, was insubordinate, and was frequently absent. The administrative law judge sustained the tenure charges and dismissed the teacher.

On the other hand, Mr. Masullo relies on the case of *In re Suspension of the Certificates of Steven Kramer,* No. A-4573-08T2, 2010 N.J. Super. Unpub. LEXIS 2588 (Super. Ct. App. Div., 2010). As noted above, in *Kramer,* a school principal altered a fire alarm system which had malfunctioned and was disrupting the operation of a school. The alteration of the alarm prevented the fire department from learning that that the alarm was triggered. Having analyzed the actions of the principal and having concluded that it constituted conduct unbecoming, the State Board of Examiners weighed those actions against the difficult circumstances that the principal faced, together with his long and distinguished career, and suspended the principal for sixty-nine days. The principal appealed his loss of back pay to the Appellate Division. The Court held that the Board of Examiners' decision was supported by substantial credible evidence and was neither arbitrary nor capricious.

A comparison of *Thomas, supra* and *Kramer, supra* supports the premise that tenure issues must be determined on a case-by-case basis. While a tenured pedagogue

may have engaged in unbecoming conduct, that conduct must be weighed against that pedagogue's career and record. In *Thomas*, the teacher in question was guilty of far more than merely disconnecting an alarm in her classroom. Her overall record revealed behavior which combined with the conduct in disconnecting the alarm, in the aggregate, were considered by the Commissioner and provided the basis for upholding her dismissal. In *Kramer* by contrast, the principal's overall record as an excellent employee limited his discipline to a sixty-nine-day suspension.

The lesson drawn from these cases is that the record must be analyzed to determine if there are enough mitigating factors to reduce the ultimate penalty of dismissal. In this proceeding, Mr. Masullo's conduct in disconnecting the loudspeaker in the Computer Lab constituted a grave offense which may have endangered students and staff. Under well settled principles, this act was flagrant enough that a serious penalty is merited. It is of no moment that this might have been the only time that Mr. Masullo failed to participate in a security drill pursuant to an announcement by school administration. I credit Ms. Turtoro's testimony that on at least two previous occasions she believed that she successfully alerted Mr. Masullo to the fact that a security drill was taking place and Mr. Masullo followed protocol and participated in the drill. Once the loudspeaker in the Computer Lab was disconnected by Mr. Masullo, there existed a continuing danger to Mr. Masullo's students. It is of no significance that Mr. Masullo believed that he could hear the loudspeakers outside of the Computer Lab. Clearly, on October 19, 2016, Mr. Masullo did not hear the loudspeaker. If there had been an actual shooter or bomb scare on October 19, 2016, Mr. Masullo's students would have been in grave danger.

Nevertheless, termination is not an appropriate penalty in Mr. Masullo's case. In

reviewing the *Fulcomer* factors as applied to this case, I conclude that the penalty of termination should be reduced. While I conclude that Mr. Masullo acted recklessly when he disconnected the loudspeaker, I do not believe that he intentionally sought to endanger either his students, other staff members or himself. His testimony demonstrated a tremendous amount of remorse, and I believe that if he is reinstated he will not engage in such reckless behavior again.

I credit Mr. Masullo's testimony that he felt justified in disconnecting the loudspeaker because he became sensitive to the sounds emanating from the loudspeaker. I also credit Mr. Masullo's testimony that the loudspeaker sounds disrupted Mr. Masullo's classroom and that the sounds disturbed students on the autism spectrum.[10] Mr. Masullo's sensitivity to the sounds does not excuse his actions and he could certainly have been more forceful in pressing for an accommodation to this problem.

Mr. Masullo's conduct in this matter must be weighed against his entire record as a teacher. Although there is some evidence of poor interactions with other staff members, Mr. Masullo's disciplinary record is generally a good one, and he has shown himself to be an active participant in school activities. The testimony of both Dr. DeFabiis and Dr. Maceri establish that Mr. Masullo took leading roles in extracurricular activities, and spent his own time and money in support of the school. In addition, the record evidence established that, overall, Mr. Masullo is an excellent teacher. The District's observation and evaluation reports entered into the record support this conclusion.

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[10] As set forth below in this decision, I have concluded that Mr. Masullo shall be reinstated to his position. If he is reassigned to the Computer Lab, I make no finding regarding any accommodation, if any which should be made regarding the volume of the loudspeaker. *See, e.g. The New Jersey Law Against Discrimination, N.J.S.A.* 10:5-12.

Finally, I am mindful that, if Mr. Masullo was to be terminated, there is a very strong likelihood that his license to teach within the state of New Jersey would be revoked. While this is obviously true of all teachers faced with a loss of tenure, given Mr. Masullo's overall record, I conclude that he is deserving of one more chance. I do not believe that the actions proven in this case render Mr. Masullo unfit to teach.

It is my view that if Mr. Masullo is returned to the classroom, he will continue to be an effective teacher. Mr. Masullo is cautioned that he may not engage in any activity that could be perceived as endangering the safety and wellbeing of his students and fellow staff members. In lieu of termination, I direct that Mr. Masullo be suspended for the remainder of the 2016-2017 school year, that his increment for the 2016-2017 school year (if any) be withheld upon his return in the 2017-2018 school year, and that he receive no payments for time lost from the date of his suspension to the date of his reinstatement.

Based on the above, I render the following:

AWARD

The undersigned Arbitrator having been designated pursuant to *N.J.S.A., 18A:6-16,* as amended by *P.L. 2012, c. 26 and P.L. 2015, c. 109* ("TEACHNJ") hereby issues and AWARDS as follows:

1. The Allegation of the Charge has been proven, with such conduct constituting conduct unbecoming and providing just cause for discipline;
2. Christopher Masullo shall remain suspended for the remainder of the 2016-2017 school year;
3. Christopher Masullo shall be reinstated to his position as a tenured teacher in the South Hackensack Public School District and resume his duties in the District at the appropriate time for teachers to return to work for the 2017-2018 school year;
4. There shall be no back pay for the period of Christopher Masullo's suspension, and his increment for the 2016-2017 school year (if any) shall be withheld upon his return to employment;
5. The undersigned shall retain jurisdiction for the limited purpose of resolving any disputes concerning the remedy herein.

Dated: April 18, 2017

Ira Cure

State Of New York)
)
County of Kings)

On this 18th day of April 2017 before me personally came and appeared Ira Cure, to me known and known to me to be the individual described herein and who executed the foregoing instrument and he acknowledged that he executed the same.

Notary Public

KAMAL P. SONI
Notary Public, State of New York
No. 01SO6089949
Qualified in Kings County
Commission Expires March 31, 2019

113-17

OAL DKT. NO. EDU 05666-15
AGENCY DKT. NO. 62-3/15

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
C.C., on behalf of minor child, T.W.-C.,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/20/17

Date of Mailing: 4/20/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05666-15
AGENCY DKT. NO. 62-3/15

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Petitioner,
v.
C.C. ON BEHALF OF T.W.-C.,
Respondents.

Heather Savage-Ford, Esq., for petitioner (Deputy Counsel, for Elizabeth Board of Education)

C.C., pro se

Record Closed: March 1, 2017 Decided: March 2, 2017

BEFORE **LELAND S. MCGEE**, ALJ:

On April 22, 2015, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for hearings on December 9, 2015, August 24, 2016 and March 29, 2017, but the dates were adjourned because the parties agreed to settle the matter. A signed copy of the Settlement Agreement and General Release

indicating the terms of settlement was forwarded to the undersigned October 18, 2016 and is attached hereto.

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

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

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

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

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

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

March 2, 2017
DATE

LELAND S. McGEE, ALJ

Date Received at Agency: 3-8-17

Date Mailed to Parties: MAR 8 2017

lr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made this 20 day of December 2015, by and between the Elizabeth Board of Education ("Defendant") and its members, officers, administrators, agents, employees and attorneys, and Angelica Briceno ("Briceno"), Coleen Callinan ("Callinan") and Elliott Brooks ("Brooks") (collectively "Plaintiffs"). Plaintiffs and Defendant collectively shall be referred to as the "Parties."

WHEREAS, on or about June 3, 2014, Plaintiffs commenced an action against Defendant in the Superior Court of New Jersey, Law Division, Union County, entitled Angelica Briceno, Coleen H. Callinan, Elliott Brooks v. Elizabeth Board of Education, Docket No. UNN-L-1965-14 ("Rice Notice Action"); and

WHEREAS, Defendant thereafter commenced the following actions against Plaintiffs with the Commissioner of Education:

(a) Elizabeth Board of Education v. A.B., on behalf of minor children Ad.Y., Al.Y. and An.Y., OAL Docket No. EDU 04878-2015 N, Agency Ref. No. 64-3/15, against Briceno for unpaid tuition for three (3) students;

(b) Elizabeth Board of Education v. C.C., on behalf of minor child T.W.C., OAL Docket No. EDU 05666-2015 N, Agency Ref. No. 62-3/15, against Callinan for unpaid tuition for one (1) student; and

(c) Elizabeth Board of Education v. E.B., on behalf of minor child J.B., Agency Ref. No. 63-3/15, against Brooks for unpaid tuition for one (1) student (collectively "Unpaid Tuition Actions").

WHEREAS, Plaintiffs and Defendant have determined that it is in the best interests of all Parties to resolve all disputes between them; and

NOW, THEREFORE, in consideration of the agreements contained herein and other good and valuable consideration, the Parties agree as follows:

Consideration

1. Defendant has agreed to withdraw its Unpaid Tuition Actions against Plaintiffs in full and final settlement of any and all claims that Plaintiffs have or may have, whether known or unknown, against Defendant and its past and present members, officers, administrators, agents, employees and attorneys. Defendant will make reasonable efforts to ensure that the Unpaid Tuition Actions are withdrawn within thirty (30) days of execution of the Agreement.

2. The Parties agree to dismiss the Rice Notice Action and execute the Stipulation of Dismissal annexed hereto as Exhibit A.

Mutual Release

3. In exchange for the above consideration, the Parties hereby irrevocably and unconditionally waive, release and forever discharge any claims or rights, whether known or unknown, for any and all claims that have or could have arisen prior to the execution of this Agreement, which they have or may have against each other, including, but not limited to, any claims for counsel fees, back pay or front pay, any claims for emotional distress or pain and suffering, any claims involving tax liability stemming from this settlement and any claims arising under any federal, state or local law or ordinance, including, but not limited to, Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, et seq., U.S. Constitution Amendment XIV, the Age Discrimination in Employment Act, the New Jersey Law Against Discrimination, the New Jersey Civil Rights Act, the New Jersey Tort Claims Act, any common law claim and any other claims for harassment, discrimination, bullying or retaliation of any kind, breach of contract, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge or any other tort, contractual or quasi-

contractual claim. The above release does not include any currently unknown claims that Plaintiffs may have related to workers' compensation, or claims in which Plaintiffs allege that Defendant committed an "intentional wrong," pursuant to N.J.S.A. 34:15-8, in relation to Plaintiffs' exposure to toxic substances. If either party breaks this promise and files a lawsuit or claim waived under this paragraph, the party initiating the action will be responsible for all costs, including reasonable counsel fees, incurred in the opposing party's defense against the claims. The Parties agree that they have not waived their right to enforce this Agreement in the event of a breach.

4. Plaintiffs represent that neither they nor any non-governmental person, organization or any other entity acting on their behalf have any lawsuits currently pending asserting any claim that is waived under Paragraph 3, and Plaintiffs agree that they will not in the future file any lawsuit asserting any claim that is waived under Paragraph 3. Plaintiffs further represent that neither they nor any non-governmental person, organization or any other entity acting on their behalf have any claims or charges currently pending before any federal, state or local agency, including, but not limited to, the Equal Employment Opportunity Commission and the New Jersey Division on Civil Rights, asserting any claim that is waived under Paragraph 3, and Plaintiffs agree that they will not in the future file any claim or charge with any federal, state or local agency, including, but not limited to, the Commissioner of Education, the Equal Employment Opportunity Commission and the New Jersey Division on Civil Rights, asserting any claim that is waived under Paragraph 3. Notwithstanding the foregoing, this Agreement shall not affect the rights and responsibilities of the Equal Employment Opportunity Commission or similar federal or state agency to enforce applicable laws, and the Parties further acknowledge and agree that this Agreement shall not be used to justify interfering with Plaintiffs' protected

right to participate in an investigation or proceeding conducted by the Equal Employment Opportunity Commission or similar federal or state agency.

5. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective legal representatives, successors, heirs and assigns.

No Rehire

6. Plaintiffs acknowledge that Defendant has no obligation, contractual or otherwise, to rehire or reemploy Plaintiffs should they seek any future employment or consultant relationship with Defendant.

Representation

7. Each party to this Agreement is represented by counsel.

Confidentiality

8. The Parties agree to keep the existence and substance of this Agreement, the settlement giving rise to this Agreement and the consideration for this Agreement strictly confidential to the fullest extent permitted by law. The Parties are expressly forbidden from discussing this Agreement with any person, other than to each other, their immediate families, accountants, tax advisers and attorneys ("permitted disclosure"), and to any other individual or entity as necessary to implement the Agreement or to which they are legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, the Parties agree that they will tell the person to whom they are making the permitted disclosure that the existence and substance of this Agreement, the settlement giving rise to this Agreement and the consideration for this Agreement are to be held strictly confidential as permitted by law. The Parties specifically agree not to discuss the nature, terms and conditions of this Agreement with, among others, any representative of the media and any past, present or prospective employee of

Defendant or its agents or attorneys. The Parties understand that this provision is an integral and material part of this Agreement. If subpoenaed for any litigation or administrative action, Plaintiffs will provide Defendant notice within five (5) days of receipt of a subpoena by sending such notice via facsimile and U.S. Mail, postage prepaid, addressed to Defendant's counsel:

JODY T. WALKER, ESQ.
SCHWARTZ SIMON EDELSTEIN & CELSO LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
Telephone: (973) 301-0001
Facsimile: (973) 993-3152

Defendant may then move to quash the subpoena. If Defendant makes such a motion, Plaintiffs will await receipt of an order determining the validity of the subpoena before responding to the subpoena, provided that such action by Plaintiffs does not cause them to violate any legal obligation to comply with the subpoena.

If subpoenaed for any litigation or administrative action, Defendant will provide Plaintiffs notice within five (5) days of receipt of a subpoena by sending such notice via facsimile and U.S. Mail, postage prepaid, addressed to Plaintiffs' counsel:

PAUL W. TYSHCHENKO, ESQ.
CARUSO SMITH PICINI, P.C.
60 Route 46 East
Fairfield, New Jersey 07004
Telephone: (973) 667-6000
Facsimile: (973) 667-1200

Plaintiffs may then move to quash the subpoena. If Plaintiffs make such a motion, Defendant will await receipt of an order determining the validity of the subpoena before responding to the subpoena.

Mutual Non-Disparagement

9. The Parties agree not to disparage each other, nor to make or solicit any comments or statements related to the facts underlying the Rice Notice Action, the Unpaid Tuition Actions and this Settlement Agreement, to the media or to others that may be considered derogatory or detrimental in nature. This provision is a material part of this Agreement and any breach of this provision shall constitute a breach of the entire Agreement, thus affording the Parties any and all remedies available at law and/or equity, including, without limitation, injunctive relief and/or monetary damages.

Successors and Assigns

10. This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective successors and assigns.

Neutral Reference

11. Defendant agrees to limit remarks regarding Plaintiffs in response to any future employment inquiries, either orally or in writing, to confirming the dates of Plaintiffs' employment with Defendant, the amount of Plaintiffs' salary in the final year of their employment and the position that Plaintiffs held with Defendant. Employment inquiries shall be directed to the Superintendent of the Elizabeth Public Schools.

No Admission

12. It is further specifically acknowledged and understood by the Parties that this Agreement and/or the consideration contained herein are not an indication or admission of any liability or the violation of any law, statute or regulation or a breach of any duty by Defendant, its past and present members, officers, administrators, agents, employees or their attorneys in connection with the Rice Notice Action. It is further acknowledged that the consideration is not

indicative of any action or inaction taken by Defendant and its past and present members, officers, administrators, agents, employees or their attorneys. The consideration is given solely to alleviate the necessary time and expense of a trial, preparation therefore and/or further proceedings. This Agreement, and compliance with this Agreement, shall not be construed as an admission by any party of any liability whatsoever with respect to any matter. Defendant, its past and present members, officers, administrators, agents, employees and its attorneys expressly deny liability. This Agreement may not be introduced into evidence or used in any other way in any other legal or administrative proceeding other than a proceeding seeking the enforcement of the terms of this Agreement. None of the Parties shall be considered the "prevailing party" to this matter.

Law Governing

13. This Agreement shall be governed by the laws of the State of New Jersey, and any dispute arising out of this Agreement shall be subject to the exclusive jurisdiction of the Courts of the State of New Jersey.

Severability

14. If any provision of this Agreement, or the application thereof, is held invalid, such invalidity shall not affect other provisions or applications and, to this end, the provisions of this Agreement are declared to be severable.

Execution

15. This Agreement may be executed simultaneously in two (2) or more counterparts, each of which shall be deemed an original and all of which, when taken together, constitute one and the same document. The signature of any party to any counterpart shall be deemed a signature to, and may be appended to, any other counterpart.

Negotiated by Counsel

16. Plaintiffs and Defendant acknowledge that this Agreement is the result of arms length negotiations between the Parties, all of whom are represented by counsel. The Parties have consulted with their attorneys throughout the negotiations and have been fully advised of all of the ramifications of this Agreement, including the claims and rights that they are waiving herein and the affirmative obligations that they are agreeing to undertake. The Parties are fully satisfied with the services of their counsel with respect to both this Agreement and all other aspects of this case and they enter into this Agreement knowingly, willingly and without any coercion or improper inducements.

Assent to Terms

17. Plaintiffs further acknowledge that they were given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and were given seven (7) days from the execution of this document to revoke this Agreement, by delivering written notification to Jody T. Walker, Esq., Schwartz Simon Edelstein & Celso, LLC, 100 South Jefferson Road, Whippany, New Jersey 07981. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Plaintiffs will not be entitled to the consideration described herein.

Board Approval

18. This Agreement is subject to formal approval by the Elizabeth Board of Education.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement as of the date first written above.

Angelica Briceno

ANGELICA BRICENO

Dated: 12/7/15

Witness/Attest

Talaco

Dated: 12-7-15

COLEEN CALLINAN

Dated: _____

Witness/Attest

Dated: _____

ELLIOT BROOKS

Dated: _____

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement as of the date first written above.

_____
ANGELICA BRICENO

Dated: _____

Witness/Attest

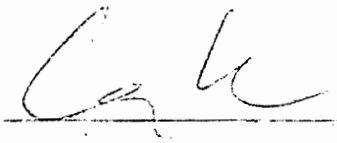
_____

Dated: _____

COLEEN CALLINAN

Dated: 12/15/15

Witness/Attest



Dated: 12/15/15

_____
ELLIOT BROOKS

Dated: _____

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement as of the date first written above.

_____
ANGELICA BRICENO

Dated: _____

Witness/Attest

_____

Dated: _____

_____
COLEEN CALLINAN

Dated: _____

Witness/Attest

Dated: 12/21/15

Elliott Brooks
ELLIOT BROOKS

Dated: 12/20/15

Witness/Attest

Dated: 12/24/15

ELIZABETH BOARD OF EDUCATION

Date: 2/21/17

Stanley Neron, Board President

Dated: _____

Witness/Attest

HAROLD E. KENNEDY, JR.
Board Secretary/Business Admin.

Dated: 2/21/2017

C
O
P
Y

BOARD OF EDUCATION

RESOLUTION

BE IT RESOLVED that the Elizabeth Board of Education hereby approves the attached settlement of Agreement and Release with former employees Angelica Briceno, Coleen H. Callinan, and Elliott Brooks; and

BE IT FURTHER RESOLVED that the Elizabeth Board of Education authorizes the Board President and the School Business Administrator/Board Secretary to execute the Settlement Agreement and Release on behalf of the Board; and to take such further steps as may be necessary to effectuate the within Settlement Agreement and Release and carry out this action of the Board.

Elizabeth, New Jersey
January 19, 2017

16-201

114-17

PATRICIA MCRAE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a non-tenured second grade teacher employed by the respondent Board through the Provisional Teacher Program Alternate Route for the 2015-2016 school year – appealed the non-renewal of her contract following notification, by letter received on or about May 11, 2016, that she would not be renewed for the 2016-2017 school year based upon her performance and conduct. Petitioner filed a petition for emergent relief on August 24, 2016, alleging that she was terminated as a result of ineffective and partially effective performance ratings. Petitioner asserted that funds were withheld from her paycheck to pay for required mentoring services that were never provided to her, and therefore her evaluations should be viewed as unfair and considered null and void. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue herein, and the matter is ripe for summary decision; petitioner had notice of the Board's decision to non-renew her contract as of May 11, 2016; the time for filing a petition is clearly set forth at *N.J.A.C.* 6A:3-1.3(i), which provides that a petition of appeal before the Commissioner must be filed no later than the 90th day from the date of receipt of the notice of a final order or ruling; in this case, the petitioner filed her appeal on August 24, 2016, which was 106 days after she received notice of non-renewal; and jurisdiction over whether respondent had a contractual obligation to provide mentoring services or failed to provide such services does not rest with the Commissioner or with the OAL. The ALJ concluded that the within petition was not timely filed pursuant to *N.J.A.C.* 6A:3-1.3(i). Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ that the within petition was untimely filed and must be dismissed on those grounds. In so determining, the Commissioner clarified that petitioner's allegations related to teacher mentoring services implicate New Jersey school law, as all novice teachers are required to enroll and successfully complete the respective district's mentoring program in order to become eligible for a standard teaching certificate. *N.J.A.C.* 6A:9B-8.4, 8.7. Accordingly, the recommended decision of the OAL was adopted with modification. The petition was dismissed.

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

Issued 4/20/17

OAL DKT. NO. EDU 13150-16
AGENCY DKT. NO. 230-8/16

PATRICIA MCRAE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the petition of appeal was time barred under *N.J.A.C.* 6A:3-1.3(i)[1] because, consistent with well-settled law, the ninety-day time period accrues from the employee's receipt of the board of education's notice of nonrenewal.[2] Furthermore, a *Donaldson* hearing – an "informal appearance" before the board "to permit the staff member to convince the members of the board to offer reemployment"[3] – does not toll the time for an employee to file a petition of appeal with the Commissioner because the *Donaldson* hearing occurs *after* the board has already made its decision to not renew the employee's contract and has *acted* on that decision by providing notice of nonrenewal to the employee. Therefore, the day that petitioner received the notice of nonrenewal from the

[1] *N.J.A.C.* 6A:3-1.3(i) provides in relevant part: "The petitioner shall file a petition no later than the 90th day from the *date of receipt of the notice of a final order, ruling or other action* by the district board of education . . . ." (emphasis added).

[2] *E.g.*, *Suarez v. State-Operated School District of the City of Jersey City*, OAL Dkt No. EDU 11077-04, Commissioner Decision No. 393-05 (Oct. 28, 2005); *Perkins v. Bd. of Educ. of the Twp. of Gloucester*, OAL Dkt. No. EDU 13750-15, Commissioner Decision No. 76-16, (Feb. 19, 2016); *Campbell v. Bd. of Educ. of the City of Camden*, OAL Dkt. No. EDU 480-12, Commissioner Decision No. 359-12, (Aug. 30, 2012); *Clark v. Bd. of Educ. of the Twp. of Winslow*, 2011 U.S. Dist. LEXIS 12981 (D.N.J. Feb. 9, 2011).

[3] *See N.J.S.A.* 18A:27-4.1.

District – May 11, 2016 – is the date from which petitioner had ninety days to file her cause of action. Additionally, requesting a statement of reasons and a *Donaldson* hearing does not provide "constructive notice" to a board that its former employee intends to file a petition of appeal with the Commissioner at a later time. There is simply no legal basis for such assertions made by the petitioner.

The Commissioner clarifies that the petitioner's allegations related to teacher mentoring services do implicate New Jersey school law. All novice teachers – irrespective of whether they are participants in the Alternate Route Program – are required to enroll in and successfully complete the respective district's mentoring program in order to become eligible for a standard teaching certificate. *See N.J.A.C.* 6A:9B-8.4, 8.7. Therefore, whether petitioner received proper mentoring services (or allegedly failed to take advantage of the mentoring services offered to her by the District) falls within the purview of the Commissioner. The record in this matter, however, is insufficient to consider the merits of petitioner's allegations regarding the District's mentoring program. More importantly, petitioner's appeal is time barred pursuant to *N.J.A.C.* 6A:3-1.3(i).[4]

Accordingly, the recommended decision of the ALJ – as modified herein – is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed with prejudice.

IT IS SO ORDERED.[5]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/20/17

Date of Mailing: 4/20/17

[4] The record also indicates that the petitioner did not dispute the contents of her evaluations or raise her concerns about the mentoring program prior to the filing of this untimely petition.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 13150-16
AGENCY DKT. NO. 230-8/6

PATRICIA MCRAE,
Petitioner,
v.
NEWARK STATE-OPERATED SCHOOL DISTRICT,
Respondent.

Hassen Ibn Abdellah, Esq., for Petitioner

Bernard Mercado, Esq., for respondent Newark Public School District

Record Closed: February 16, 2017 Decided: March 9, 2017

BEFORE **LELAND S. MCGEE**, ALJ:

STATEMENT OF THE CASE

Respondent (Board or District) hired Petitioner as a non-tenured second-grade teacher through the Provisional Teacher Program Alternate Route, for the 2015-2016 school year. Respondent gave Petitioner an "Ineffective" mid-year rating, a "Partially Effective" annual rating, and a "Partially Effective" observation rating throughout the

school year. Respondent alleged that Petitioner was also the subject of an incident relating a charge of conduct unbecoming. On May 10, 2016, Respondent gave Petitioner formal notice that her teaching contract was not being renewed for the 2016-2017 school year based on her performance and conduct. Petitioner filed an application for a due process hearing and emergent relief, which the undersigned denied.

PROCEDURAL HISTORY

1. On May 10, 2016, the Board issued a Notice of Non-Renewal.
2. On May 18, 2016, Petitioner requested a Donaldson hearing.
3. On June 27, 2016, the Donaldson hearing was held.
4. On June 29, 2016, the Board issued a letter confirming non-renewal of Petitioner's employment contract.
5. On August 24, 2016, Petitioner filed an application for Emergent Relief.
6. On August 31, 2016, this matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to -15.
7. On September 22, 2016, the undersigned denied Petitioner's application for Emergent Relief.
8. On October 7, 2016 the Department of Education affirmed the September 22, 2016, Order of Denial.
9. On November 22, 2016, the Board filed a Motion for Summary Decision.
10. On December 22, 2016, Petitioner, with new counsel, filed an Answer and Brief in opposition to respondent's Motion for Summary Decision.
11. On January 6, 2017, the Board filed a Reply Brief in Further Support of Summary Decision was received by OAL.
12. The first day of hearing is scheduled for February 21, 2017.

STATEMENT OF FACTS

Petitioner Patricia McRae was hired as a non-tenured second-grade teacher at First Avenue Elementary School through the Provisional Teacher Program Alternate Route (Alternate Route) for the 2015-2016 school year.

Throughout the school year, McRae received teacher evaluations. In her "Teacher Mid-Year Review 15-16" dated February 16, 2016, McRae received a rating of overall ineffective. (Pet'r Pet. for Emer. Relief at Appendix A.) The mid-year review also noted that McRae had not had any issues with tardiness or absenteeism. (Ibid.)

On April 15, 2016, McRae received her "Teacher Annual Evaluation 15-16," dated April 14, 2016, where McRae was rated as overall partially effective. (Ibid.) The annual evaluation indicated that McRae had no issues with tardiness or absenteeism and that McRae had taken two personal days. (Ibid.) This evaluation also noted that McRae had been paired with a mentor and has not used that opportunity to her full advantage. (Ibid.) The evaluation did not specify the name of the mentor or the date that the mentor was appointed to provide guidance to McRae.

On or about May 11, 2016, McRae received notice that her employment as a teacher at First Avenue Elementary would be terminated as of June 30, 2016. (Pet'r Opp. to Summ. Decision at 2.) The letter indicated that McRae's non-renewal was based on teacher performance evaluations and professional conduct. The letter was sent on or before May 15, 2016, as required by N.J.S.A. 18A:27-10. The letter did not indicate any specific instances of conduct that were considered to lead to McRae's non-renewal.

On May 18, 2016, Petitioner McRae requested a Donaldson hearing to take place prior to June 30, 2016, to determine why her employment with the District was not renewed. In a letter dated June 16, 2016, McRae was granted a Donaldson hearing, which took place on June 27, 2016, at 10 a.m. at the District's administrative offices located at 2 Cedar Street, Room 802, Newark, New Jersey. On June 29, 2016, McRae

received a letter from the Board advising her that the non-renewal was upheld following the Donaldson hearing. The District based its non-renewal of McRae's employment on the above-referenced evaluations and unspecified conduct.

On August 29, 2016, McRae filed a Petition for Emergent Relief. The Petitioner alleges that her employment with the Newark Public School District was terminated as a result of ineffective and partially-effective performance ratings and conduct unbecoming. (Pet'r Pet. for Emer. Relief at 1.) McRae asserts that she has the legal right to be mentored pursuant to the state alternate route program requirements and her employment contract. (Id. at 2.) McRae further asserts that she paid one thousand ($1,000) dollars for mentor services through paycheck deductions and that such services were never provided to her. (Ibid.) There are no records of her meeting with a mentor, being observed by a mentor, receiving mentorship during her time teaching in the classroom, or of a mentoring plan. (Ibid.) McRae asserts that this lack of mentoring was intentional and deliberate. (Ibid.) As stated above, the annual performance evaluation notes that she had been assigned a mentor but failed to take full advantage of that opportunity. (Pet'r Pet. for Emer. Relief at Appendix A.) Petitioner asserts that because she never received any mentoring services, her evaluations should be viewed as unfair and considered null and void. (Pet'r Pet. for Emer. Relief at 2.) However, Petitioner never contested her evaluations at or after the time she received them.

The District asserts that McRae's employment contract did not contain any provision or requirement on its face obligating the District to provide specific "mentoring services" to McRae during the 2015-2016 school year as part of the contract. (Resp't Mot. for Summ. Decision at 3.). The District asserts that McRae was the subject of an incident related to unbecoming conduct during the 2015-2016 school year but does not cite any details of the incident, does not offer any disciplinary record, or other information to support this allegation. (Resp't Mot. for Summ. Decision at 2.) McRae argues that any allegations of conduct unbecoming are unfounded as she never had an incident relating to tardiness, absenteeism, behavioral misconduct or interpersonal conflict with a colleague, parent or otherwise. (Pet'r Pet. for Emer. Relief at 1.)

According to an audio file from the New Jersey Department of Labor and Workforce Development (DLWD), when McRae applied for unemployment benefits after her non-renewal, the Board indicated that the reason she was terminated was a reduction in force, rather than poor performance or conduct issues contrary to her letter of non-renewal. (Pet'r Opp. to Mot. for Summ. Decision at 14.) As a result, DLWD did not conduct any fact finding with respect to Petitioner's performance or conduct and McRae was granted unemployment benefits. No date was provided for the unemployment benefit application or when Petitioner began receiving benefits.

On September 22, 2016, the undersigned denied Petitioner's application for Emergent Relief.

LEGAL ANALYSIS AND DISCUSSION

"Ninety-day" Rule

Under N.J.A.C. 6A:3-1.3(i), a "Petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing (ninety-day rule)." As the New Jersey Supreme Court explained,

> Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. See Burns v. West Am. Corp., 137 N.J. Super. 442, 446 (Dist. Ct. 1975). Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. See Apex Roofing Supply Co. v. Howell, 59 N.J. Super. 462, 467 (App.Div.1960). A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. Ochs v. Fed. Ins. Co., 90 N.J. 108, 112 (1982). The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs. Ibid. (quoting Farrell v. Votator Div., 62 N.J. 111, 115 (1973)).

> [Kaprow v. Bd. of Educ. of Berkley Twp., 131 N.J. 572, 587 (1993).]

Thus, "[w]hen a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action." Farrell, supra, 62 N.J. at 115.

The ninety-day time period for filing a petition is to be strictly construed and claims that are not timely filed are precluded from review. Raymond v. Bd. of Educ. of the Borough of River Edge, 94 N.J.A.R.2d (EDU) 203, aff'd, 94 N.J.A.R.2d (EDU) 431. If compliance with the ninety-day rule is disputed, that procedural matter should be decided prior to any decision on the merits. Nissman v. Bd. of Educ. of the Twp. of Long Beach Island, 272 N.J. Super. 373, 380-81 (App. Div. 1994).

An agency regulation that focuses on the date of the employer's act as the accrual date for a cause of action, rather than the date on which the consequences of the act is directly felt by the employee (termination), is not inherently arbitrary or capricious. Id. at 381; see Nissman, supra, at 379 (cause of action accrued when principal "knew or should have known" that they were not going to be offered a new contract for the following year); Chardon v. Fernandez, 454 U.S. 6, 8, 102 S. Ct. 28, 29, 70 L. Ed. 2d 6, 9 (1981), rehearing denied, 454 U.S. 1166, 102 S. Ct. 1042, 71 L. Ed. 2d 322 (1982) (Where non-tenured administrator was notified by letter on or before June 18, 1977, that he would be terminated at a specified date between June 30 and August 8, 1977, his cause of action accrued on the date he received the letter, not the date on which his appointment ended.); Delaware State College v. Ricks, 449 U.S. 250, 259-61, 101 S. Ct. 498, 504-06, 66 L. Ed. 2d 431, 440-42 (1980) (Cause of action accrued on the date Ricks was advised that he would be denied tenure rather than on the date when his employment terminated.); Suarez v. State-operated School District of Jersey City, EDU 11077-04, Initial Decision (September 13, 2005), http://njlaw.rutgers.edu/collections/oal/ (where a teacher was not permitted to toll the ninety-day rule while awaiting a statement of reasons pursuant to Donaldson).

It is undisputed that Petitioner received a notice of non-renewal on or about May 11, 2016. As of May 11, 2016, McRae was on notice that the Board did not intend to offer her employment for the 2016-2017 school year. Under N.J.A.C. 6A:3-1.3(i), August 9, 2016, was the ninetieth (90^{th}) and final day that McRae could have timely filed her petition. I **CONCLUDE** that, pursuant to N.J.A.C. 6A:3-1.3(i) and existing case law, the ninety-day rule began to run when Petitioner received notice of non-renewal on or about May 11, 2015.

A request for a Donaldson hearing does not provide the Board with constructive notice of Petitioner's intent to file a petition opposing the non-renewal and does not fulfill the requirements of the ninety-day rule under N.J.A.C. 6A:3-1.3(i). In Lauchenaur v. State-operated School District of the City of Newark, EDU 11820-08, Initial Decision (February 3, 2009), partially adopted, Comm'r (March 18, 2009), <http://njlaw.rutgers.edu/collections/oal/final/edu11820-08.pdf>, the Honorable Jesse Strauss, Administrative Law Judge (ALJ) held that in a non-renewal or a termination, a teacher is required to file his petition within ninety days of the notice of non-renewal, not within ninety days of the exhaustion of other avenues and mechanisms. Ibid. (citing LeMee v. Bd. of Educ. of the Village of Ridgewood, 1990 S.L.D. 663, 667) (the day Petitioner received notice that her contract was not renewed was the date the ninety-day timeline commenced, notwithstanding any efforts to appear before the board to change its decision).

Court decisions in cases similar to the present case have established that it is the first notice of non-renewal—not the letter confirming non-renewal after a hearing or review—that triggers the ninety-day limitation period. See Pacio v. Bd. of Educ. of Lakeland Reg'l '1 High School Dist., 1989 S.L.D. 2060, 2069 (the first written communication provided to a staff member of an action by the Board initiates the ninety-day timeline); Wise v. Bd. of Educ. of the City of Trenton, decided by the Commissioner (September 11, 2000), aff'd, State Bd. (January 4, 2001) (when a teaching staff member receives notice that his contract will not be renewed is when the ninety-day period is initiated).

In the case at bar, the Board issued a letter of non-renewal on May 10, 2016. Thus, Petitioner's cause of action accrued on the date McRae received the letter, which was on or about May 11, 2016. Petitioner's cause of action did not accrue on the date her employment ended nor did it accrue on the date that she requested a Donaldson hearing or when she received notice of non-renewal after the Donaldson hearing. McRae filed her petition on August 24, 2016, one hundred and six (106) days after she received the notice of non-renewal. As such, I **CONCLUDE** that Petitioner's claim is time barred pursuant to N.J.A.C. 6A:3-1.3(i).

Jurisdiction

The Commissioner and the OAL do not have jurisdiction to decide contractual issues that do not arise under the school laws. N.J.S.A. 18A:6-9 states, "[t]he commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner."

The "Non-Tenured Alternate Route Program" is mentioned in two places in the New Jersey Statutes. One mention is in N.J.S.A. 18A-36A:14(c) which states that, "[a]ll classroom teachers and professional support staff shall hold appropriate New Jersey certification. The commissioner shall make appropriate adjustments in the alternate route program in order to expedite the certification of persons who are qualified by education and experience." Second, N.J.S.A. 18A:37-22 states that participants in the Alternate Route Program must satisfactorily complete a program on harassment, intimidation, and bullying prevention within one year of being employed. Neither statute specifies any mentoring requirement or that districts should contract to provide mentoring services as part of the Alternate Route Program.

In general, contractual disputes do not fall within the Commissioner's jurisdictional mandate unless they arise under the school laws or otherwise implicate the agency's special expertise. Dolan v. Centuolo, A-2470-10T4, A-2710-10T4 (App.

Div. July 9, 2012), http://njlaw.rutgers.edu/collections/courts/ (quoting Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 425-26 (App. Div. 2002). The Appellate Division has held that the Commissioner lacks jurisdiction to decide certain contractual issues. See Picogna v. Bd. of Educ. of Cherry Hill, 249 N.J. Super. 332, 334-35 (App. Div. 1991) (holding that jurisdiction over a purely contractual claim of wrongful termination of non-tenured assistant superintendent was properly venued in Superior Court and not before the Commissioner); S. Orange-Maplewood Educ. Ass'n v. Bd. of Educ. of S. Orange and Maplewood, 146 N.J. Super. 457, 462-63 (App. Div. 1977) (holding that the Commissioner did not have jurisdiction over a dispute involving interpretation of sabbatical leave provisions of an agreement entered into by the school board and the teachers' association as there was nothing in the dispute involving interpretation of any specific statute).

In the present case, McRae's claim that she did not receive proper mentoring services pursuant to either the Newark Public School's Mentor handbook or the Non-Tenured Alternative Route Program is a contractual issue that does not arise under the school laws as required by N.J.S.A. 18A:6-9. As a result, I **CONCLUDE** that jurisdiction over whether Respondent had a contractual obligation to provide mentoring services or failed to provide such services does not rest with the Commissioner of Education or with the OAL. Petitioner may be entitled to remedies in a proper venue.

N.J. Department of Labor

Following the non-renewal, Petitioner applied for unemployment insurance benefits with the N.J. Department of Labor and Workforce Development. Petitioner asserts that the DLWD maintained an audio recording of the application process that indicates the reason for Petitioner's termination other than what appears in her non-renewal letter. Petitioner asserts that the audio recording states that the reason she was let go was a result of a reduction in force. This is contrary to the reason stated in the non-renewal letter. The undersigned is persuaded that the audio recording is not germane to the substance of this proceeding. For the Commissioner to have jurisdiction over a controversy or dispute, it must arise under the school laws or under the rules of

the New Jersey Board of Education. N.J.S.A. 18A:6-9. Issues related to unemployment compensation generally arise under N.J.S.A. 43:21. Specifically N.J.S.A. 43:21-11 grants DLWD the duty and power to adopt and amend regulations related to the administration of, appeals, and other issues involving unemployment benefits. As such, the DLWD has jurisdiction over unemployment benefits and any relevant determinations regarding the reasons for termination. This proceeding is not the appropriate venue to revisit the unemployment determination regarding Petitioner. If she wishes to appeal DLWD's determination regarding her benefits, or alternatively to contest the reason that the District provided as to her termination, she must do so through the appropriate DLWD appeals process.

Finally, the issue of why Petitioner was terminated as provided by the Board to DLWD was not raised in McRae's original Petition. Unemployment Insurance Benefits determinations are not properly within the jurisdiction of this proceeding. Therefore, I **CONCLUDE** that McRae's assertion regarding DLWD's determination must be dismissed as a matter of law.

Petitioner Barred From Future Employment

The "non-renewal notice" dated May 10, 2016, states that "your employment with Newark Public Schools will be terminated on June 30, 2016, and **you will not be considered for future employment within the district**." (Emphasis added.) The Board has not offered any evidence of misconduct by McRae. There is no evidence of a disciplinary record with the District, her evaluations indicate timeliness, and there is no issue of absenteeism. Respondent has not offered any legal basis to support its decision to permanently bar Petitioner from employment within the district. N.J.S.A. 2C:51-2(a)(1) states that, "A person holding any public office, position, or employment, elective or appointive . . . who is convicted of an offense shall forfeit such office or position if: [h]e is convicted . . . of an offense involving dishonesty or of a crime of the third degree or above." Similarly, a teacher may be permanently barred from public employment if they are convicted of, "an offense involving or touching on his public office, position or employment shall be forever disqualified from holding any

office or position of honor, trust or profit under this State or any of its administrative or political subdivisions." N.J.S.A. 2C:51-2(d). "Involving or touching on his public office, position or employment" means that the offense was related directly to the person's performance in, or circumstances flowing from, the specific public office, position or employment held by the person. Ibid. "The Legislature intended wide latitude in the employing authority to determine fitness for permanent employment. It is clear that public employment may not be refused upon a basis which would violate any express statutory or constitutional policy." Zimmerman v. Bd. of Educ., 38 N.J. 65, 80 (1962) (where the New Jersey Supreme Court upheld dismissal of a teacher who had not completed three calendar years of employment as required to be considered tenured).

In the present case, the Board has not alleged any facts regarding McRae's conduct except that her teaching evaluations did not indicate her performance was at the desired level. District evaluations explicitly indicate that McRae had no problems with tardiness or absenteeism and do not mention a single issue of conduct. The District has simply alleged that McRae was the subject of an incident related to unbecoming conduct during the 2015-2016 school year. However, it has not provided any details of any incident, or evidence of a disciplinary record, or any additional information to support this allegation. (Resp't Mot. for Summ. Decision at 2.) It is undisputed that McRae has not been convicted of a crime of dishonesty or involving her position as a teacher that would disqualify her from teaching pursuant to N.J.S.A. 2C:51-2(a)(1) or N.J.S.A. 2C:51-2(d). As there is no relevant conviction at issue and respondent District has put forth an allegation with no background or evidence, I **CONCLUDE** that the District may not permanently bar McRae from future employment within the District.

Summary Decision

Under the New Jersey Uniform Administrative Procedure Rules, a party may move for summary decision regarding all or any substantive issues in a case. N.J.A.C. 1:1-12.5(a). Motions for summary decision may be granted if the papers and discovery, together with any supporting affidavits, show there is no genuine issue of material fact

and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). A motion for summary decision is almost identical to the standard used for summary judgment under the New Jersey Rules of Court, which provides that summary judgment should be granted if:

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences there from favoring the non-moving party, would require submission of the issue to the trier of fact.
>
> [R. 4:46-2(c).]

In Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 536 (1995), the New Jersey Supreme Court further refined the standard for summary decision with this analysis: "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Thus, a court should deny a motion for summary judgment only where the party opposing the motion has come forward with evidence that creates a genuine issue of material fact. Id. at 529. The Brill Court stated:

> A determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'
>
> [Id. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose." Brill, supra, 142 N.J. at 541.

For a party opposing summary decision to prevail, that party must file a responding affidavit setting forth specific facts demonstrating the existence of a genuine issue that can only be determined by an evidentiary proceeding. Ibid. The opposing party must demonstrate, moreover, that the disputed issue of fact is material to the adjudication. See Frank v. Ivy Club, 120 N.J. 73, 98 (1990). The genuinely disputed material fact must be essential to the decision in the case. Ibid. In addition, the opposing party must establish the issue with competent evidential materials. Robbins v. Jersey City, 23 N.J. 229, 240-214 (1957). "Bald allegations or naked conclusions" are insufficient to warrant an evidentiary hearing. J.D. ex rel. D.D.H. v. N.J. Div. of Developmental Disabilities, 329 N.J. Super. 516, 525 (App. Div. 2000). If the opposing party fails to raise a material factual issue with competent proofs, then the issue should be resolved on summary decision. Frank, supra, 120 N.J. at 98-99.

A contested case can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts indicate that a particular disposition is required as a matter of law. In re Robros Recycling Corp., 226 N.J. Super. 343, 350 (App. Div.), certif. denied, 113 N.J. 638 (1988). A summary decision must be based on an examination of the totality of circumstances, mitigating and aggravating factors, adequate factual findings and conclusions of law. Ibid.

Respondent Board issued a letter to McRae on May 10, 2016, indicating that her employment would not be renewed for the 2016-2017 school year. McRae received that letter on or about May 11, 2016. It is not disputed that Petitioner filed her petition for emergent relief on August 24, 2016. She filed her petition 106 days later in violation of N.J.A.C. 6A:3-1.3(i). The latest that McRae could have filed a claim would have

been August 9, 2016. There is no genuine dispute of the fact that the Petition was filed after August 9, 2016, and outside the ninety-day requirement.

For the foregoing reasons, I **CONCLUDE** that Respondent is entitled to Summary Decision as a matter of law.

ORDER

It is hereby **ORDERED** that Respondent's Motion to Dismiss is **GRANTED** and Petitioner's requests for relief are hereby **DENIED** except as otherwise decided below.

It is hereby **ORDERED** that Respondent may not permanently bar Petitioner from future employment within the District based upon the **Finding of Facts** of this proceeding.

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

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

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

March 9, 2017
DATE

LELAND S. McGEE, ALJ

Date Received at Agency: March 9, 2017

Date Mailed to Parties: MAR 10 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

LSM/lr

115-17

OAL DKT. NO. EDU 7660-16
AGENCY DKT. NO. 148-5/16

A.T., on behalf of minor child, B.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/20/17

Date of Mailing: 4/20/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 07660-16
AGENCY DKT. NO. 148-5/16

A.T., ON BEHALF OF MINOR CHILD, B.T.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,
Respondent.

A.T., petitioner, pro se

Daniel H. Long, Esq. for respondent (Wade Long Wood & Long, attorneys)

Record Closed: March 2, 2017 Decided: March 8, 2017

BEFORE **SARAH G. CROWLEY**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 23, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

March 8, 2017
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: 3/10/17

Mailed to Parties: 3/10/17

/mel

SETTLEMENT AGREEMENT

Petitioner, Alisha Tildon, on behalf of B.T., a minor student and Respondent, Black Horse Pike Regional School District, agree as follows:

(1) Respondent agrees to end B.T.'s suspension and reinstate him back into school effective June 3, 2016.

(2) Petitioner acknowledges that B.T. will not be permitted to go on the Senior Class trip.

(3) Respondent agrees to amend B.T.'s student record to reflect a ten (10) day suspension for the incident that occurred on April 7, 2016.

(4) Respondent agrees to give Petitioner a full refund for the Senior Class trip.

(5) Respondent will permit B.T. to walk at graduation, assuming all other requirements are met.

(6) Petitioner agrees to hereby withdraw her Petition and Request for Emergent Relief, filed with the Office of Administrative Law, under OAL Docket No.: EDU 07660-2016 S, Agency Ref. No.: 148-5/16.

Alisha Tildon

Dated: 8/1/16

Daniel H. Long, Esquire
Attorney for the Black Horse Pike
Regional School District

Dated: 6/30/16

RECEIVED
2017 MAR -2 P 4: 17
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

J.T., ON BEHALF OF MINOR CHILDREN, J.T., A.T., AND B.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

In November 2016, *pro se* petitioner appealed the determination of the respondent Board that his children are ineligible for a free public education in respondent's school district. Petitioner contended that he resides at an address in Monmouth Junction, which is within the South Brunswick school district. The Board contended that a residency investigation revealed that petitioner and his children actually reside in Franklin Township. The Board filed a motion to dismiss, asserting that the petition was late filed.

The ALJ found, *inter alia*, that: the facts of this matter were set forth in respondent's brief in support of its motion to dismiss and in a certification from the Superintendent of Schools, and the tuition costs for the 2015-2016 school year were contained in a letter from the New Jersey Department of Education dated February 17, 2017; the facts contained therein were adopted as if set forth at length within the Initial Decision. The ALJ concluded, *inter alia*, that: petitioner failed to timely file a residency appeal in accordance with *N.J.S.A.* 18A:38-1(b); respondent's motion to dismiss should be granted as petitioner failed to file a response thereto; and respondent is entitled to tuition for the period of ineligible attendance. Accordingly, the ALJ denied the petitioner's residency appeal and ordered tuition reimbursement at a rate of $71 per day per child for the period of ineligible attendance.

The Commissioner remanded the matter to the OAL, finding that the ALJ failed to include a factual discussion or make factual findings in this case. As *N.J.A.C.* 1:1-18.3 requires that Initial Decisions include a factual discussion and make factual findings, the Commissioner remanded the matter for inclusion of a factual discussion.

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

Issued 4/20/17

OAL DKT. NO. EDU 19075-16
AGENCY DKT. NO. 298-11/16

J.T., ON BEHALF OF MINOR CHILDREN, J.T., A.T., AND B.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner finds that the Initial Decision does not contain a recitation of the facts. Instead, the Administrative Law Judge (ALJ) indicates that the facts set forth in the Board's brief in support of its motion to dismiss, in the Certification of Gary McCartney, and in a letter from the New Jersey Department of Education dated February 17, 2017, are adopted as if set forth at length; however, the ALJ does not attach those documents as exhibits to the Initial Decision. *N.J.A.C.* 1:1-18.3 requires that Initial Decisions include a factual discussion and make factual findings. As no such factual findings are set forth in the Initial Decision, the Commissioner is constrained to remand this matter for inclusion of a factual discussion.[1]

[1] The Commissioner notes that pursuant to *N.J.S.A.* 18A:38-1, when an appeal is filed within 21 days of the date of the district's decision, no child shall be removed from the school during the pendency of the proceedings before the Commissioner. Nevertheless, appeals may be filed after expiration of the 21-day period, but the student's right to attend school during the pendency of the appeal is not guaranteed by operation of statute. See *Attendance at School Based on Domicile or Residency in the School District: Sample Forms, Notices, and Informational Documents*.

Accordingly, the Initial Decision of the OAL is rejected, and the matter is hereby remanded for the reasons expressed above.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/20/17

Date of Mailing: 4/20/17

http://www.state.nj.us/education/code/current/title6a/chap22sample.pdf, p. 15.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 19075-16
AGENCY REF. NO. 298-11/16

J.T.. ON BEHALF OF MINOR CHILDREN, J.T., A.T. AND B.T.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDLLESEX COUNTY,

Respondent.

J.T., Petitioner, pro se

Adam S. Herman, Esq., for Respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: March 3, 2017 Decided: March 8, 2017

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges Respondent Board of Education's residency determination.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on December 20, 2016, as a contested case. N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to –13.

A prehearing conference was held on January 6, 2017. A prehearing order, dated January 6, 2017, was entered by the undersigned.

Respondent filed a motion to dismiss the petitioner's appeal with the Bureau of Controversies and Disputes on December 16, 2016, prior to the matter being transferred to the OAL, and before a decision on said motion was made. Respondent simultaneously filed its Answer and Cross Petition with the Bureau of Controversies and Disputes.

Pursuant to the prehearing Order entered on January 6, 2017, Petitioner was permitted ten days from the receipt of said motion to respond. No response was submitted.

On February 24, 2017, Respondent filed a certification of Gary McCartney, Superintendent of the South Brunswick Board of Education.

On March 3, 2017, Respondent's counsel provided a letter from the New Jersey Department of Education setting forth Tuition Costs per Pupil for the 2015-2016 school year.

ISSUES

1. Did Respondent err in its determination that Petitioner's three children did not reside in South Brunswick and were ineligible to attend school in the South Brunswick School District; and, is petitioners claim time barred?

2. Are Respondents entitled to tuition reimbursement?

FACTUAL DISCUSSION

The Preliminary Statement and the Factual Background set forth in Respondent's brief in support of its motion to dismiss are adopted herein as if set forth at length.

The facts set forth in the Certification of Gary McCartney are adopted herein as if set forth at length.

The tuition costs per pupil for the 2015-2016 school year contained in the letter from the New Jersey Department of Education, dated February 17, 2017, are adopted herein as if set forth at length.

LEGAL ANALYSIS AND CONCLUSION

Standard of Review

N.J.A.C. 6A:3-1.5(g) states, "Nothing in this section precludes the filing of a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. Briefing on such motions shall be in the manner and within the time fixed by the Commissioner, or by the ALJ if the motion is to be briefed following transmittal to the OAL."

In ruling on a motion to dismiss:

> The judge considers whether all of the evidence together with all legitimate inferences could sustain a judgment in favor of the party opposing the motion. The judge is not concerned with the weight, worth, nature or extent of the evidence. The judge must accept all evidence supporting the party defending against the motion and accord that party the benefit of all inferences that can and legitimately be deducted therefrom...Myles Hart v. New Jersey State Board of Examiners, 2014 WL 3708621 (citing New Jersey Practice, Administrative Law and Practice, §5, 19, at 259-60).

Petitioner did not file a response to Respondent's motion to dismiss.

N.J.S.A. 18A:38-1 provides that public schools shall be free to the following persons over five and under 20 years of age:

> a. Any person who is domiciled within the school district;
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the resident in writing of his right to contest the board's decision to the commissioner within 21 days. No child shall be denied admission during the pendency of the proceedings before the commissioner. In

> the event the child is currently enrolled in the district, the student shall not be removed from school during the 21-day period in which the resident may contest the board's decision nor during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the resident, parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner.

In the instant matter, Respondent notified Petitioner of the residency hearing by letter dated October 13, 2016. The residency hearing was held on October 24, 2016. By letter dated October 26, 2016, Petitioner was advised of Respondent's determination that his children were not eligible to attend school in the Respondent School District. Petitioner was advised in said letter of his right to contest Respondent School District's decision within twenty-one days. Petitioner did not file the pro se residency appeal until November 22, 2016. Said appeal was dated November 20, 2016. The twenty-one day period in which to file expired on November 15, 2016.

Right to a Free Public Education

N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a) sets forth the right of a student to a free public education, which in pertinent parts states:

> Public schools shall be free to the following persons over five and under twenty years of age:
>
> a. Any person who is domiciled within the school district[.]

Consideration in proving residency for purposes of establishing eligibility for school district placement is found at N.J.A.C. 6A:22-3.4(a),

(a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:

1. Property tax bills, deeds, contracts of sale, leases, mortgages, signed letters from landlords and other evidence of property ownership, tenancy or residency;

2. Voter registrations, licenses, permits, financial account information, utility bills, delivery receipts, and other evidence of personal attachment to a particular location;

. . .

3. Court orders; State agency agreements; and other evidence of court or agency placements or directives;

4. Receipts; bills; cancelled checks; insurance claims or payments; and other evidence of expenditures demonstrating personal attachment to a particular location or to support the student;

. . .

6. Affidavits, certifications and sworn attestations pertaining to statutory criteria for school attendance, from the parent, guardian, person keeping an "affidavit student," adult student, person(s) with whom a family is living, or others as appropriate;

. . .

8. Any other business record or document issued by a governmental entity.

(b) A district board of education may accept forms of documentation not listed in (a) above, and shall not exclude from consideration any documentation or information presented by a person seeking to enroll a student.

(c) A district board of education shall consider the totality of information and documentation offered by an applicant, and

> shall not deny enrollment based on failure to provide a particular form of documentation, or a particular subset of documents, without regard to other evidence presented.

In S.S. ex rel. A.S. and A.S. v. Bd. of Education of the Township of Marlboro, Monmouth County, EDU 192-12, Initial Decision (August 26, 2013), http://njlaw.rutgers.edu/collections/oal, evidence submitted by an investigator hired by the Marlboro New Jersey School District to determine whether certain minor children who were enrolled in the school district in fact were domiciled therein within the meaning of N.J.A.C. 6A:22-3.1(a) was sufficient to establish that the children in fact were not domiciled in the district during the period in question and, instead, supported a conclusion that the minors resided at their grandmother's home in Edison, New Jersey. Even though their mother had submitted documentation of the type described in N.J.A.C. 6A:22-3.4(a) that supported her claim that the minors were domiciled in Marlboro, the circumstances of the mother's employment, which included late hours, was such that the minors were properly found to be residing with their grandmother. On that basis, the administrative law judge recommended that the Department of Education find the mother liable for tuition for the minors.

In the instant matter, it is clear that neither Petitioner, nor his children, resided within Respondent's school district. (See Certification of Gary McCartney and the investigator's report attached thereto as Exhibit A)

N.J.A.C. 6A:22-6.2 states:

> (a) If an appeal to the Commissioner is filed by the parent, guardian, adult student, or school district resident keeping an "affidavit" student and the petitioner does not sustain the burden of demonstrating the student's right to attend the school district, or the petitioner withdraws the appeal, fails to prosecute, or abandons the appeal by any means other than settlement agreeing to waive or reduce tuition, the Commissioner may assess tuition for the period during which the hearing and decision on appeal were pending, and for up to one year of a student's ineligible attendance in a school district prior to the appeal's filing and including the 21-day period to file an appeal.

> 1. Upon the Commissioner's finding that an appeal has been abandoned, the district board of education may remove the student from school and seek tuition for up to one year of ineligible attendance pursuant to N.J.A.C. 6A:22-6.1(a) plus the period of ineligible attendance after the appeal was filed. If the record of the appeal includes a calculation reflecting the tuition rate(s) for the year(s) at issue, the per diem tuition rate for the current year and the date on which the student's ineligible attendance began, the Commissioner may order payment of tuition as part of his or her decision. In doing so, the Commissioner shall consider whether the ineligible attendance was due to a school district's error. If the record does not include such a calculation and the district board of education has filed a counterclaim for tuition, the counterclaim shall proceed to a hearing notwithstanding that the petition has been abandoned.
>
> 2. An order of the Commissioner assessing tuition is enforceable through recording, upon request of the district board of education pursuant to N.J.A.C. 6A:3-12, on the judgment docket of the Superior Court, Law Division, in accordance with N.J.S.A. 2A:58-10.

Cleary, Petitioner has failed to sustain the burden of proof to demonstrate J.T., A.T. and B.T. have the right to attend the Respondent school, and Respondent is entitled to tuition reimbursement.

N.J.A.C. 6A:22-6.3 states in pertinent part:

> a) Tuition assessed pursuant to this section shall be calculated on a per-student basis for the period of a student's ineligible enrollment, up to one year, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23A-17.1. The individual student's record of daily attendance shall not affect the calculation.

Respondent calculates tuition reimbursement for the 2016-2017 school year at $71 per day. (Certification of Gary McCartney, Exhibit C)

I **CONCLUDE** that petitioner failed to timely file a residency appeal in accordance with N.J.S.A. 18A:38-1(b), and therefore the same is time barred.

I further **CONCLUDE** that petitioner's motion to dismiss should be **GRANTED** as Petitioner failed to file a response thereto, and the facts set forth in Respondent's motion to dismiss are adopted herein.

I further **CONCLUDE** neither Petitioner, nor his children, resided within Respondent's District during the 2016-2017 school year and Respondent is entitled to the relief requested in its Answer and Cross Petition: reimbursement for tuition for the period of ineligible attendance for each child.

I further **CONCLUDE** that Respondent is entitled to an order excluding Petitioner's children from the Respondent school district

ORDER

Based upon the foregoing it is **ORDERED** that Respondent's motion to dismiss Petitioner's residency appeal is granted: and,

It is further **ORDERED** that Petitioner's residency appeal is dismissed with prejudice; and,

It is further **ORDERED** that Petitioner's children, J.T., A.T. and B.T. are not entitled to attend school in the Respondent school district and are excluded therefrom; and,

It is further **ORDERED** that Respondent is entitled to tuition reimbursement from Petitioner in the amount of $71 per day per child for each day J.T., A.T. and B.T. attended school in the Respondent school district.

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

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

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

March 8, 2017
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

March 8, 2017

Date Mailed to Parties:
MAR 9 2017
db

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

118-17EL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

April 24, 2017

Laura A. Siclari, Esq.
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Re: *Christopher Lombardi v. New Jersey State Interscholastic Athletic Association*, Agency Dkt. No. 73-4/17

Dear Counsel:

I have reviewed the materials filed in connection with the petition of appeal and motion for emergent relief filed by the petitioner, Christopher Lombardi, in the above-captioned matter. The petitioner is appealing the decision of the Eligibility Appeals Committee (EAC) of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying the petitioner's request for a waiver of the eligibility rules to allow him to participate in baseball at New Providence High School.

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. The party seeking such relief must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

Upon review of the parties' submissions, I find that the petitioner has failed to meet the standard required for emergent relief. Most notably, the petitioner has failed to demonstrate a likelihood of success on the merits of the underlying appeal. The Commissioner's scope of review in matters involving NJSIAA decisions, including determinations made by the EAC, is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by the NJSIAA in

applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a)(2); *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Nor may the Commissioner substitute her own judgment for that of the NJSIAA, where due process has been provided and where there is sufficient credible evidence in the record as a whole to serve as a basis for the decision reached by the NJSIAA. *N.J.A.C.* 6A:3-7.5(a)(1).

Athletic competition in New Jersey's public schools is overseen by respondent, NJSIAA, a voluntary, non-profit organization which promulgates the rules and regulations governing high school athletics. Article V, Section J of NJSIAA's Bylaws, Rules and Regulations restricts a student's eligibility to play sports to four years. Specifically, the provision known as the Eight Semester Rule provides that, "[n]o student shall be eligible for high school athletics after the expiration of eight consecutive semesters following his or her entrance into the 9th grade. A student becomes ineligible for high school athletics when the class in which he/she was originally enrolled has graduated." The NJSIAA Guidelines set forth the reasons for the Eight Semester Rule in the NJSIAA Handbook:

> This rule is intended to prohibit "red shirting," and is also aimed at preventing athletically gifted pupils who are not meeting academic standards from replacing other students who are maintaining their academic standards but who might not have the same athletic prowess. The rule is also aimed at maintaining a uniform progression among all member schools within a four-year cycle and equalizing competition within these schools.

In appropriate cases, the NJSIAA may grant a waiver of the eligibility rules if the overall objectives of the association and its member schools will not be undermined. The Eight Semester Rule can be waived when a student proves that he cannot comply with the rule due to circumstances beyond his control.

It is undisputed that the petitioner herein was scheduled to graduate high school in June 2016, and as such he is ineligible to participate in interscholastic athletics based on the Eight Semester Rule. The petitioner therefore applied to the NJSIAA for a waiver of the Eight Semester Rule so that he could participate on the New Providence baseball team this spring.[1] Previously, petitioner had participated in baseball at New Providence during the 2012-2013, 2013-2014 and 2014-2015 school years, but did not play during the 2015-2016 school year. The petitioner did not play baseball in 2016 because he had been placed on extended home instruction and was not permitted on school grounds as the result of several behavioral incidents that the New Providence School District deemed to be threatening.[2] In reaching its decision to deny the waiver request, the

---

[1] The petitioner is currently enrolled in his 5th year of high school at the Shepard School pursuant to an Individualized Education Plan (IEP) for Attention Deficit Hyperactivity Disorder (ADHD), and his education is financed by the New Providence School District. The petitioner received special education services pursuant to an IEP during 9th and 10th grade at New Providence but was declassified for 11th grade. In June 2016 the district re-classified the petitioner and provided him with an IEP and a 5th year of educational services to address his academic deficiencies.

[2] In one incident, petitioner took a "selfie" with a gun. In a second incident, petitioner told another student that he wanted "to shoot up the school," and advised the student to wear red so that petitioner could easily identify him and avoid taking aim at him.

EAC recognized that the petitioner may have academic difficulties that have been exacerbated or caused by his ADHD; however, what led to petitioner not playing baseball in the spring of 2016 were his disciplinary problems. As such, the EAC concluded that the circumstances were not entirely beyond the petitioner's control and, accordingly, he was not eligible for a waiver. The EAC also noted that because disciplinary problems contributed to the petitioner's inability to play baseball in 2016, it would not be appropriate to displace another student by giving the petitioner a waiver to play baseball.

The petitioner asserts that his behavioral issues are directly tied to his diagnosis of severe ADHD as well as other academic and psychological factors. Thus, the petitioner did not have the requisite control over his ability to graduate high school on time and should in turn be granted an eligibility waiver. The petitioner's IEP for 2017 specifically notes that his placement at the Shepard School was to accommodate his behavioral disability. Unlike other cases in which waiver requests have been denied by the NJSIAA, the petitioner stresses that he has not played four years of high school baseball. Finally, the petitioner points out that he does not start on the varsity team, he is not a difference maker, and his ability to play would not pose any safety concerns as baseball is not a contact sport.[3]

Petitioners seeking to overturn decisions of the NJSIAA bear a heavy burden, and – considering the record of this matter in light of the prescribed standard of review – I find that the petitioner has failed to demonstrate a likelihood of success on the merits. Specifically, the petitioner has not made a preliminary showing that the EAC applied its rules in a patently arbitrary or unreasonable manner when it determined that the circumstances that caused the petitioner to miss a season of baseball in 2016 were not beyond his control. The NJSIAA has a duty to ensure fairness and integrity in athletic competition statewide, and there is not enough evidence in the record to establish that the decision to deny petitioner's waiver request was unreasonable.[4]

In light of the fact that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the three remaining factors. Accordingly, the petitioner's request for emergent relief and an Order permitting him to participate in the New Providence baseball program is hereby DENIED.

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

VIA FAX AND REGULAR MAIL

[3] Although petitioner argues that baseball is not a contact sport, NJSIAA rules specifically limit non-contact sports to: bowling, cross-country, fencing, golf, gymnastics, skiing, swimming and diving, tennis, track and volleyball.

[4] Since the petitioner is not entitled to emergent relief in connection with his request for a waiver of the Eight Semester Rule, for purposes of this motion it is not necessary to also analyze the credit rule and its potential applicability to the circumstances in this case.

119-17

OAL DKT. NO. EDU 15489-16
(EDU 02377-16 ON REMAND)
AGENCY DKT. NO. 21-2/16

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATES OF	:	COMMISSIONER OF EDUCATION
ELIZABETH CALDERON, SCHOOL DISTRICT	:	DECISION ON REMAND
OF THE BOROUGH OF FREEHOLD,	:	
MONMOUTH COUNTY.	:	

The record, proposed stipulation of settlement, and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's October 6, 2016 determination that the prior stipulation of settlement could not be approved because it was devoid of affirmation from the parties that the respondent was not employed as a teacher elsewhere during the proposed suspension period. Since the stipulation of settlement now contains a certification of respondent attesting that she has not worked as a teacher during the suspension period, the Commissioner can approve the within settlement agreement in its present form.

Accordingly, the Initial Decision recommending approval of the parties' settlement as the final decision in this matter is hereby adopted, and the matter is dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/24/17

Date of Mailing: 4/24/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 15489-16

EDU 02377-16 (**ON REMAND**)

AGENCY DKT. NO. 21-2/16

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF ELIZABETH CALDERON, SCHOOL DISTRICT OF THE BOROUGH OF FREEHOLD, MONMOUTH COUNTY.

Micci J. Weiss, Esq., for petitioner (Cleary Giacobbe Alfieri Jacobs, LLC, attorneys)

Elizabeth Calderon, respondent, pro se

Record Closed: January 26, 2017 Decided: March 6, 2017

BEFORE **SARAH G. CROWLEY**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on February 9, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

March 6, 2017
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: 3/8/17

Date Mailed to Parties: 3/9/17

/mel

CLEARY GIACOBBE ALFIERI JACOBS, LLC
Micci Weiss, Esq. (Attorney ID 046522005)
Attorneys-at-Law
5 Ravine Drive
Matawan, NJ 07747
Tel.: 732-583-7474
Attorneys for Petitioner

FREEHOLD BOROUGH BOARD OF EDUCATION, Petitioner, vs. ELIZABETH CALDERON, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDU 02377-2016S Agency Ref. No. 22-1/16 **STIPULATION OF SETTLEMENT**

WHEREAS, the Parties appeared in the Office of Administrative Law on July 7, 2016 before the Honorable Sara G. Crowley, A.L.J. for the hearing in this matter; and

WHEREAS, at that time, the Parties reached an amicable settlement of this matter, which was placed on the record, and which shall be memorialized by this Stipulation of Settlement.

NOW, THEREFORE, the Parties hereby stipulate to the following facts and agree to resolve this matter upon the following terms:

1. Freehold Borough Board of Education (the "Board") hired Elizabeth Calderon ("Ms. Calderon") as a Spanish teacher, commencing on Monday, November 16, 2015.

2. Ms. Calderon executed an employment contract with the Board, which, in accordance with N.J.S.A. 18A:26-10, required that she provide the Board with sixty (60) days' notice of any resignation.

3. On Monday, November 16, 2015, at 8:03 a.m., Ms. Calderon emailed a letter of resignation to the Board.

4. Ms. Calderon failed to appear for work, despite the sixty (60) day notice provision in her employment contract and as required by law.

5. The Board initiated this action seeking suspension of Ms. Calderon's teaching certificate for failing to provide sixty (60) days' notice as required by the employment contract and N.J.S.A. 18A:26-10.

6. The Parties have agreed that Ms. Calderon's teaching certificate shall be suspended from November 16, 2015 through November 15, 2016.

7. This is the entire agreement of the Parties and may not be altered or amended, except in writing, with the same formality as this agreement.

8. This Stipulation of Settlement is subject to approval by the Commissioner of Education.

Respondent

By: Elizabeth Calderon
Elizabeth Calderon

Cleary Giacobbe Alfieri Jacobs LLC
Attorneys for Petitioner

By: _____
Micci J. Weiss

SO APPROVED AND RECOMMENDED:

_____
Hon. Sarah G. Crowley, A.L.J.

Dated: _____

CLEARY GIACOBBE ALFIERI JACOBS, LLC
Micci Weiss, Esq. (Attorney ID 046522005)
Attorneys-at-Law
5 Ravine Drive
Matawan, NJ 07747
Tel.: 732-583-7474
Attorneys for Petitioner

FREEHOLD BOROUGH BOARD OF EDUCATION,
Petitioner,

vs.

ELIZABETH CALDERON,
Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET NO. EDU 0~~2337-2016~~S 15489-16
Agency Ref. No. 22-1/16

CERTIFICATION OF ELIZABETH CALDERON

ELIZABETH CALDERON, of full age, hereby certifies and says:

1. I was hired by Freehold Borough Board of Education (the "Board") as a Spanish teacher, commencing on Monday, November 16, 2015.

2. On Monday, November 16, 2015, I emailed a letter of resignation to the Board.

3. I have not worked as a teacher since my resignation of November 16, 2015 and I am still not working as a teacher as of the date of this certification.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

By: Elizabeth Calderon
ELIZABETH CALDERON

Dated: 1/26/2017

120-17

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

In the Matter of the Tenure Hearing of

JENNIFER ROME

and

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN
CAMDEN COUNTY

Agency Docket No. 32-2/17

The above-entitled matter was submitted to the undersigned Arbitrator by letter dated March 10, 2017 from the Commissioner of Education through the Director of the Bureau of Controversies and Disputes, pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, c. 26. Following a preliminary conference on March 14, 2017, a hearing was held on March 27, 2017 at the office of Brown and Connery, Esqs. in Westmont, New Jersey, during which hearing the parties successfully engaged in settlement discussions and executed a Settlement Agreement and General Release governing the instant tenure dispute and several other ancillary controversies involving Respondent Jennifer Rome; her

brother, Stan T. Stanford III, a/k/a/ Stan Skyrm; the State-Operated School District of the City of Camden; and several named employees of the District. Subsequent scheduled hearings were adjourned pending ratification of the Settlement Agreement and General Release by the State District Superintendent on behalf of the Camden City School District, which ratification occurred on March 31, 2017.

At the arbitration hearing on March 27, 2017, the Arbitrator examined Respondent Jennifer Rome as to her understanding and acceptance of the terms of the Settlement Agreement and General Release. Respondent and her brother Stan T. Stanford III, a/k/a/ Stan Skyrm affirmatively acknowledged on the record in response to questioning by Matthew B. Wieliczko, Esq., of Zeller and Wieliczko, Esqs., counsel for Respondent; by Louis R. Lessig, Esq., of Brown and Connery, Esqs., counsel for the Camden School District in this tenure matter and in the Superior Court action; and by the Arbitrator that they understood that Ms. Rome's attorneys in the tenure matter, Matthew B. Wieliczko and Amy L. Gillette, did not represent either Ms. Rome or Mr. Stanford in the proceedings in Superior Court, Law Division, or before the New Jersey Division on Civil Rights; that they understood and accepted that the Superior Court and New Jersey Division on Civil Rights proceedings, as well as the instant tenure dispute, would be definitively determined by the global settlement they were signing; that they were aware of their

right to seek legal representation regarding the pending Superior Court action and the pending New Jersey Division on Civil Rights proceeding; that they were knowingly waiving their right to engage other counsel regarding these proceedings; that they understood what they were gaining and what they were conceding in the global Settlement Agreement and General Release; and that they were fully satisfied with the representation afforded to them in this tenure proceeding by Zeller and Wieliczko, Esqs. The Arbitrator is satisfied that these acknowledgements by Respondent Jennifer Rome and by Mr. Stan Stanford III that they fully understood and accepted the consequences of their accepting the terms of and signing the Settlement Agreement and General Release and ancillary documents attached as exhibits to the Settlement Agreement and General Release were sincere and constituted informed consent.

On April 4, 2017, the parties submitted to the undersigned Arbitrator for examination and consideration an executed Settlement Agreement and General Release covering any other current proceedings or potential future causes of action arising from any act or failure to act by the Camden School District or its agents or employees that may have occurred before March 27, 2017, and four Exhibits, including a Stipulation of Dismissal with prejudice involving an action pending in the Superior Court of New Jersey, Law Division, Camden County. I have

carefully considered each of these documents, as well as the transcript of the tenure hearing of March 27, 2017 as the basis for issuing the following Award.

AWARD OF ARBITRATOR

After duly evaluating the nature of the tenure charges over which I had jurisdiction, the Respondent's record of service to the State-Operated School District of the City of Camden, the absence of proven harm to any student for whom the Respondent was responsible, and the advantages and factors cited by the Board as the bases for its decision to enter into the Settlement Agreement and General Release resolving the instant tenure matter and also resolving ancillary proceedings involving the same parties, I hereby find that the terms and conditions agreed upon by the State-Operated School District and by Respondent Jennifer Rome, each of whom has been advised by counsel regarding these tenure proceedings, to resolve the tenure dispute before me to be reasonable and in the best interest of both the parties and the public.

There being no charge against the Respondent of any moral turpitude, the terms and conditions negotiated under the parties' Settlement Agreement and General Release serve the best interests of the public and of the students of the Camden City School District and satisfy

the criteria of N.J.A.C. 6A:P3-5.6 (a). Consequently, I accept the Settlement Agreement and General Release as proposed by the parties, and hereby issue this Consent Award incorporating the terms of the Settlement Agreement and General Release executed by the parties, effective March 31, 2017, provided that Respondent has not revoked her execution of the Settlement Agreement within the statutory time periods described in the Settlement Agreement and General Release.

Based on the facts elicited by the evidentiary record in the instant matter regarding the tenure charges brought by the State-Operated School District of the City of Camden against Respondent Jennifer Rome, and having examined the terms of the Settlement Agreement and General Release executed by Respondent Jennifer Rome on March 27, 2017, I find that the terms and conditions set forth in the parties' Settlement Agreement dated March 27, 2017, ratified by the State District Superintendent on behalf of the Camden City School District on March 31, 2017, appear to me to be reasonable, to be consistent with the terms and intent of the TEACHNJ Statute and applicable regulations, and to reflect that Respondent has not committed any conduct unbecoming a tenured teacher.

I hereby endorse and approve the parties' Settlement Agreement and General Release as appropriate under the circumstances and as satisfying the requirements of the TEACHNJ statute.

April 17, 2017

Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 17th day of April, 2017 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

Kathryn Gallagher

KATHRYN GALLAGHER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 2/18/2021

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This **SETTLEMENT AGREEMENT AND MUTUAL RELEASE** (hereinafter, the "Agreement"), being entered into by and between the **CAMDEN CITY SCHOOL DISTRICT**, for the benefit of the District, and all of its related entities, and all of the District's current, future, and former officers, employees, agents, officials, representatives, attorneys, insurers, successors and assigns, and heirs, both in their official and individual capacities, including but not limited to, Stephen D. Bournes (hereinafter, "Bournes"), Tia Mcintosh, Lana Murray, Nicholas Pillsbury, Hye-Won Gehring, Darrell Staton (hereinafter, collectively, "the District"), **JENNIFER ROME** (hereinafter "Rome"), and **STAN T. STANFORD III, a/k/a STAN SKYRM** (hereinafter, "Stanford")(hereinafter, the District, Rome and Stanford, collectively, the "Parties"), and,

WHEREAS, Rome has been employed in a teaching position by the District;

WHEREAS, Rome filed a complaint, as amended by Rome (hereinafter, the "Complaint"), against the District and Bournes in the Superior Court of New Jersey, Law Division, Camden County, under the caption of "Jennifer Rome v. Stephen Bournes and Camden City School District," Docket No. CAM-L-2260-16 (hereinafter, the "Lawsuit");

WHEREAS, the District filed a Counterclaim against Rome (hereinafter, the "Counterclaim") and a Third Party Complaint against Stanford (hereinafter, the "Third Party Complaint") in the Lawsuit and Stanford filed a Third Party Counterclaim (hereinafter, the "Third Party Counterclaim") against the District in the Lawsuit;

WHEREAS, Rome filed a Verified Complaint against the District with the New Jersey Division on Civil Rights, Docket No.:ED08JE-66054 (EEOC No.: 17E 2016 00373) (hereinafter, the "DCR Action");

WHEREAS, the District served and filed certain tenure charges with the Commissioner of Education for the State of New Jersey, Agency Docket No. 32-2/17 seeking to remove Rome from her teaching position (hereinafter, the "Tenure Charge Proceedings");

WHEREAS, the District is represented by the Law Firm of Brown & Connery, LLP in the Lawsuit, the DCR Action and the Tenure Charge Proceedings (hereinafter, "B&C");

WHEREAS, Rome and Stanford are Pro Se litigants in the Lawsuit, and Rome is a Pro Se litigant in the DCR Action;

WHEREAS, Rome is represented by the Law firm of Zeller & Wielieczko in the Tenure Charge Proceedings;

WHEREAS, the Parties wish to amicably resolve the Lawsuit, the DCR Action and the Tenure Charge Proceeding and any other potential or actual disputes between them of any kind;

WHEREAS, the District and Rome intend to execute an appropriate agreement in addition to this Agreement to resolve the Tenure Charge Proceeding (hereinafter the "Tenure Charge

Agreement"), and the Parties incorporate the terms and provisions of the Tenure Charge Agreement as set forth in Exhibit 1 hereto, into the Agreement as if fully set forth herein;

THEREFORE, in exchange for the mutual promises set forth below, and intending to be legally bound, the Parties hereby acknowledge and agree to the following terms and conditions:

1. **CONSIDERATION**

(a) As to Rome. Rome shall receive the Payment and Medical Coverage as set forth in Sections 2(b) and (c) of the Tenure Charge Agreement, and the withdrawal and/or dismissal of the Tenure Charges, as set forth in Section 2(c) of the Tenure Charge Agreement, and the District shall dismiss the Counterclaim in the Lawsuit and release and waive any and all claims and/or potential claims as set forth in the Section 3(c) of the Agreement, and for other valuable consideration as set forth in this Agreement.

(b) As to Stanford. The District shall dismiss the Third Party Complaint in the Lawsuit, and release and waive any and all claims and/or potential claims as set forth in the Section 3(c) of the Agreement, and for other valuable consideration as set forth in this Agreement.

(c) As to the District. Rome shall provide to the District the Resignation Letter as set forth in Section 2(a) of the Tenure Charge Agreement and Rome shall dismiss and/or withdraw the Complaint in the Lawsuit and the Verified Complaint in the DCR Action, and Stanford shall dismiss as may be necessary the Third Party Counterclaim in the Lawsuit, and Rome and Stanford shall release and waive any and all claims and/or potential claims as set forth in the Section 3(a) and (b) of the Agreement, and for other valuable consideration as set forth in this Agreement.

2. **DISMISSAL OF THE LAWSUIT AND THE DCR ACTION**

The Parties agree to execute any and all documents which may be requested or required to effect the dismissal of the Lawsuit with prejudice immediately upon the execution of this Agreement and the Tenure Charge Agreement, including, but not limited to, a Stipulation of Dismissal with Prejudice, in the form attached hereto as "Exhibit 2" (the "Stipulation") and Rome agrees to execute any and all documents which may be requested or required to effect the withdrawal and/or dismissal of the DCR Action with prejudice immediately upon the execution of this Agreement and the Tenure Charge Agreement, including, but not limited to a letter of withdrawal, in the form attached hereto as "Exhibit 3" (The withdrawal of DCR). This is a material part of the Agreement.

3. **GENERAL RELEASE OF CLAIMS**

(a) Rome. In exchange for the valuable consideration provided in this Agreement and the Settlement Agreement, Rome hereby waives, relinquishes, and forever releases the District from any and all rights or claims, known or unknown, asserted or unasserted, from the beginning of time up to and including the date of full execution of this Agreement, including, but not limited to, those claims asserted by her in the Lawsuit

and/or the DCR Action, and any other claims which arise and/or relate to her employment and/or cessation of employment, including claims for discrimination or harassment with regards to any alleged protected category, status, or class, including, but not limited to, age, sex, religion, race, disability, or national origin, breach of contract, wrongful termination, hostile work environment, wrongful discharge, retaliation, constructive discharge, as well as claims in tort, including, but not limited to, claims for misrepresentation, defamation, libel, interference with contract or prospective economic advantage, intentional and/or negligent infliction of emotional distress, personal injury, lost wages and/or benefits, and any other economic and/or non-economic damages whatsoever. Rome specifically waives any rights that she may have under the National Labor Relations Act; the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Employment Retirement Income Security Act; the Immigration Reform Control Act; the Americans with Disabilities Act; the Age Discrimination & Employment Act; the Older Workers Benefit Protection Act; the Fair Labor Standards Act; the Occupational Safety & Health Act; the Family & Medical Leave Act; the Equal Pay Act; the New Jersey Law Against Discrimination; the New Jersey Wage Payment Law; The New Jersey Minimum Wage Law; the Equal Pay Law for New Jersey; the New Jersey Worker Health & Safety Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; any constitution, statute, regulation, ordinance, executive order, public policy or common law; any written, verbal or implied contract; and any other authority or basis for seeking damages or relief of any kind or any other theories now or hereafter recognized or any claim related to any the District policy, procedure, or plan. This releases all claims, including those of which Rome is not aware and those not mentioned in this Agreement. This releases all claims, including those for counsel fees and/or costs related to any of the pending litigation and/or other matters, and the Parties shall bear their own attorneys' fees and costs. This Agreement applies to claims resulting from anything which has happened up to the execution of this Agreement. Rome hereby acknowledges that she has been and will be fully paid any and all due wages and benefits to which she is entitled pursuant to this Agreement and that she suffered no workers' compensation related injury while employed by the District of which she has not already notified the District and/or its insurer.

(b) Stanford. In exchange for the valuable consideration provided in this Agreement, Stanford hereby waives, relinquishes, and forever releases the District from any and all rights or claims, known or unknown, asserted or unasserted, from the beginning of time up to and including the date of full execution of this Agreement, including, but not limited to, as may be necessary, the Third Party Counterclaim, and those claims asserted by him or which could or should have been asserted by him in the Lawsuit. This includes, but is not limited to, those claims asserted by him in the Lawsuit and/or the DCR Action, and any other claims which arise and/or relate to Rome's employment and/or cessation of employment, including claims for discrimination or harassment with regards to any alleged protected category, status, or class, including, but not limited to, age, sex, religion, race, disability, or national origin, breach of contract, wrongful termination, hostile work environment, wrongful discharge, retaliation, constructive discharge, as well as claims in tort, including, but not limited to, claims for misrepresentation, defamation, libel, interference with contract or

prospective economic advantage, intentional and/or negligent infliction of emotional distress, personal injury, lost wages and/or benefits, and any other economic and/or non-economic damages whatsoever. Stanford specifically waives any rights that he may have under the National Labor Relations Act; the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Employment Retirement Income Security Act; the Immigration Reform Control Act; the Americans with Disabilities Act; the Age Discrimination & Employment Act; the Older Workers Benefit Protection Act; the Fair Labor Standards Act; the Occupational Safety & Health Act; the Family & Medical Leave Act; the Equal Pay Act; the New Jersey Law Against Discrimination; the New Jersey Wage Payment Law; The New Jersey Minimum Wage Law; the Equal Pay Law for New Jersey; the New Jersey Worker Health & Safety Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; any constitution, statute, regulation, ordinance, executive order, public policy or common law; any written, verbal or implied contract; and any other authority or basis for seeking damages or relief of any kind or any other theories now or hereafter recognized or any claim related to any the District policy, procedure, or plan. This releases all claims, including those of which Stanford is not aware and those not mentioned in this Agreement. This releases all claims, including those for counsel fees and/or costs related to any of the pending litigation and/or other matters, and the Parties shall bear their own attorneys' fees and costs. This Agreement applies to claims resulting from anything which has happened up to the execution of this Agreement. This releases all claims, including those for counsel fees and/or costs related to any of the pending litigation and/or other matters, and the Parties shall bear their own attorneys' fees and costs. This Agreement applies to claims resulting from anything which has happened up to the execution of this Agreement.

(c) The District. In exchange for the valuable consideration provided in this Agreement, the District hereby waives, relinquishes, and forever releases Rome and Stanford from any and all rights or claims, known or unknown, asserted or unasserted, from the beginning of time up to and including the date of full execution of this Agreement, including, but not limited to, the Counterclaim against Rome and the Third Party Complaint against Stanford in the Lawsuit, and those claims asserted by the District or which could or should have been asserted by the District in the Lawsuit. This releases all claims, including those for counsel fees and/or costs related to any of the pending litigation and/or other matters, and the Parties shall bear their own attorneys' fees and costs. This Agreement applies to claims resulting from anything which has happened up to the execution of this Agreement.

4. COVENANT NOT TO SUE

Rome and Stanford hereby warrant that as of the date this Agreement is signed that they have not filed any other legal complaint, counterclaim, claim, charge, or lawsuit against the District except for the Lawsuit and the DCR Verified Complaint. Further, Rome and Stanford agree that they will not file, charge, claim, sue or cause or permit to be filed any civil action, suit, or legal proceeding seeking personal, equitable, or monetary relief on their behalf in connection with any and all claims, known or unknown, asserted or unasserted, from the beginning of time up to and including the date of full execution of

this Agreement. Rome and Stanford further agree that should any person, organization, or other entity file, charge, claim, sue, or cause or permit to be filed any such civil action, suit, or legal proceeding, they will not seek or accept any personal relief in such civil action, suit, or legal proceeding. In the event of a violation of this paragraph, Rome and Stanford agree that the District shall be entitled to immediate dismissal of such civil action, suit, or legal proceeding and that they shall be responsible for the payment of the reasonable attorneys' fees and expenses incurred by the District's defense. Rome and Stanford further agree that they will not file nor permit any other party to file charges with any governmental agency relating to any matter alleged in the Lawsuit.

Notwithstanding Sections 4 and 6 of this Agreement, it is understood and agreed that Rome and Stanford are not waiving claims filed under any state workers' compensation or unemployment law or challenges to the validity of this Agreement including under the Older Workers Benefits Protection Act or other mandate under law.

Nothing in this Agreement shall preclude the District from forwarding the relevant materials to the Board of Examiners as directed by the applicable Regulations, etc.

5. NO ADMISSION OF LIABILITY

The Parties understand that by entering into the Agreement, the District, Rome and Stanford do not admit any liability and expressly deny that they have committed any wrongdoing whatsoever, and that the parties have entered into this Agreement to avoid additional expenses and cost and the aggravation of defending the Lawsuit and/or the DCR Action and/or the Tenure Charge proceeding.

6 CONFIDENTIALITY

Rome and Stanford agree that the terms, amount, and fact of this Agreement, and the nature of all claims that were or could have been raised against the other, as well as any information disclosed by the Parties in the negotiations and mediation leading to this Agreement, are confidential. Rome and Stanford agree that they will not, as of the date of execution of this Agreement, communicate or disclose the terms of this Agreement to any person other than their attorney, accountant, or members of their immediate family, each of whom must first be advised of this duty of confidentiality. In the event Rome and Stanford are asked about the Litigation or the incidents which gave rise to the Lawsuit by any person or entity, they agree that they will state only that the matter has been settled and/or resolved to the Parties' satisfaction. Rome and Stanford recognize and agree that the representations, promises, and covenants set forth in this paragraph constitute a material and significant part of this Agreement and the District would not have entered into this Agreement absent such agreement and, therefore, any violation of this paragraph will constitute a material violation and breach of this Agreement. In the event of a judicial finding of a breach of this provision of the Agreement, the District shall have the right to seek liquidated damages in the full amount of the Payment and the value of the Medical Coverage in Section 2 of the Tenure Charge Agreement and to recover all costs and reasonable attorneys' fees incurred related to any such action.

08108 at least fourteen (14) days prior to any return date of any subpoena or upon receipt of any court order. If either is served or receives any notice or court order within the fourteen (14) day period prior to the return date, they agree to immediately notify the other party.

Nothing in this paragraph shall be construed to prevent Rome and Stanford from testifying truthfully as a witness in any other litigation matters which may be pending against the District if compelled to do so in response to a duly issued subpoena.

7. **AGREEMENT NOT TO DISPARAGE**

In further consideration, the District, Superintendent and Bourne, acting in their official capacity, and Rome and Stanford agree to refrain from making any disparaging remarks or comments whatsoever about the District, including, with respect to the District, any of its current or former employees, officers, agents, attorneys, or representatives, and/or its work, schools, facilities, operations, activities, programs, or services. This Agreement includes, but is not limited to, any statements or postings made online, on the internet, or on any social media platform, including but not limited to, any blog, Twitter, MySpace, Facebook, Instagram, Snapchat, Yelp, Tumblr, Flickr, LinkedIn, YouTube, Periscope, or Facebook Live. To the extent such postings exist as of the date of this Agreement, Rome and Stanford hereby agree to immediately and permanently delete or remove such postings at or before the time of their execution of this Agreement. To verify this has been done a Google or similar search may be done by the District or its representatives and must reveal no such information. This is a material part of the Agreement, subject to Paragraph 14 below.

8 **AGREEMENT NOT TO CONTACT OR COMMUNICATE WITH THE DISTRICT**

In further consideration, Rome and Stanford agree upon the execution of the Agreement to refrain from making any contact or communications of any kind with the District, including any of their current or former attorneys (for any reason other than one related to this Agreement), employees, officers, agents or representatives, either personally; face to face contact; by written correspondence, letters, notes or memos; by mailing, delivering, sending and/or forwarding any tangible thing or object; by telephone; or through any electronic form of communication, including, but not limited to, email, text messaging, or any contact or communication through any social media platform, except as may be necessary in the performance of the Parties duties and obligations under the Agreement and/or the Tenure Charge Agreement. This is a material part of the Agreement, subject to Paragraph 14 below. An express exception to this provision of the Agreement allows and permits both Rome and Stanford to remain friends with current employees, maintain Facebook contact with current friends/acquaintances that are employees and communicate by phone, text or in person with current friends/acquaintances that are employees but are prohibited from discussing anything regarding the settlement topics or terms with these individuals.

9. OVERT PROHIBITION ON SPECIFIC IMPROPER ACTIVITY

Rome and Stanford agree and understand that a portion of the claims raised by the District involve assertions related to the alleged improper use of email addresses, software and servers that are District property. Further, assertions were made that Rome and Stanford utilized agents to contact, make representations and take actions against the District. Additionally, there was allegedly improper access to District records for staff as well as students. Rome and Stanford agree that this Agreement and the compensation related to the same is based in part on an absolute prohibition on engaging in, promoting others to engage in or otherwise disclosing any information allegedly obtained via any of the avenues discussed in this paragraph or these Agreements. This includes the directives under section 4 of the Tenure Charge Agreement and a mandate that Rome and Stanford return any and all information, in any form that was allegedly obtained using the above mentioned methods. Further, Rome and Stanford agree that this section includes a mandate to delete any such materials from any and all devices, servers, etc. in either person's possession. This is a material part of the Agreement, subject to Paragraph 14 below.

10. NOT ELIGIBLE FOR RE-HIRE

In further consideration, Rome hereby acknowledges and agrees that her employment with the District shall be deemed irrevocably severed and that she is ineligible for rehire by the District in any position. Rome agrees that she will not apply for, nor accept employment with, the District and, that if she is offered employment that she will refuse the offer. Should she re-apply for employment, the District shall have no obligation to consider or review her application, and rejection of such application shall not be deemed to constitute any form of retaliation or other claim by the District against Rome. This is a material part of the Agreement.

11. ACKNOWLEDGEMENT BY ROME

The releases in Section 3(a) above shall include a waiver and release of all claims under the Age Discrimination in Employment Act ("ADEA") and the Older Workers Benefit Protection Act ("OWBPA"); and, pursuant to the requirements of the ADEA and OWBPA, Rome specifically acknowledges that:

(a) She has been advised to consult with an attorney of her choosing concerning the legal significance of the Agreement and has had the opportunity to do so;

(b) The Agreement is written in a manner that she understands;

(c) The consideration set forth the Agreement set forth in Section 1(a) of the Agreement consists of benefits to which she is not otherwise arguably entitled and is adequate and sufficient to support her promises, covenants and releases as set forth in Section 3(a) of this Agreement;

(d) She has been afforded **twenty-one (21) days** to consider the Agreement before executing it, that any changes thereto subsequently agreed upon by

the parties, whether material or immaterial, do not restart this period for consideration, and that by signing and returning the Agreement before the end of the **twenty-one (21) day** period she will have knowingly and voluntarily waived the right to consider the Agreement for the full consideration period; and

(e) She has been advised that during the **seven (7) day** period following her execution of the Agreement, she may revoke her acceptance of the Agreement by delivering written notice to counsel for the District (set forth below) with a courtesy copy to her counsel (see below), and that the Agreement and the Tenure Charge Agreement shall not become effective or enforceable until after the revocation period has expired:

For the District:	Courtesy Copy to:
Louis R. Lessig, Esquire Brown & Connery, LLP 360 Haddon Avenue Westmont, New Jersey 08108	Matthew Wieliczko, Esquire Zeller & Wieliczko, LLP 120 Haddontowne Court Cherry Hill, NJ 08034

12. ACKNOWLEDGEMENT BY STANFORD

Stanford acknowledges that he has read all of the terms of this Agreement; he has had an opportunity to discuss it with individuals of his own choice who are not associated with the District. He has been advised to consult with an attorney of his own choosing and acknowledges that Zeller & Wieliczko, LLP is not his attorney and has not provided him with legal advice or representation. Stanford understands that by signing this Agreement and accepting the terms set forth above, he is receiving benefits to which he would not otherwise be entitled. Stanford understands that he is receiving such benefits as a result of entering into and complying with the terms and provisions of this Agreement. He hereby acknowledges that he signs this Agreement voluntarily and knowingly in exchange for the consideration described therein, which he acknowledges is adequate and satisfactory; and that he has been provided an opportunity to review and consider this Agreement prior to signing it.

13 CONTINGENT AGREEMENT

The terms and conditions of this Agreement are contingent upon the execution by Rome of the Tenure Charge Agreement, and the terms and conditions of the Tenure Charge Agreement are incorporated into this Agreement as if fully set forth herein.

14. RESTRAINTS FOR ROME AND STANFORD

Rome and Stanford both acknowledge that compliance with this Agreement and the Tenure Charge Agreement is necessary to protect the parties, but more specifically to protect the District and its employees and representatives as well as those specifically identified in this Agreement and that any actual or prospective breach will irreparably cause damage to the District for which money damages may not be adequate. Consequently Rome and Stanford both agree that if either or both breaches or attempts to

breach this Agreement, the District shall be entitled to obtain temporary, preliminary and permanent equitable relief, without bond, to prevent irreparable harm or injury, and to money damages, together with any and all other remedies available under the law. Rome and Stanford acknowledge that the damage to the District from a breach of this Agreement would be difficult to value and hereby agrees that five thousand dollars ($5,000.00) per breach is a reasonable amount to compensate the District for such damages, unless the District is able to prove otherwise. Rome and Stanford further understand and agree that both shall be liable to pay the District's reasonable attorney's fees and costs in any successful action to enforce this Agreement

Rome and Stanford agree and understand that if one or both of them breach this Agreement, that the District and/or B&C, shall have the right to apply to the Superior Court of New Jersey, Law or Chancery Division, Camden County, to obtain a "Order for Restraints" against one or both of them, in the form attached hereto as "Exhibit 4" to enforce the above restraints in their entirety.

15. GOVERNING LAW AND CONSTRUCTION

This Agreement shall be governed by the laws of the State of New Jersey. Any disputes arising out of and/or relating to this Agreement shall be filed only in the Superior Court of New Jersey, Law or Chancery Division, Camden County, New Jersey and the Parties consent to personal jurisdiction in such courts for any such actions.

16. ENTIRE AGREEMENT AND HEADINGS

This Agreement embodies the entire agreement and understanding between the Parties and supersedes all prior agreements and understandings related to the subject matters hereof. The headings in this Agreement are for purposes of reference only and shall not limit or otherwise affect the meaning of this Agreement or its provisions.

17. NOT ADMISSIBLE

This Agreement is not intended to be used and shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the Parties' compromise as set forth herein, or to enforce the terms of this Agreement.

18. MODIFICATIONS AND AMENDMENTS

This Agreement shall not be modified or amended except by writing duly executed and signed by the Parties to this Agreement.

19. SEVERABILITY

In the event that any such provision of this Agreement is deemed invalid, illegal, void, or unenforceable, such provision shall be regarded as stricken from this Agreement and will not affect the validity or enforceability of the remainder of this Agreement.

20. **COUNTERPARTS**

This Agreement may be exercised in more than one counterpart and each counterpart shall be considered an original, but all of which together shall constitute one and the same.

IN WITNESS THEREOF, the Parties have executed this Agreement.

JENNIFER ROME

By _____
Jennifer Rome

Dated 3/27, 2017

STAN T. STANFORD, III, a/k/a STAN SKYRM

By _____
Stan T. Stanford, III, a/k/a Stan Skyrm

Dated: 03/27, 2017

CAMDEN CITY SCHOOL DISTRICT

By: _____
Paymon Rouhanifard
State District Superintendent, on behalf of the Camden City School District

Dated: 3/31, 2017

EXHIBIT "1"

SETTLEMENT AGREEMENT AND RELEASE OF TENURE CHARGE PROCEEDINGS

This Settlement Agreement and Release of Tenure Charge Proceedings ("this Tenure Charge Agreement") is entered into by and between Jennifer Rome ("Rome") and the Camden City School District (the "District"). Together, Rome and the District may be referred to herein as "the Parties."

WHEREAS, Rome is a Computer Teacher with the District;

WHEREAS, the District commenced proceedings with the Commissioner of the New Jersey Department of Education by certifying and filing tenure charges against Rome (the "Tenure Charges");

WHEREAS, Rome wishes to resign from her position effective December 30, 2017;

WHEREAS, the Parties mutually desire to resolve this matter;

NOW, THEREFORE, IT IS HEREBY AGREED by and between the Parties as follows:

1. Effective Date: This Tenure Charge Agreement shall take effect on the date it is fully executed by the Parties, and as such, deemed ratified by the State Superintendent as the authorized representative of the District in accordance with N.J.S.A. 18A:7A-35.

2. Separation from Employment:

(a) Rome shall provide the District immediately, through its counsel, Brown & Connery, LLP, with an irrevocable letter of resignation effective December 30, 2017 (hereinafter, the "Resignation Date"), which shall be attached as Exhibit "A" to this Agreement (hereinafter, the "Resignation Letter");

(b) Rome shall be placed by the District on paid administrative leave retroactive to February 28, 2017 through her Resignation Date and with her current salary, but without any increases for the 2017-2018 school year, to be paid in the normal course of the District's payroll operations subject to all applicable payroll deductions, by direct deposit with the first regular pay on or before April 15 and retro payment on or before May 15, including as set forth in Section 2(c) below (the "Payment"). This includes payroll payments to be made during July and August of 2017;

(c) Rome shall remain eligible for all District medical benefits through her Resignation Date. Her portion of the premium for those benefits shall be deducted from her wages in the normal course of the District's payroll operations. Rome will then be eligible for and offered COBRA insurance coverage in the normal course (hereinafter, the "Medical Coverage"); and

(d) In the event that Rome owes any outstanding sums for her portion of the premium for her Medical Coverage, Rome will be required to reimburse the District for same, in the event that the funds exceed the amount of the final payroll check, otherwise any outstanding amount will be deducted from the same;

(e) The District shall take all steps with the New Jersey Commissioner of Education or their designee to withdraw and/or dismiss the Tenure Charges against Rome bearing agency reference number 32-2/17; and

(f) The District shall provide Rome with a neutral reference including only her position as a teacher, dates of employment, where she was employed, and her final annual salary.

(g) The District reserves its right to object and pursue any appeals, suits, disputes or challenges to any claim or filing by Rome for unemployment benefits compensation at the conclusion of this Agreement. Rome reserves the right to preserve and pursue same benefits.

(h) During Rome's administrative leave she is to have no contact, in accordance with this Agreement with anyone at the District, with the exception of support or information needed by Rome concerning only her continued medical coverage and only if two (2) people are on the call with Rome, which may require advanced scheduling. To facilitate communication, Rome must first email with specific questions and then call if a response is not received within ten (10) business days. Additionally, if Rome is contacted directly by the State Superintendent or his designee and in that event shall make herself reasonably available to complete the requested task. Otherwise Rome is prohibited from being on District property or at any District event, with the exception of attending sporting or other events hosted by the District in which Rome's children are participants. Even in this instance, Rome is precluded from discussing any topics or items in these Agreements.

(i) Nothing in this Agreement shall preclude the District from forwarding the relevant materials to the Board of Examiners as directed by the applicable Regulations, etc.

3. Contingent Agreement: The terms and conditions of this Tenure Charge Agreement are contingent upon the execution by the Parties, and by Stan T. Stanford, III, a/k/a Stan Skyrm, of a Settlement Agreement and General Release ("Agreement"), and the terms and conditions of the Agreement are incorporated into the Tenure Charge Agreement as if fully set forth herein.

4. Safe Return of all District Property: Rome's receipt of the wages as set forth in this Tenure Charge Agreement is expressly contingent upon her safely returning all District property in her possession without damage and in properly working order. The District reserves the right to recoup from Rome the total loss for any District property that is not returned or returned in damaged condition.

5. General Release: Rome releases the District from all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever that Rome has, ever had, or may have had, against the District, whether or not apparent or yet to be discovered, or which may hereafter develop, for any acts or omissions relating to or arising from anything that has happened up to the Effective Date of this Agreement. This includes, but is not limited to, any claims Rome asserted, or may have asserted, under the following: the National Labor Relations Act; the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Employment Retirement Income Security Act; the Immigration Reform Control Act; the Americans with Disabilities Act; the Age Discrimination & Employment Act; the Older Worker Benefit Protection Act; the Fair Labor Standards Act; the Occupational Safety & Health Act; the Family & Medical Leave Act; the Equal Pay Act; the New Jersey Law Against Discrimination; the New Jersey Wage Payment Law; The New Jersey Minimum Wage Law; the Equal Pay Law for New Jersey; the New Jersey Worker Health & Safety Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; N.J.S.A. 18A; The Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act; N.J.A.C. 6A; any constitution, statute, regulation, ordinance, executive order, public policy or common law; any written, verbal or implied contract; and any other authority or basis for seeking damages or relief of any kind. This release is intended to be broadly construed and applies to any and all claims and potential claims whatsoever, including those of which Rome is not aware, resulting from anything that has happened up to the Effective Date of this Agreement.

6. Covenant Not to Sue: Rome hereby warrants that as of the date this Agreement is signed that she has not filed any other legal complaint, counterclaim, claim, charge, or lawsuit against the District except for the Lawsuit and the DCR Verified Complaint. Further, Rome agrees that she will not file, charge, claim, sue or cause or permit to be filed any civil action, suit, or legal proceeding seeking personal, equitable, or monetary relief on her behalf in connection with any and all claims, known or unknown, asserted or unasserted, from the beginning of time up to and including the date of full execution of this Agreement. Rome further agrees that should any person, organization, or other entity file, charge, claim, sue, or cause or permit to be filed any such civil action, suit, or legal proceeding, she will not seek or accept any personal relief in such civil action, suit, or legal proceeding. In the event of a violation of this paragraph, Rome agrees that the District shall be entitled to immediate dismissal of such civil action, suit, or legal proceeding and that she shall be responsible for the payment of the reasonable attorneys' fees and expenses incurred by the District's defense. Rome further agrees that she will not file nor permit any other party to file charges with any governmental agency relating to any matter alleged in the Lawsuit.

Notwithstanding Sections 5 and 6 of this Agreement, it is understood and agreed that Rome is not waiving any claims filed under any state workers' compensation or unemployment law or any claim arising from a breach of this agreement; or challenges to the validity of this Agreement under the Older Workers Benefits Protection Act.

7. Older Workers Benefit Protection Act: The releases in section 5 above include a waiver and release of all claims under the Age Discrimination in Employment Act ("ADEA") and the Older Workers Benefit Protection Act ("OWBPA"). Therefore, pursuant to the requirements of the ADEA and OWBPA, Rome specifically acknowledges that:

(a) She has been advised to consult with an attorney of her choosing concerning the legal significance of the Settlement Agreement and Release and has done so;

(b) The Settlement Agreement and Release are written in a manner that she understands;

(c) The consideration set forth this Settlement Agreement consists of benefits to which she is not otherwise entitled and is adequate and sufficient to support her promises, covenants and releases as set forth in this Release;

(d) She has been afforded **twenty-one (21) days** to consider the Settlement Agreement and Release before executing it, that any changes thereto subsequently agreed upon by the parties, whether material or immaterial, do not restart this period for consideration, and that by signing and returning the Settlement Agreement and Release before the end of the **twenty-one (21) day** period she will have knowingly and voluntarily waived the right to consider the Settlement Agreement and Release for the full consideration period; and

(e) She has been advised that during the **seven (7) day** period following her execution of the Settlement Agreement and the Release, she may revoke her acceptance of this Agreement by delivering written notice to counsel for the District (as identified below) and courtesy notice to Zeller & Wieliczko, LLP, and that the Settlement Agreement and the Release shall not become effective or enforceable until after the revocation period has expired:

For the District:
Louis R. Lessig, Esquire
Brown & Connery, LLP
360 Haddon Ave.
Westmont, NJ 08108

Courtesy Copy to:
Matthew Wieliczko, Esquire
Zeller & Wieliczko, LLP
120 Haddontowne Court
Cherry Hill, New Jersey 08034

8. Not Eligible for Rehire: Rome acknowledges and agrees that her employment with the District is irrevocably severed upon the effective date of the letter of resignation and that she is ineligible for re-hire as an employee of the District in any position. Rome agrees not to apply for re-employment with the District. If, for some reason, the District receives an application for Rome's employment, the District shall have no obligation to consider or review her application for employment.

9 No Admission of Liability: This Tenure Charge Agreement is not, and may not be construed as, an admission of liability by either Party.

10. Entire Tenure Charge Agreement: This Tenure Charge Agreement encompasses the sole and entire agreement between the Parties and fully supersedes any and all prior agreements or understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to represent an amendment or supersession to this Tenure Charge Agreement.

11. Severability: If any portion of this Tenure Charge Agreement is deemed unenforceable, the remainder will be fully enforceable.

12. Applicable Law and Construction: This Tenure Charge Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey; however, since each party to this Tenure Charge Agreement and their counsel have reviewed and negotiated this Tenure Charge Agreement, the general rule of construction that any ambiguity or uncertainty in a writing shall be interpreted against the party drafting the writing shall not apply to any action relating to this Tenure Charge Agreement. Any action to enforce or interpret this Tenure Charge Agreement shall only be brought in a court of competent jurisdiction in Camden County, New Jersey.

13. Counterparts: This Tenure Charge Agreement may be exercised in more than one counterpart and each counterpart shall be considered an original, but all of which together shall constitute one and the same.

14. Individuals Bound: This Tenure Charge Agreement and General Release is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, personal or legal representatives, successors and/or assigns.

15. Notices: Any notice given or demand made pursuant to this Tenure Charge Agreement shall be made by certified mail, return receipt requested, to the following persons at the following addresses:

If to Rome:

Ms. Jennifer Rome
830 S. Kings Highway
Cherry Hill, New Jersey 08034

With a copy to:

Matthew B. Wieliczko, Esquire
Zeller & Wieliczko, LLP
120 Haddontowne Court
Cherry Hill, New Jersey 08034

If to the District:
Camden City School District
Business Administrator/Board Secretary
201 N. Front Street
Camden, New Jersey 08102

With a copy to:

Louis R. Lessig, Esquire
Brown & Connery, LLP
360 Haddon Avenue
Westmont, New Jersey 08108

16. Facsimile or Electronic Signature Fully Binding: The Parties agree that a facsimile or electronic signature herein shall be deemed to have the same force and effect of an original.

BY SIGNING THIS AGREEMENT, THE PARTIES ACKNOWLEDGE:

A. THEY HAVE READ IT;
B. THEY UNDERSTAND IT AND KNOW THEY ARE GIVING UP IMPORTANT RIGHTS;
C. THEY AGREE WITH EVERYTHING IN IT;
D. THEIR RESPECTIVE ATTORNEYS NEGOTIATED IT WITH THEIR KNOWLEDGE AND CONSENT;
E. THEY HAVE CONSULTED WITH THEIR RESPECTIVE ATTORNEYS ABOUT IT AND ARE FULLY SATISFIED WITH THEIR RESPECTIVE REPRESENTATION; AND
F. THEY SIGN IT KNOWINGLY AND VOLUNTARILY.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereby execute this Tenure Charge Agreement.

Jennifer Ronne

Jennifer Ronne

Date: 3-27-2017

Paymon Rouhanifard
State Superintendent
Camden City School District

Date: 3/31/17

EXHIBIT "A"

March 27, 2017

Paymon Rouhanifard, State District Superintendent
Camden City School District
201 N. Front Street
Camden, New Jersey 08102

Dear Superintendent Rouhanifard

I, Jennifer Rome, hereby submit this irrevocable letter of resignation from my tenured position as a Computer Teacher with the Camden City School District. This irrevocable letter of resignation from my position will become effective on December 30, 2017.

Sincerely,

Jennifer Rome

EXHIBIT "2"

EXHIBIT 2 TO SETTLEMENT AGREEMENT AND GENERAL RELEASE

BROWN & CONNERY, LLP
Louis R. Lessig, Esq. (ID No. 006561997)
360 Haddon Avenue
P.O. Box 539
Westmont, New Jersey 08108
(856) 854-8900
Attorneys for Defendant Stephen Bournes and Camden City School District

JENNIFER ROME, Plaintiff, vs. STEPHEN BOURNES, and CAMDEN CITY SCHOOL DISTRICT Defendant. --- STEPHEN BOURNES, and CAMDEN CITY SCHOOL DISTRICT Third-Party Plaintiff, vs. STAN SKYRM a/k/a STAN STANFORD Third-Party Defendant.	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION CAMDEN COUNTY Docket No. CAM-L-2260-16 Civil Action **STIPULATION OF DISMISSAL WITH PREJUDICE AS TO ALL CLAIMS PURSUANT TO R. 4:37-1(a)**

The matters in dispute having been amicably resolved and adjusted between the parties, it is stipulated that any and all claims in the above captioned matter are dismissed with prejudice and without costs or fees to any party.

JENNIFER ROME
Plaintiff

Jennifer Rome
Date: 3-22-2017

BROWN & CONNERY, LLP
Attorneys for Defendants/Third Party Plaintiffs

Louis R. Lessig, Esquire
Date: 3/21/17

STAN T. STANFORD, III, a/k/a STAN SKYRM
Third Party Defendant

Stan T. Stanford, III, a/k/a Stan Skyrm
Dated: 03/27/2017

EXHIBIT "3"

March 27, 2017

RECEIVED BY
CONTROVERSIES & DISPUTES

2017 APR 21 A 11: 21

John Beauchamp, Regional Director
Department of Law & Public Safety
Division on Civil Rights
Southern Regional Office
5 Executive Campus, Suite 107
Cherry Hill, NJ 08002

Re: Jennifer Rome v. Camden City School District
Docket No.: ED08JE-66054
EEOC No.: 17E 2016 00373

Dear Mr. Beauchamp:

Please be advised that pursuant to N.J.A.C. 13:4-8.1(a), I hereby withdraw the Verified Complaint since the parties have amicably resolved the matter.

Very Truly Yours,

Jennifer Rome

cc: Louis Lessig, Esquire (via regular mail)

EXHIBIT “4”

EXHIBIT 4 TO SETTLEMENT AGREEMENT AND GENERAL RELEASE

BROWN & CONNERY, LLP
Louis R. Lessig, Esq. (ID No. 006561997)
360 Haddon Avenue
P.O. Box 539
Westmont, New Jersey 08108
(856) 854-8900
Attorneys for the Camden City School District and/or Brown & Connery, LLP

CAMDEN CITY SCHOOL DISTRICT, and/or BROWN & CONNERY, LLP Plaintiffs, vs. JENNIFER ROME and/or STAN T. STANFORD, III, a/k/a STAN SKYRM Defendants	**SUPERIOR COURT OF NEW JERSEY** _____ DIVISION CAMDEN COUNTY Docket No. CAM-L-_____-__ Civil Action **ORDER FOR RESTRAINTS AGAINST STAN T. STANFORD, III, A/K/A STAN SKYRM AND/OR JENNIFER ROME [FORM]**

THIS MATTER having come before the Court upon the motion of the Plaintiff Camden City School District (hereinafter, the "District") and/or Brown & Connery LLP (the "B&C"), by and through their counsel, Brown & Connery LLP; and

WHEREAS, the Defendant Jennifer Rome (hereinafter, "Rome"), a former employee of the District, filed a lawsuit against the District and Stephen Bournes in the Superior Court of New Jersey, Law Division, Camden County, under the caption of "Jennifer Rome v. Stephen Bournes and Camden City School District," Docket No. CAM-L-2260-16 (hereinafter, the "Lawsuit");

WHEREAS, the District filed a Counterclaim against Rome and a Third Party Complaint against the Defendant Stan T. Stanford, III a/k/a Stan Skyrm (hereinafter, "Stanford") in the Lawsuit, and Stanford filed a Third Party Counterclaim against the District in the Lawsuit;

WHEREAS, pursuant to a Settlement Agreement and General Release (the "Agreement"), the District, Rome and Stanford, settled any and all claims by and between them arising out of the Lawsuit;

122-17

T.F., on behalf of minor child, T.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In June 2016, *pro se* petitioner appealed the determination of the respondent Board that her daughter, T.N., was ineligible for a free public education in respondent's school district. Petitioner contended that she resides at an address within the Ocean City school district. The Board contended that a residency investigation revealed that petitioner and her daughter actually reside at an address in Margate, New Jersey – outside of the respondent's school district. The Board filed a counterclaim seeking tuition for the period of T.N.'s ineligible attendance in the district. A hearing in this matter was held on December 27, 2016. However, petitioner failed to appear and offered no explanation for her non-appearance.

The ALJ found, *inter alia*, that: the facts of this matter indicate that petitioner applied through the school choice program to have T.N. attend Ocean City Schools for the 2015-2016 school year; when T.N. was not accepted into the program, petitioner enrolled her in the Ocean City school district using an apartment address in Ocean City; subsequently, a residency investigation revealed that the lease for the Ocean City apartment had expired, and that petitioner and her daughter were actually living in Margate, at the home of petitioner's mother; as petitioner failed to appear at the hearing, the testimony and evidence presented by the respondent Board was uncontroverted; and the tuition cost for the period of T.N.'s ineligible attendance totaled $15,537. The ALJ concluded that T.N. was ineligible to attend school in Ocean City for the 2015-2016 school year, ordered petitioner to pay respondent in the total amount of $15,537, and dismissed the petition.

The Commissioner adopted the Initial Decision as the final decision in this matter, for the reasons expressed therein. The petitioner was ordered to pay tuition as set forth above. The petition was dismissed.

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

April 28, 2017

OAL DKT. NO. EDU 10336-16
AGENCY DKT. NO. 166-6/16

T.F., on behalf of minor child, T.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Initial Decision as the final decision for the reasons set forth therein. Accordingly, the petitioner shall pay the Board $15,537.00 in tuition costs for T.N.'s ineligible enrollment in the District for the 2015-2016 school year.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/28/17
Date of Mailing: 4/28/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10336-16
AGENCY DKT. NO. 166-6/16

T.F., ON BEHALF OF MINOR CHILD, T.N.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,
Respondent.

No appearance by or on behalf of petitioner

Michael P. Stanton, Esq., for respondent (McCrosson & Stanton, P.C., attorney)

Record Closed: February 1, 2017 Decided: March 16, 2017

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

Petitioner, T.F., the mother of T.N., challenges the determination made by the Board of Education of the City of Ocean City (District) that she did not reside in the City of Ocean City School District. The District filed a counterclaim seeking payment of tuition for the number of days T.N. attended school in the district.

PROCEDURAL HISTORY

On April 7, 2016 and May 19, 2016, the District notified the petitioner that her daughter, T.N., was ineligible to attend the schools of the district due to non-residency. Petitioner appealed the decision. On July 13, 2016, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A conference call was held on September 2, 2016, in an attempt to settle the case between the parties. A hearing was thereafter scheduled on December 27, 2016, and the petitioner did not appear. Petitioner was marked as "Failed to Appear". The District presented its proofs for the counterclaim but the record remained open for the petitioner to explain her nonappearance. When no explanation was received from petitioner regarding her failure to appear, the record was closed on February 1, 2017.

FACTUAL DISCUSSION

The facts of this case are not in dispute as they are reflected in the exhibits and as such, I **FIND** the following facts:

1. Petitioner's daughter, T.N., was being schooled by the District for the 2015-2016 school year.

2. Ocean City is a school choice school and T. F. who applied for T.N. to attend as a school choice student for the 2015-2016 school year, but T.N. was not accepted into the program.

3. After not being accepted in the school choice program, T.N. then enrolled in the District using an apartment address in Ocean City, New Jersey.

4. Thereafter, the District received information that T.N. was not actually residing and domiciled at the Ocean City address, but was actually residing at a Margate address.

5. The District engaged the services of DiJoseph Investigations, L.L.C. to conduct an investigation into T.N.'s actual residence.

6. Surveillance was conducted on the Margate address. It was determined at the conclusion of the investigation that petitioner and T.N. did not reside at the Ocean City address. (R-3).

7. On May 19, 2016, a Notice of Request for Disenrollment, along with the supporting documents, was delivered to plaintiff, at both the Ocean City and Margate addresses, via regular mail, Certified Return Receipt mail and hand delivery.

8. On May 25, 2016, a residency hearing was conducted before the Board of Education (Board).

9. The Board determined that T.N. was not domiciled or a resident of Ocean City, which would have entitled her to attend a school with the District without a tuition obligation.

10. On June 20, 2016, petitioner filed an appeal from the District's determination of ineligibility.

11. Tuition for the 2015-2016 school year was $86.38 per day for 180 days, equaling $15,537 per annum.

TESTIMONY

Investigator Lou DiJoseph testified on behalf of the respondent. Prior to becoming a private investigator, he spent twenty-five years in the Intelligence Unit of the New Jersey State Police. He has participated in thirty to forty prior residency hearings.

In this case, on April 22, 2016, he initiated an investigation from a complaint that the Board received indicating that T.F. resided outside of the sending district. The

information was that although there was a lease from an Ocean City residence, she actually resided at 29 South B. Avenue in Margate.

His initial investigation involved looking at all of the documents for the 2015-2016 year pertaining to T.F. and her family. He was provided with student registration information sheets from the District regarding the student. Several searches were conducted with emphasis on the student's parent's residency.

According to the student information sheet provided by the District, the student's parent and legal guardian is identified as T.F. with an apartment address in Ocean City, New Jersey. The student information sheet lists it as her primary address. The owner of record for this property is listed as H.A and C.A. of Margate, New Jersey.

He also reviewed other documents including the student information sheet, an expired rental lease agreement between T.F. and H.A., as well as an account agreement between T.F. and H.A. from Cape Bank in Linwood, New Jersey.

T.N.'s father is not listed on the student information sheet and his name remains unknown to the investigator. T.N.'s grandmother is identified as R.F. R.F. resides at South B. Avenue in Margate. An internet based searches for T.F. and R.F. showed a listed address of Doylestown, Pennsylvania and the South B. Avenue address in Margate.

Surveillance was conducted from April 24, 2016 through May 14, 2016, on the South B. Avenue address in Margate. On those occasions, a silver Ford Focus registered to R.F. was observed parked in the driveway. During the course of this surveillance, T.F., R.F. and T.N. were consistently observed at the residence. T.N. was observed letting two small dogs inside the residence and assisting R.F. bringing groceries into the residence. Also, landscapers cut the grass and prior to leaving, spoke with T.F.

It was his conclusory opinion that T.F. is the biological mother of T.N. R.F. is T.N.'s grandmother. The three are living together at South B. Avenue in Margate. As such, she resides outside the confines of the sending district for the District.

FINDINGS OF FACT

Therefore, based upon the uncontroverted testimony and evidence, I **FIND** that T.N. and her mother were domiciled in Margate, which is outside the District. Accordingly, I **FIND** that T.N. was ineligible to attend school in the District for the 2015-2016 school year. I **FURTHER FIND**, by a preponderance of the credible evidence, that the Board filed a counterclaim seeking tuition for the days T.N. attended the District while she was ineligible for the 2015-2016 school year.[1] As such, the District must establish the cost of tuition and the number of days T.N. attended the District's schools when she was ineligible to do so. The testimony was uncontroverted and therefore, I **FIND** that the per-pupil cost for a student to attend school in the district for the 2015-2016 school year was $86.38 per day multiplied by days of attendance, which was 180, equaling $15,537 per annum.

CONCLUSIONS OF LAW

At issue is whether T.N. was entitled to a free education under N.J.S.A. 18A:38-1, which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom. Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education).

---

[1] Although the Respondent's Answer does not include a titled "Counterclaim", the Wherefore clause clearly requests relief for tuition reimbursement. As such, the undersigned believes that the Appellants have been afforded proper notice of the request for tuition reimbursement.

A person who meets age requirements and is domiciled within a school district may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). A person may have many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). A child's domicile is normally that of his or her parents. Ibid. The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999).

The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

The record reflects that T.N. attended school within the district for the 2015-2016 school year while domiciled outside of the District. Accordingly, I **CONCLUDE** that T.N. was not entitled to a free public education in the district. N.J.S.A. 18A:38-1(b)(1) provides that when the evidence does not support the claim of the resident, the resident shall be assessed tuition "for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per-pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced." The uncontested record reflects that the actual cost of T.N.'s attendance in-district was $86.38 per day equaling $15,537 per annum. Accordingly, I **CONCLUDE** that the District is entitled to reimbursement for tuition by the petitioner in the amount of $15,537. I further **CONCLUDE** that petitioner's appeal should be dismissed.

ORDER

It is, therefore, **ORDERED** that petitioner, T.F., pay respondent, Board of Education of the City of Ocean City, tuition in the total amount of $15,537 for unauthorized attendance in the District schools for the periods stated above. It is further **ORDERED** that the District's determination that T.N. was ineligible to attend school while domiciled outside the district is hereby **AFFIRMED**. Petitioner's appeal is **DISMISSED**.

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

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

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

March 16, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 3/16/17

Date Mailed to Parties: 3/17/17

/vj/lam

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

Lou DiJoseph, Investigator

EXHIBITS

For petitioner:

None

For respondent:

R-1 Investigation Report by DiJoseph Investigations

R-2 Notice of Request for Disenrollment, dated April 7, 2016

R-3 Notice of Request for Disenrollment, dated May 19, 2016

123-17

OAL DKT. NO. EDU 10129-16
AGENCY DKT. NO. 167-6/16

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CATHERINE KAZAN,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the respondent, Catherine Kazan, does not have a conflict of interest pursuant to *N.J.S.A.* 18A:12-2 that precludes her from serving on the Board. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein and the petition is hereby dismissed.[1]

IT IS SO ORDERED.[2]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/28/17

Date of Mailing: 4/28/17

[1] There is currently a related matter pending before the School Ethics Commission that is being held in abeyance pursuant to *N.J.S.A.* 18A:12-32. This final decision is not dispositive of the school ethics complaint. The School Ethics Commission will determine how to proceed with the related school ethics matter.

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

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CATHERINE KAZAN,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioning Board of Education of the Wayne Township Public Schools (Board) sought to remove and disqualify the respondent as a member of the Board for alleged breaches of *N.J.S.A.* 18A:12-2, which – in pertinent part – provides that no member of a board of education shall be interested directly or indirectly in any contract with or claim against the board. The Board based its claim against respondent upon an alleged inconsistent interest involving Ms. Kazan's ongoing support for a full day kindergarten program within petitioner's school district after a proposal for funding the program was defeated in a public referendum. Specifically, respondent was among a group of citizens who petitioned the Superior Court to review and invalidate the election results, alleging that the outcome of the vote was tainted by illegal political activity at the polling places. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner sought to disqualify and remove the respondent from the Board for holding an opinion on a public issue over which reasonable people could disagree, and for speaking in defense of her position while sitting in Board meetings; while the Board argued that words spoken and actions taken by the respondent violated *N.J.S.A.* 18A:12-2 because of an alleged inconsistent interest, it has failed to support its argument with evidence that respondent was involved in any contract with or claim against the Board; respondent did not sue or file a complaint against the Board, but rather was among a group of citizens who sought a Superior Court review of the election process in the referendum, only the subject matter of which implicated Board interests. The ALJ concluded that the respondent has the right to remain on the Board on behalf of the citizens who voted for her, and for her platform in favor of full day kindergarten. Accordingly, the ALJ granted respondent's motion for summary decision and denied the Board's cross motion for summary decision.

The Commissioner concurred with the ALJ's determination that respondent has no conflict of interest pursuant to *N.J.S.A.* 18A:12-2 that precludes her from serving on the Board. Accordingly, the recommended decision of the Office of Administrative Law was adopted as the final decision for the reasons expressed therein. The petition was dismissed.

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

Issued 4/28/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED INITIAL DECISION ON CROSS MOTIONS FOR SUMMARY DECISION
OAL DKT. NO. EDU 10129-16
AGENCY DKT. NO. 167-6/16

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,
Petitioner,
v.
CATHERINE KAZAN,
Respondent.

Isabel Machado, Esq., on behalf of petitioner the Board of Education of the Township of Wayne (Machado Law Group, attorneys)

Robert J. DeGroot, Esq., on behalf of respondent Catherine Kazan (Law Offices of Roger J. DeGroot, attorneys)

Record Closed: February 10, 2017 Decided: March 16, 2017

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about June 17, 2016, petitioner Board of Education of the Township of Wayne (Board) filed an action with the Commissioner of the Department of Education

against respondent Catherine Kazan (respondent) seeking her removal and disqualification as a member of the Board for violating N.J.S.A. 18A:12-2.

The matter was transmitted by the Department of Education to the Office of Administrative Law (OAL), where it was filed on July 11, 2016, for plenary hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On or about September 23, 2016, the Board filed an Amended Ethics Complaint with the School Ethics Commission (SEC) within the Department of Education, which alleged ten violations under N.J.S.A. 18A:12-21 et seq. The petitioners in the latter matter are six of the other members of the Board. The SEC did not transmit that matter over but is retaining the matter until this action is decided by the Department.[1]

I convened a telephonic case management conference with the parties on September 29, 2016, to discuss the potential issues in the case, scheduling, and other case management concerns. It became apparent that the matter was amenable to dispositive motion practice and a briefing schedule was agreed upon. Respondent filed a Motion for Summary Decision on or about October 18, 2016. On or about January 13, 2017, petitioner filed a Cross-Motion for Summary Decision. Responses and replies were thereafter submitted. Those motion submissions having been received, the matter is now ripe for decision.

---

[1] I initially was under the impression that the matters were to be consolidated and entered my Initial Decision accordingly. While I am no longer in possession of the physical record filed, I do not recall ever being provided with the SEC Letter of October 25, 2016, until the "clarification" letter filed by Isabel Machado, Esq., on March 16, 2017. I note that in one of her briefs, she wrote:

> While we recognize that this instant petition concerns Respondent's qualifications to continue to serve on the Board of Education and not her ethics, the same principals apply. Respondent's First Amendment freedoms do not allow her to act on behalf of her personal interests, when such interests conflict with the will of the majority of the voters of Wayne Township and are inconsistent with the Board's interests.
>
> [Cross-Motion Brief at 15]

This Amended Initial Decision is intended to correct the jurisdictional error.

ISSUE PRESENTED ON THE MOTION

Whether respondent should be found disqualified and removed from her elected position on the Board of Education due to alleged breachs of N.J.S.A. 18A:12-2, because of an alleged inconsistent interest. That statute provides in pertinent part: "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, . . ."

UNDISPUTED MATERIAL FACTS

1. In 2013, Respondent ran on a political platform pledging to institute a Full Day Kindergarten Program within the District. See Certification of Isabel Machado, Esq. ("Machado Cert."), Exhibit A.

2. Respondent has been a sitting member of the Wayne Township Public Schools Board of Education since January 2, 2014.

3. On or about November 3, 2015, a public question was posed to the residents of Wayne Township asking whether, if a Full Day Kindergarten were to be established in the District, they would support raising the 2% cap. The public question was defeated 5,071 to 4,500. See Machado Cert., Exhibit D and F.

4. In or about November 2015, respondent donated $100 to a GoFundMe page in support of Full Day Kindergarten. See Machado Cert., Exhibit B.

5. On or about December 3, 2015, fifteen citizens, including respondent filed suit naming the Township Clerk, Paul V. Margiotta, as the official responsible for certifying the election results of the township as the respondent and sought to have the results of the public question set aside due to alleged illegal electioneering on the part of poll workers. See Machado Cert., Exhibit C ("Complaint").

6. On January 7, 2016, at the Board Organizational Meeting, six of the eight Board members voted to approve a motion to implement full-day kindergarten in all nine elementary schools for the 2016/2017 school year within the 2016/2017 budget. The motion was offered by Christian Smith and seconded by respondent. In stating her reasons for supporting the motion, respondent advised that it "is our job, that is what you voted for us to do, and that is the administration's job to find a way" to implement Full Day Kindergarten and cut "whatever we need to cut" to keep the program within the 2% tax levy cap. Id. Furthermore, she stated "it is our job to inform the administration the needs and wants of the community, as boards and trustees." See Machado Cert., Exhibit D.

7. At the January 21, 2016, Board meeting, both the Wayne Superintendent and the Interim Executive County Superintendent spoke to the members concerning budgetary constraints. Both expressed opinions that full-day kindergarten could not be implemented within the cap without impacting mandatory and other programs.

8. At the March 3rd and 14th meetings of the Board, the budget was presented and debated. There was concern expressed about some loss of State funding. Respondent questioned the priorities within the budget and some specific line items. See Machado Cert., Exhibits F and G.

9. After hearing administration's concerns, at the March 14th meeting, the Board voted seven to two to rescind the earlier vote to implement full-day kindergarten within the then-current proposed school budget. See Machado Cert., Exhibit G.

10. On March 17, 2016, the Board ultimately agreed to again place a question on the ballot regarding adding the cost of full-day kindergarten above the then-current school budget funding limit, by a unanimous vote. See Machado Cert., Exhibit H.

11. On or about April 16, 2016, Robert DeGroot, Esq., filed an Order to Show Cause, Certification, and accompanying Petition, identical to the December 2015

Petition, seeking redress to invalidate the November 2015 election results. Prior thereto, DeGroot had concluded that the Complaint was moot as a result of the January vote. The Order to Show Cause was filed because of the vote of the Board rescinding that action. Respondent did not have direct knowledge that an Order to Show Cause would be filed.

12. On or about June 8, 2016, the Board was served with a copy of the Complaint and a Summons. See Machado Cert., Exhibit I. Several days later, the Board was served with a copy of the Order to Show Cause and Petition, filed by the Superior Court under a separate docket number. See Machado Cert., Exhibit K. The service of these court papers was undertaken at the request of the Court Clerk. See Certification of Roger DeGroot, Esq., ¶ 7.

13. At no time relevant to these events did respondent advise the Board that she had been a signatory on the original Complaint to rescind the prior full-day kindergarten ballot question due to improper electioneering.

14. At a June 16, 2016, the Board passed a resolution directing counsel to file a complaint with the School Ethics Commission and a Petition with the Commissioner of Education to disqualify respondent from membership on the Board. Respondent notes that the resolution was passed without giving an opportunity for the respondent to answer any concerns or accusations of the Board members. Additionally, it appears the vote was taken under the mistaken premise that respondent filed an action against the Board.

15. On or about June 17, 2016, a Petition for Disqualification was filed with the Commissioner of Education, which was then transmitted to the OAL as the within matter.

16. Plaintiffs voluntarily withdrew the Complaint on June 26, 2016, after the decision was made to place the question again on the ballot. See Machado Cert., Exhibit O.

17. Respondent filed an answer to said Petition to Disqualify on July 6, 2016. See Machado Cert., Exhibit N.

18. On or about June 24, 2016, respondent was photographed with members of a Facebook group named "Wayne Say OK to Full Day K" at a fundraising event open to the public at an art studio named "Pinot's Palette." See Machado Cert., Exhibit M.

To the extent that the parties have not expressly admitted to all the material facts, I add the following which are material but are established as a matter of documentation and public record and should not be deemed in dispute:

1. The Board of Education of the Township of Wayne was not a party to nor named in the complaint filed to set aside the results of the public ballot question.

2. Neither respondent nor her counsel have any control over the Superior Court's Clerk Office or automated case management system.

LEGAL DISCUSSION

It is well-established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Brill guides us thusly:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential

> materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Id. at 540]

In explaining the standard to be applied in summary motion practice, the Brill Court explained:

> The same standard applies to determine whether a prima facie case has been established by the party bearing the burden of proof in a trial. . . . If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party.
>
> [Id. at 536-37]

As a result of the agreement on the material facts, I **CONCLUDE** that the issue of any disqualifying offense by respondent can be decided as a matter of law.

The Board asserts ethics violations in the companion dispute, of which it has also provided supporting documentation notwithstanding that it was not consolidated herein, under two statutory provisions applicable to Board members, which provide as follows:

> N.J.S.A. 18A:12-24. Conflicts of interest
>
> a. No school official or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest;
>
> b. No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others;
>
> c. No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a

direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

d. No school official shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties;

e. No school official, or member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the school official has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the school official in the discharge of his official duties;

f. No school official shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated;

g. No school official or business organization in which he has an interest shall represent any person or party other than the school board or school district in connection with any cause, proceeding, application or other matter pending before the school district in which he serves or in any proceeding involving the school district in which he serves or, for officers or employees of the New Jersey School Boards Association, any school district. This provision shall not be deemed to prohibit representation within the context of official labor union or similar representational responsibilities;

h. No school official shall be deemed in conflict with these provisions if, by reason of his participation in any matter required to be voted upon, no material or monetary gain accrues to him as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of that business, profession, occupation or group;

And:

N.J.S.A. 18A:12-24.1. Code of Ethics for School Board Members

A school board member shall abide by the following Code of Ethics for School Board Members:

a. I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures.

b. I will make decisions in terms of the educational welfare of children and will seek to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race, creed, sex, or social standing.

c. I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

d. I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

e. I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

f. I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.

g. I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board

> members, interpret to the staff the aspirations of the community for its school.
>
> h. I will vote to appoint the best qualified personnel available after consideration of the recommendation of the chief administrative officer.
>
> i. I will support and protect school personnel in proper performance of their duties.
>
> j. I will refer all complaints to the chief administrative officer and will act on the complaints at public meetings only after failure of an administrative solution.

Frankly, I am shocked at the level of vitriol that has been on display just in the papers filed in this matter. I am also shocked at the suggestion that a citizen who has been elected to a Board is expected to leave his or her opinions at the door notwithstanding he or she campaigned on specific concerns and issues, and notwithstanding the retention of free speech rights under the First Amendment. Respondent is passionate about full-day kindergarten for Wayne's children. Petitioner is correct that this case is not about the correctness of that position; nor will this matter reach any conclusion on that local subject. Yet, no member who is part of a minority of persons holding a certain viewpoint on an issue of local concern is stifled from expressing those views by any ethical code so long as those views are expressed in an appropriate manner, i.e., without profanity or libelous speech, or for an inappropriate reason, i.e., personal gain.

Petitioner seeks to disqualify and remove respondent from the Board for holding an opinion on a public issue over which clearly reasonable people could disagree, and for speaking her mind on that issue while sitting in Board meetings. Query what was the point of being elected to the Board if holding the minority or even an unpopular point of view is prohibited? No other Board member who voted similarly to respondent has been subjected to charges of unethical behavior before the Commission so far as I can discern. For example, the allegations of the Amended School Ethics Complaint would have findings of violations entered for the acts of debate and vote as a Board member during a Board meeting – Violations Four, Five, Six, Seven, and Eight. Other allegations split hairs or puff up repetitive charges, including Violations Two, Three and

Six. Violation One alleges unethical conduct on the part of respondent because she privately contributed money for a campaign to support full-day kindergarten; she visited a booth in support of full-day kindergarten at Wayne Day; and she was at a public art studio for a fundraising event for full-day kindergarten and was photographed with a pro-full-day kindergarten group of citizens. None of those actions is alleged to have occurred as a result of respondent representing herself as a Board member as opposed to acting as a private citizen. Violation Ten cites hearsay contained in newspaper reports of the dispute between the parties hereto and statements of her attorney as evidence of negative comments attempting to smear other members of the Board. Violation Nine is an allegation that she failed to properly serve her pro se request for an advisory opinion from the Commission (after this dispute had already ripened).[2]

While the Board argues that the enumerated words spoken and actions taken by respondent violates N.J.S.A. 18A:12-2, because of an alleged inconsistent interest. That statute provides in pertinent part: "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, . . .," it has failed to support its argument with evidence of any contract with or claim against. In fact, the ethics proscriptions in Section 24.1 includes the statement "I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends." Respondent retained her independent judgment and nothing to the contrary presented by the Board indicates that she abdicated it for her gain or the gain of others. The only change respondent was seeking to make was to establish full-day kindergarten in Wayne and she tried to do so by exercising her right to lobby her fellow members through debate and discussion.

With respect to the issue of respondent signing on to the Complaint, petitioner has also exaggerated both the facts and their significance. Respondent correctly asserts that she was just one of the fifteen citizens who signed the Complaint, the number needed to mount an election challenge under Title 19. She is also correct in

[2] While Wayne separates the Board disqualification petition from the SEC ethics complaint, these facts are all set forth in the certifications and documents supporting the present cross-motions.

stating that the Board was not a party to that litigation, no matter what a clerk might say or a computerized summary might display. This was not a lawsuit filed to force the Board to install full-day kindergarten. This was a lawsuit to invalidate the results of a public question on the ballot. That the subject matter of the public question involved the school budget and its 2% cap is not relevant to that lawsuit or this one.

I could reach the conclusion that respondent should have erred on the side of caution and not become a signatory plaintiff to the Complaint, but in no other manner or fashion did she violate the ethical restraints upon Board members. The Commission has recognized that "board members do not surrender the rights that they have as citizens such as freedom of speech" due to their board membership but, in exercising those rights, a board member must comply with the standards set forth in the School Ethics Act. SEC Advisory Opinion, A02-06 (March 10, 2006). I **CONCLUDE** as a matter of law and undisputed facts that petitioner has failed to support these allegations. Moreover, even if it had, the relief sought by petitioner should be seen as extreme and extremely inappropriate.

Again, the Board seeks to disqualify and remove respondent on the basis of N.J.S.A. 18A:12-2, because of alleged inconsistent interests. That statute provides in pertinent part: "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, . . ." The Supreme Court of New Jersey has interpreted Section 2 to require a "substantial conflict" in order to support a removal of a duly-elected member of a Board of Education:

> Accordingly, the Commissioner's decisions examining claims by board members have discussed the relevance of determining whether the member was pursuing a claim in the public interest rather than "personal aggrandizement and enrichment," Bd. of Educ. of Newark v. Brown, 1984 S.L.D. 671, 680 (Comm'r of Educ.), aff'd, 1984 S.L.D. 683 (St. Bd. of Educ.), and such other considerations as whether the claim giving rise to the conflict of interest promised "substantial and material benefit" to the claimant. Id. at 681 (internal quotation marks omitted). We note further that, in one decision, the Commissioner specifically rejected the argument that N.J.S.A. 18A:12-2 requires automatic

> disqualification for "any" claim against a board. See id. at 679, 681 (citing Hogan v. Bd. of Educ. of Kearny, 1982 S.L.D. 329(ALJ), aff'd, 1982 S.L.D. 354 (Comm'r of Educ.) (permitting abstention to remedy circumstances where "claim" against board involved reimbursement of legal fees incurred in Open Public Meetings Act lawsuit filed by member), aff'd, 1982 S.L.D. 356 (St. Bd. of Educ.)).
>
> In sum, we find that the Commissioner's applications of N.J.S.A. 18A:12-2 demonstrate a willingness to engage in a careful examination of a board member's asserted conflicting interest in a claim against a board and, further, to find that not all claims in which a board member has an interest constitute a "substantial conflict" requiring removal from office as the sole remedy.
>
> [Bd. of Educ. of City of Sea Isle City v. Kennedy, 196 N.J. 1, 15-16 (2008)]

Here, respondent did not sue or file a complaint against the Board of which she was a member. She and fourteen other citizens sought Superior Court review of the election process on the public question. She gained nothing and had no pecuniary interest, such as a family business, adverse to the Board. Nothing I have read requires respondent to sit home from Wayne Day or other cultural events in the community. Moreover, a more careful inquiry by the Board would have revealed that the Complaint was an election law challenge to obtain an order to the municipal clerk to void the election results. Only the subject matter of the public question implicated Board interests. Nevertheless, respondent might have appeared to be challenging her Board in this litigation by the general public of Wayne. It is a very weak claim by petitioner that I **CONCLUDE** should be thrown out entirely. Respondent has every right to remain on the Board on behalf of the citizens who voted for her, no doubt because they agree with her passionate stance about kindergarten.

I would remind all parties that "[d]iscussion in America means dissent." James Thurber. We should welcome different views on important school policies such as full-day kindergarten because "[f]reedom is hammered out on the anvil of discussion, dissent, and debate." Hubert H. Humphrey

ORDER

It is **ORDERED** that the motion of respondent Catherine Kazan for an Order Granting Summary decision is hereby **GRANTED**. It is further **ORDERED** that the cross-motion of petitioner Board of Education of the Township of Wayne for an Order Granting Summary Decision is hereby **DENIED**.

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

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

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

March 16, 2017
DATE

Gail M. Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency: 3-16-2017

Date Mailed to Parties:

id

124-17

AGENCY DKT. NO. 188-7/14

S.L., ON BEHALF OF MINOR CHILDREN., J.L., J.L., AND O.L.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	ORDER
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	
RESPONDENT.	:	

On July 8, 2015, a final agency decision was rendered in this matter, wherein the Commissioner found S.L. liable for tuition in the amount of Sixty Four Thousand Four Hundred Ninety Nine Dollars and Forty Cents ($64,499.40), representing tuition for a period of ineligible attendance by her children, J.L., J.L., and O.L., in the Board's school district during the 2013-2014 and 2014-2015 school years. The Board subsequently notified the Commissioner that S.L. had failed to comply with the decision and it requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. S.L. offered no reasons why the judgment against her should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Sayoka Lewis is now subject to entry of a judgment by the court in the amount of $64,499.40, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/28/17

Date of Mailing: 4/28/17

125-17

AGENCY DKT. NO. 253-9/16

IN THE MATTER OF THE TENURE	:	
HEARING OF LAURITHA LANE,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF	:	DECISION
THE CITY OF NEWARK, ESSEX COUNTY.	:	

The record of this matter, along with the parties' proposed Settlement Agreement and General Release, have been reviewed. The Commissioner finds that the proposed Agreement – a term of which is respondent's resignation from employment in petitioner's district – is consistent with the established standards governing settlement of tenure matters contained within *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, and as incorporated in *N.J.A.C.* 6A:3-5.6.

The Commissioner notes that the settlement indicates respondent will resign effective February 10, 2017. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

In light of the foregoing, the parties' settlement is hereby approved and the tenure matter dismissed – subject to compliance with the terms of the Agreement – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

Kimberley Harrison

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/28/17

Date of Mailing: 4/28/17

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139
Attorneys for State-Operated School
District of the City of Newark

IN RE	:	
LAURITHA LANE	:	
and the	:	SETTLEMENT AGREEMENT
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,	:	

The parties involved herein have voluntarily resolved all disputed matters and enter into the following Settlement Agreement (the "Settlement") that fully disposes of all issues in controversy between Lauritha Lane ("Lane") and the State-Operated School District of the City of Newark ("the District"):

1. Lane hereby agrees to resign from her tenured position effective February 10, 2017. Attached is a copy of Lane's signed Letter of Resignation (Exhibit A). Lane's separation from employment will be deemed a voluntary resignation in good standing. Upon inquiry from any third parties, the District will only confirm Lane's employment, position, title, salary and dates of employment.
2. Lane also agrees to withdraw with prejudice any and all claims or suits that he may have previously filed against the District that are still pending in any and all courts and/or before any and all agencies, with the exception of workers compensation claims. The Settlement is intended to be the final resolution of all outstanding matters between the District and Lane. Should Lane fail to submit letters of withdrawals for any such pending claims or suits, this Settlement Agreement will serve as Lane's formal written notice of withdrawal of those pending claims or suits, except for workers' compensation claims.

3. In exchange, commencing November 1, 2016, Lane will be placed on administrative leave with pay until the date of her effective resignation. Should Lane obtain employment with another entity prior to her date of effective resignation, the District will remove Lane from administrative leave with pay status and process her resignation to be effective the date she obtained subsequent employment and Lane will cease receiving any salary from the District thereafter. Other than the salary that she receives until the date of her resignation, Lane will not receive any further monies from the District in exchange for this Settlement Agreement.
4. The District also agrees not to pursue any disciplinary action, including termination of Lane's employment so long as this Settlement Agreement remains in effect and is not voided by any court or administrative agency of competent jurisdiction. However, if the Settlement Agreement is voided, the District retains the right to pursue disciplinary action against Lane including termination from the District.
5. As of the date of her resignation, all of Lane's employment rights, including, but not limited to salary, insurance coverage, tenure and seniority, will permanently end.
6. Lane agrees that she will not apply for reemployment with the District at any time. Specifically, Lane will be considered to have permanently retired from her tenured position as a result of this Settlement Agreement. If Lane does apply for reemployment with the District and is approved for employment, the terms of this Settlement shall control and be grounds for immediate termination of Lane's employment.
7. This Settlement shall not constitute a precedent in any matters involving other employees.
8. Except as noted above, Lane waives all claims of any nature against the District with regard to her employment with and/or separation from the District including fees, or other monetary relief, with the exception of workers' compensation claims.

9. By entering into this Settlement, and in exchange for the good consideration set forth in Paragraph 3 and 4 above, the sufficiency of which is hereby acknowledged by the parties, Lane releases and discharges the District, the State District Superintendent, its Advisory Board of Education and its Advisory Board members, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that he has or may have against the District regarding her employment. This release and discharge includes, without limitation, any and all actions, claims and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Lane's employment with the District and separation from the District. It specifically includes, without limitation, all claims which Lane may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Workers Benefit Protection Act; Title VII of the Civil Rights Act of 1964; as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employment Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employment Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to

the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on her employment by and the termination of her employment with the District, including, but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys fees, costs, and/or future wage loss, except for worker compensation claims.

10. Notwithstanding Paragraph 9 of this Settlement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 9, Lane agrees not to seek or accept any resulting relief whatsoever.

11. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advised Lane of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Lane acknowledges that he: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has seven (7) days from the date of the execution of this Agreement to revoke it. Lane understands that she may rescind this Agreement within seven (7) calendar days of signing it and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the seven-day period.

12. The parties respectively acknowledge that counsel has advised them regarding this Settlement and that each is signing this Settlement freely and voluntarily, without duress, coercion or pressure from the other party.

13. This Settlement constitutes the full agreement of the parties and shall be construed and enforced in accordance with New Jersey law.

14. If any provision or portion of a provision of this Settlement is held by a court of competent jurisdiction or determined under applicable federal or state law to be invalid, void or unenforceable, the remaining provisions or remaining portions of a provision will continue and remain in full force and effect.

15. This Settlement is subject to final approval by the State District Superintendent of the State-Operated School District of the City of Newark and will only become effective upon the approval of the Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue this matter further.

Dated: Nov. 9 2016

LAURITHA LANE

Dated: Nov 9 2016

EUGENE G. LISS, ESQ.
Attorney for Lauritha Lane

Dated: 11/9/16

CHRISTOPHER CERF
State District Superintendent

Dated: Nov 9, 2016

BERNARD MERCADO, ESQ.
Attorney for Newark Public Schools

CERTIFICATION

I, LAURITHA LANE, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: NOV. 9 2016

Laurtha E Lane

LAURITHA LANE

Bernard Mercado, Esq.
Newark Public Schools
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102

RE: LAURITHA LANE
NOTICE OF RESIGNATION - FEBRUARY 10, 2017

Dear Mr. Mercado:

Please be advised that I wish to inform you that I will be resigning from employment with the Newark Public Schools effective February 10, 2017. I wish to thank you for the opportunity I have had to teach the students of Newark.

Dated: Nov 9 2016

Lauritha E Lane
LAURITHA LANE

Exhibit A

126-17L

126-17

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

May 1, 2017

Colin M. Lynch, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
One Riverfront Plaza, Suite 320
Newark, New Jersey 07102-5410

Ramon E. Rivera, Esq.
Scarinci Hollenbeck
1100 Valley Brook Avenue
P.O. Box 790
Lyndhurst, New Jersey 07071-0790

Re: *Newark Teachers Union and John Abeigon, President v. Edward Hui, Gabrielle Ramos-Soloman, Sunne-Ryse Smith, Nana Ofosu-Amaah, Samantha Messer, Nick Romagnolo, Jill Wohrle, and the State-Operated School District of the City of Newark, Essex County Agency Docket No. 41-2/17*

Dear Counsel:

I have reviewed the Petition for Declaratory Ruling in the above-captioned matter, together with the respondents' answer to the petition.

Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a), and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq.*

Accordingly, petitioners' request for declaratory ruling is declined; this matter shall be transmitted forthwith to the Office of Administrative Law.

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

KH/MKD/BON

128-17

OAL DKT. NO. EDU 1682-17
(EDU 11405-16 ON REMAND)
(EDU 12005-14 ON REMAND)
AGENCY DKT. NO. 223-8/14

SERGIO CALAFIORE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
UNION COUNTY EDUCATIONAL SERVICES COMMISSION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/10/17

Date of Mailing: 5/10/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1682-17
AGENCY DKT. NO. 223-8/14

ON REMAND
OAL DKT. NO. EDU 11405-16
OAL DKT. NO. EDU 12005-14

SERGIO CALAFIORE,

Petitioner,

v.

UNION COUNTY EDUCATIONAL SERVICES COMMISSION, UNION COUNTY,

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

Bradley D. Tishman, Esq. for respondent (Cleary, Giacobbe, Alfieri, Jacobs, attorneys)

Record Closed: March 23, 2017 Decided: March 23, 2017

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 3, 2017, as a remand of OAL Docket No. EDU 11405-16, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

March 23, 2017
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: 3-28-17

Mailed to Parties: MAR 28 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

CLEARY | GIACOBBE | ALFIERI | JACOBS LLC

BRADLEY D. TISHMAN, Associate
btishman@cgajlaw.com

Reply to: Oakland Office

December 14, 2016

Via Facsimile [(973) 648-6124] and
First Class Mail
Hon. Danielle Pasquale, ALJ
State of New Jersey
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Calafiore v. Union County Ed. Serv. Comm.
OAL Docket No. EDU 11405-2016N
Agency Ref. No. 223-8/14

Dear Judge Pasquale:

As you know, our firm represents the Respondent Union County Educational Services Commission ("Commission") in the above matter. During our telephone conference held on November 16, 2016, it was agreed that the Commission would file its Motion to Dismiss by today. The parties have amicably settled this case following the telephone conference. Pursuant to this tribunal's November 21, 2016 prehearing order, we enclose a copy of the settlement agreement for your Honor's file. Based upon the terms of the agreement and discussions with Petitioner's counsel (Nicholas Poberezhsky, Esq.), it is our understanding that Petitioner will be promptly withdrawing his pending Amended Petition.

Thank you for your attention to this matter.

Respectfully Submitted,

Bradley D. Tishman

Enclosure

Cc: Nicholas Poberezhsky, Esq. [Via E-mail (NPoberezhsky@carusosmith.com)]
Terry Foppert, Superintendent [Via E-mail (TFoppert@ucesc.org)]

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 7th day of December 2016, between the Union County Educational Services Commission (hereinafter referred to as the "Commission") and Sergio Calafiore (hereinafter referred to as "Calafiore").

WHEREAS, Calafiore was employed as a Teacher of Food Services by the Commission prior to the abolishment of his position effective July 1, 2014; and

WHEREAS, Calafiore filed a retirement application with the Division of Pensions and Benefits that became effective on November 1, 2014; and

WHEREAS, on August 13, 2014, Calafiore filed a Petition with the Commissioner of Education to challenge the Commission's reduction in force and abolishment of his position [OAL Docket No. EDU 12005-14, Agency Ref. No. 223-8/14]; and

WHEREAS, on April 15, 2015, Calafiore moved to amend his Petition to include a seniority rights claim; and

WHEREAS, on June 16, 2016, the Hon. Irene Jones, ALJ granted the Commission's Motion for Summary Decision upholding the Commission's decision to abolish Calafiore's position, and denied Calafiore's motion to amend his Petition to include a seniority rights claim; and

WHEREAS, on July 28, 2016, the Commissioner of Education affirmed Judge Jones's decision regarding the Commission's abolishment of Calafiore's position, but reversed Judge Jones's determination on Calafiore's motion to amend his Petition, and remanded Calafiore's claim to the Office of Administrative Law for a determination as to whether Calafiore is entitled

to a position with the Commission by virtue of his seniority rights; and

WHEREAS, on remand the matter was assigned to the Hon. Danielle Pasquale, ALJ [OAL Docket No. EDU 11405-16, Agency Ref No. 223-8/14]; and

WHEREAS, on September 16, 2016, Calafiore resubmitted his Amended Petition for Relief; and

WHEREAS, on November 8, 2016, Calafiore filed his Second Amended Petition; and

WHEREAS, the Commission disputes Calafiore's claim of entitlement to a position with the Commission by virtue of his alleged seniority rights; and

WHEREAS, the parties are desirous to amicably resolve the matter without further litigation.

NOW, THEREFORE, in consideration for the premises and conditions set forth herein, the Commission and Calafiore agree as follows:

1. **TERMS.**

A. Calafiore will immediately dismiss with prejudice the Second Amended Petition currently pending against the Commission [OAL Docket No. EDU 11405-16, Agency Ref No. 223-8/14]. Calafiore further agrees not to file a new claim, in any forum, regarding any of the allegations raised in his original and/or amended petitions against any individuals or entities affiliated with the Commission, as further detailed in the "Complete Release" section below.

B. Calafiore will receive the total sum of $3,750.00, inclusive of attorneys' fees in settlement of this matter. The Commission's payment to Calafiore will be subject to applicable tax withholdings, and the Commission will issue a W-2 form to Calafiore for this payment.

C. The parties agree that they are only responsible for their respective attorneys' fees

incurred to date. Calafiore agrees that if he should file a claim in a court of competent jurisdiction and/or administrative action relating to the terms set forth in this Agreement (with the exception of any action necessary to enforce the terms of this Agreement), the Commission may seek reasonable attorneys' fees incurred in defending against said litigation, as further provided for in subsection 2b below.

D. The Commission agrees to provide Calafiore with a neutral letter of reference by providing his title and dates of service only.

E. The terms of this Agreement are subject to formal acceptance and ratification by the Commission.

2. COMPLETE RELEASE.

a. In consideration of the settlement hereinabove, Calafiore, his heirs, assigns and agents hereby agree to release, waive and discharge the Commission, its affiliated departments, and its officers, trustees, agents, employees, former employees, current and former elected officials, current and former attorneys, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, or action or writ of any kind, nature, character or description that Calafiore had, now has, or may in the future have against the Releasees on account of or arising out of the Petition or any matter that, has happened, developed or occurred prior to the date of this Agreement. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, claim for damages of any kind, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law),

rule, regulation, executive order or guideline, and any and all claims for attorney's fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (LAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, gender identity or expression, familial status, disability or nationality, or liability for service, in the Armed Forces of the United States.

ii. Any federal claim, cause of action demand or complaint arising out of or under the Federal Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex, or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA), which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child; spouse or parent who has a serious health condition and any claim, cause

of action, demand or complaint arising out of under the New Jersey Family Leave Act (NJFLA).

vi. Any claim, cause of action demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

ix. Any claim, cause of action, demand or complaint arising out of or under the Federal Fair Labor Standards Act (FLSA) or the New Jersey Equal Pay Act.

x. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA).

b. Calafiore specifically acknowledges he has not filed and shall not hereafter file any claim, charge or complaint of any nature against Releasees with the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local court or agency against the Commission or the Releasees for any events preceding the ratification of this Agreement. If Calafiore violates this Complete Release by filing any claim, charge or complaint as prohibited by this Agreement, Calafiore agrees to pay all costs

and expenses of defending against the suit incurred by the Commission and/or the Releasees, including reasonable attorneys' fees.

3. CONSULTATION WITH ATTORNEY.

Calafiore has consulted with his legal counsel with respect to this Agreement, and has reviewed with his attorney all of the terms and conditions of this Agreement prior to executing this Agreement.

4. COMPLETE AGREEMENT.

This Agreement contains the entire agreement between Calafiore and the Commission with respect to the subject matter and supersedes all prior agreements, understandings and/or dealings whether written or otherwise with respect to the same subject matter. There is no agreement on the part of the Commission to do anything other than what is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

5. MODIFICATION.

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

6. SEVERABILITY.

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

7. ATTESTATION.

Calafiore represents and warrants that he has carefully read each and every provision of this Agreement and that he fully understands all of the terms and conditions contained in each provision of this Agreement. Calafiore represents and warrants that he enters into this Agreement voluntarily, of his own free will, without any pressure or coercion from any person or entity including, but not limited to, the Commission and the Releasees.

8. NON-ADMISSION OF LIABILITY.

This Agreement is executed and all consideration is given in final settlement of disputed claims and shall not be construed as an admission of any allegation or of liability by the Commission, and any such liability is expressly denied.

9. FUTURE EMPLOYMENT.

Calafiore acknowledges that his relationship with the Commission has been permanently and irrevocably severed. Calafiore agrees that he will not at any time hereafter apply for employment or reemployment with the Commission, nor shall he accept any employment with the Commission.

10. NON-PRECEDENTIAL.

It is understood between and among all parties hereto that the terms of this settlement shall not have any precedential effect or constitute binding practice by the Commission.

11. REVOCATION.

Calafiore may revoke this Agreement within seven days after the date this Agreement is signed by Calafiore. This revocation must take the form of written notice by Calafiore that he intends to revoke the Agreement. The revocation must be provided directly to the

Commission. This seven day revocation period may not be waived by Calafiore.

12. REASONABLE PERIOD OF TIME.

Calafiore agrees that he has been given a reasonable period of time of at least 21 days within which to review and consider this Agreement prior to executing this Agreement, but that Calafiore may waive this 21 day period by signing in the space provided at the end of this Agreement.

IN WITNESS WHEREOF, and intending to be legally bound hereby, I, Sergio Calafiore, execute the foregoing Agreement this 7th day of December, 2016.

Sergio Calafiore
SERGIO CALAFIORE

Sworn and subscribed to before me
this 7th day of December 2016.

Notary Public of the
State of New Jersey

CLARE T. PELLEGRINI
A Notary Public of New Jersey
My Commission Expires November 10, 2020

UNION COUNTY EDUCATIONAL
SERVICES COMMISSION

Date: 12/07/16

By: Helen E Fuscl

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the twenty-one (21) day period referred to in the 12th recital on page 8 of this Agreement.

Date: 12/07/16

SERGIO CALAFIORE

Minutes of the U.C.E.S.C.
Representative Assembly Meeting
March 1, 2017

PERSONNEL:

It was moved by Ms. Byrne, seconded by Dr. Clancy and carried by roll call vote, to approve the following Agenda items:

D. Motion to approve the following resolution:

WHEREAS, at its meeting on December 7, 2016, the Board approved the draft Settlement Agreement and Release ("Agreement") in the following matter: OAL Docket No. EDU 12005-14, Agency Ref. No. 223-8/14; and

WHEREAS, the Board must submit a resolution approving the final Agreement and designating a Board member to sign the Agreement on its behalf; and

NOW, THEREFORE, BE IT RESOLVED that the Board formally approves the Agreement signed December 7, 2016; and

BE IT FURTHER RESOLVED, that the Board authorizes the signature of Board President Helen Kirsch as the Board's representative.

Ayes: Mesdames; Kirsch, Aklonis, Duda, Villani, Fabrizio, Powers, Clancy, Root, Byrne; Messr: Watkins, Donner, Arminio

Nays: None Abstain: None

I certify that this is a true and accurate copy of the unofficial minutes of the Union County Educational Services Commission's Representative Assembly Meeting of March 1, 2017.

Robert A. Behot, Ed.D. / Board Secretary

129-17

OAL DKT. NO. EDU 03904-17
(EDU 14271-16 ON REMAND)
AGENCY DKT. NO. 188-7/16

A.V., ON BEHALF OF MINOR CHILD, L.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS IN THE COUNTY OF BERGEN	:	DECISION
RESPONDENT.	:	

The record, proposed settlement agreement and release, and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's March 17, 2017 determination that the settlement agreement previously submitted did not comply with *N.J.A.C.* 6A:3-1.13, as it was neither signed by the Board's attorney, nor contained a copy of the Board's resolution approving the settlement. Since there is now a Board resolution approving the settlement, the Commissioner can approve the within settlement agreement in its present form.

Accordingly, the Initial Decision recommending approval of the parties' settlement as the final decision in this matter is hereby adopted, and the matter is dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/10/17
Date of Mailing: 5/10/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03904-17

A.V. ON BEHALF OF MINOR CHILD L.P.,

Petitioner,

v.

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS IN THE COUNTY OF BERGEN,

Respondent.

REMAND OF

OAL DKT. NO. EDU 14271-16

Jerry L. Tanenbaum, Esq., for Petitioner (Mattleman, Weinroth & Miller, P.C., attorneys)

William C. Soukas, Esq., for Respondent (Nowell, P.A., attorneys)

Record Closed: March 31, 2017 Decided: March 31, 2017

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The within matter, captioned under OAL Dkt. No. EDU 14271-16, was remanded by the Department of Education Bureau of Controversies and Disputes to the Office of Administrative Law (OAL) due to the absence of a Board resolution approving the settlement. On March 21, 2017, the Clerk of the OAL received and filed this remanded matter and thereafter the undersigned acquired from the Board's attorney the original

Board Resolution which is attached hereto along with the Stipulation of Settlement indicating the terms of agreement.

Having reviewed the Board Resolution and Stipulation of Settlement terms, I **FIND:**

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

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

I **CONCLUDE** that this Board Resolution along with the Settlement Agreement meets the requirements of N.J.A.C. 6A:3-1.13 and N.J.A.C. 1:1-19.1 and that settlement should be approved. Accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 31, 2017
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: March 31, 2017

Date Mailed to Parties: APR 5 2017
db

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

17-F-133T **APPROVAL – AUTHORIZING SETTLEMENT OF LITIGATION**

Resolution

WHEREAS, the Board of Education ("Board") is respondent in an administrative action brought before the Commissioner of Education bearing Agency Ref. no. 188-7/16 and OAL Dkt. No. EDU 14271-16 taking issue with discipline imposed by the school district;

WHEREAS, the Board's attorney has negotiated a settlement of the matter involving no payment of monies to petitioner and without any admission of fault or wrongdoing on the part of the Board, which settlement was accepted by petitioner's counsel and approved by the Administrative Law Judge handling the action; and

WHEREAS the Board is desirous of avoiding the cost and expense of further litigation or hearing and, also, desires to resolve all disputed claims between the parties by entering into a Settlement Agreement and Release with Petitioners; and

NOW, THEREFORE, BE IT RESOLVED, that the settlement of this lawsuit be and is hereby approved, accepted and ratified in the form memorialized in the Settlement Agreement and Release on file with the Board Secretary; and

BE IT FURTHER RESOLVED that the Superintendent of Schools be and hereby is authorized to execute the Settlement Agreement and Release on behalf of the Board of Education, and the Superintendent, Business Administrator, and Board Attorney be and hereby are authorized and directed to take all necessary and appropriate action to effectuate the settlement; and

BE IT FURTHER RESOLVED that the recitals are hereby incorporated as if restated herein in full, and this Resolution shall take effect immediately.

I John Susino, Business Administrator/Board Secretary, certify this resolution was presented and approved at the Board of Education meeting on February 28, 2017.

John Susino, Board Secretary
Bergen County Board of Vocational-Technical Schools

NOWELL, P.A.
155 Polifly Road
Hackensack, New Jersey 07601
By: William C. Soukas, Esq. (ID No. 034761994)
(201) 343-5001
Attorneys for Respondent,
Board of Education of the Vocational Schools in the County of Bergen i/p/a Bergen County Specials Services School District, Board of Education

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

MS. ANNA VLADI, ON BEHALF OF HER MINOR DAUGHTER, LEENA PRAKHINA, **Petitioner,** **v.** **THE BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS IN THE COUNTY OF BERGEN,** **Respondent.**	**AGENCY DKT. NO. 188-7/16** **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release ("Agreement") is entered into by and between Ms. Anna Vladi on behalf of her minor daughter, Leena Prakhina (hereinafter "Petitioners" or "Student") and the Board of Education of Vocational Schools in the County of Bergen (hereinafter "District").

WHEREAS the Student has filed a Petition for review with the Commissioner of Education against District, with the Petition bearing Agency Docket No. 188-7/16; and

WHEREAS, the Parties desire to resolve their differences rather than proceeding forward with any further litigation, or incurring any further attendant costs of any litigation as well as any hearing and appeal, and without any admissions of wrongdoing by either Party; and

WHEREAS the parties have consulted with their respective attorneys prior to executing this Agreement and have had an adequate opportunity within which to consider the Agreement; and

WHEREAS, in consideration of the mutual covenants and promises contained herein and intending to be legally bound, the parties mutually agree as follows:

(1) The District shall within 15 days of the date of this Agreement revise the appropriate entry in the District's Powerschool system so that the sole reference therein to the alleged disciplinary infraction in any file or document relating to the Student will state as follows: "The student received a 2 day out-of-school suspension because she admitted to momentary possession of a piece of marijuana brownie handed to her by another student on school premises. No evidence of distribution or use of the substance was found."

(2) The District shall provide Petitioners with a written copy of the revised Powerschool entry within 15 days of the date of this Agreement. The District agrees that in the event that it is contacted by, or receives any request for student records from, any college or post-secondary institution, it shall provide only the statement set forth in Paragraph 1 herein.

(3) Subject to the limitations set forth in this Paragraph, the Petitioners hereby waive release any and all claims they had or may have had against the District on the date of this Settlement Agreement and Release, known or unknown, arising from the beginning of time to the date of this Agreement, under Federal or State statutory or common law. This Release inures to the benefit of, and is binding on, all agents, subsidiaries, successors, heirs or any other related entity of the Parties and shall specifically apply only to claims resulting from the following:

> Any and all claims, demands, damages, etc. that Petitioners asserted or could have asserted against the District in the matter of Anna Vladi o/b/o L.P. v. Board of Education of the Vocational Schools in the County of Bergen filed with the Commissioner of Education and bearing Agency Dkt. No. 188-7/16

(4) Each Party is responsible for their own costs and attorney's fees. Each party waives any and all claims for attorneys' fees, costs and expenses against District which Petitoners or their counsel have/has incurred in connection with this action or in connection with any claim against the District.

(5) The Parties have consulted with counsel with respect to this Settlement Agreement and Release and enter into this Agreement under their free will without duress of any kind.

(6) This Settlement Agreement and Release represents the full understanding of the Parties and supersedes any other written or oral understandings. This Agreement can only be modified by a writing that is executed by both Parties.

(7) This Agreement can be signed in counterparts, with each counterpart having the full force and effect of a fully executed original.

(8) The District warrants that the individual designated to sign this Agreement on behalf of the District has full authority to sign for and bind the District to this Agreement.

(9) Petitioners acknowledge that the settlement of this matter is contingent upon foregoing any litigation relating to this claim and upon the execution, by Petitioner(s), of a Withdrawal of Petition in the form attached herewith as Exhibit "A."

(10) The individuals executing this Agreement represent and warrant that each is authorized to make, execute and deliver this Agreement, that each has been represented by counsel and has been fully apprised of and understands all of the terms of this Agreement and the legal ramifications of the entry into the same.

Execution of this document constitutes agreement with all of the terms and conditions above:

Board of Education of Vocational Schools in the County of Bergen

By: _____ Date: _____

Print name and Title-

Ms. Anna Vladi, O/B/O her minor daughter, Leena Prakhina

_____ Date: 1/4/2016

Anna Vladi

131-17

C.G., on behalf of minor child, E.J.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LAKELAND REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her son, E.J.G., seeking a determination that E.J.G. is entitled to a free public education in the Lakeland Regional High School District. The respondent Board alleged that petitioner resides in Lincoln Park, which is not a part of the Lakeland Regional High School District.

The matter was transmitted to the Office of Administrative Law (OAL) and a pre-hearing conference was scheduled for March 28, 2017. Petitioner failed to appear at the scheduled hearing. The OAL sent a notice of petitioner's failure to appear to the Commissioner on March 30, 2017, and subsequently returned the file to this agency. Correspondence from petitioner explaining her failure to appear was received by the Commissioner on April 13, 2017.

Upon review, the Commissioner found that the petitioner asserted that she had called the OAL on March 28 when she did not receive a call from the OAL for the 3:30 prehearing telephone conference. Petitioner asserted that she was told that she would receive a notice by mail with a new prehearing conference date. When no notice was received, she contacted the OAL and was told the file had been returned to the Department of Education. Based on the petitioner's timely written explanation for her nonappearance and her assertion that she had called regarding the status of the conference, the Commissioner determined to re-transmit the matter to the OAL for further disposition pursuant to *N.J.A.C.* 1:1-3.3(b).

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

Issued 5/11/17

OAL DKT. NO. EDU 1924-17
AGENCY DKT. NO. 323-12/16

C.G., on behalf of minor child, E.J.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LAKELAND REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the advisement by the Office of Administrative Law (OAL) – pursuant to *N.J.A.C.* 1:1-14.4 – of petitioner's failure to appear at a March 28, 2017 prehearing conference have been reviewed.

Petitioner filed a hand-written explanation asserting that she called the OAL on March 28, 2017 at 3:38 when she did not receive a call from the OAL for the 3:30 prehearing conference. The petitioner contends that someone from the OAL informed her that the OAL was experiencing problems with the phone system and that she would receive a notice in the mail with a new date for the prehearing conference. When the petitioner did not receive a notice with a new prehearing conference date, she contacted the OAL and was told that the file had been returned to the Department of Education (Department). The petitioner further states the Administrative Law Judge Bedrin Murray advised the petitioner that she should contact the Department and request that the file be returned to the OAL.

Based upon the petitioner's timely written explanation for her nonappearance and her assertion that she called the OAL on the date of the prehearing conference to inquire about

the status of the conference, this matter is being retransmitted to the OAL for further disposition, pursuant to *N.J.A.C.* 1:1-3.3(b).

IT IS SO ORDERED.

N.J.A.C. 1:1-3.3(b).

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/11/17

Date of Mailing: 5/11/17

130-17

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

SYNOPSIS

On December 5, 2016, T.M. – the mother of J.R. – filed a *pro se* petition appealing the determination of the respondent Board that her son is not entitled to a free public education in West Orange schools. Petitioner contended that J.R. resided in West Orange with his stepfather, M.M., during the school year and resided with her in East Orange during the summer months. Subsequently, T.M. was informed that the appeal must be initiated by M.M., since it is his home in which J.R. was allegedly domiciled. On December 9, 2016, M.M. filed a *pro se* petition asserting that J.R. lives with him, but visits his mother at her East Orange residence. The respondent argued that the Board had not received any legal papers or court orders that appointed petitioner M.M. as J.R.'s legal guardian or parent/legal guardian of primary residence; accordingly, the Board requested that the petition be dismissed with prejudice. The Board did not seek tuition reimbursement from petitioner.

The ALJ found, *inter alia*, that: pursuant to *N.J.A.C.* 6A:22-3.2(a)(1), a student is a resident of a school district if his parent or guardian has a permanent home in the district; the domicile of an unemancipated child is that of his or her parent, custodian or guardian; in the instant case, M.M. contested the Board's decision that J.R. was not properly domiciled in West Orange; based on the testimony and evidence, T.M. and J.R. lived with petitioner M.M. in West Orange when J.R. was registered for school in August 2015; M.M. and T.M. described their relationship as boyfriend and girlfriend when they resided together in West Orange, and believed that this was enough to establish M.M. as J.R.'s legal guardian; however, M.M. is neither a parent or legal guardian of the J.R., nor does he have any written agreement giving him permission to have J.R. reside with him in West Orange. The ALJ concluded that J.R. has not been a domiciliary of West Orange since July of 2016, and is therefore ineligible for continued attendance in the West Orange public schools.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

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

May 11, 2017

130-17

OAL DKT. NO. EDU 4-2017
AGENCY DKT. NO. 313-12/16

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

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons stated in the Initial Decision – that J.R. is no longer domiciled in the district and that the Board's decision denying J.R. the ability to attend school in the district was not arbitrary, capricious or unreasonable.

Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/11/17
Date of Mailing: 5/11/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00004-2017
AGENCY DKT. NO. 313-12/16

M.M. on behalf of MINOR CHILD, J.R.,
Petitioner,
v
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

M.M., petitioner, pro se

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

Record Closed: March 20, 2017 Decided: March 30, 2017

BEFORE **ELISSA MIZZONE TESTA,** ALJ:

STATEMENT OF THE CASE

Petitioner, M.M., challenges the determination by the Board of Education of the Township of West Orange, Essex County ("BOE" or "respondent") that the minor child,

J.R., should be removed from the West Orange School District because the BOE determined that he does not reside in West Orange, pursuant to N.J.S.A. 18A:38-1.

PROCEDURAL HISTORY

On December 5, 2017, T.M. the mother of J.R., filed a residency petition on behalf of J.R., a student at Kelley Elementary School, West Orange. On December 9, 2017, the State Department of Education (DOE), advised T.R. that because she was alleging J.R. resided with his stepfather, M.M. in the West Orange School District, M.M. would have to initiate the appeal of the Board's residency determination. On December 9, 2016, M.M. filed the residency petition on behalf of J.R. On December 27, 2016, the BOE filed an Answer with the State Department of Education (DOE). The pleading did not seek reimbursement from the Petitioner for the tuition incurred by the attendance of the minor child in the BOE's district. On December 30, 2016, this matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to 13. A hearing was held on March 20, 2017, on which date the record was closed. It was confirmed on the record with Ms. Fabres, counsel for the BOE, that her client is not seeking tuition reimbursement from Petitioner, M.M.

FINDINGS OF FACT

Based upon the testimonial and documentary evidence presented at the hearing, I **FIND**:

On August 25, 2015, T.M. registered her minor son, J.R. in the West Orange School District. (R1). Pursuant to the testimony of T.M., she and her son J.R. were residing with M.M. in West Orange. Thereafter, in or about July of 2016, T.M. moved to East Orange. Respondent's residency inspector, David Zawacki, credibly testified that the first notice that was received by the BOE that J.R. was not residing in West Orange was at the end of the 2015-2016 school year. This original investigation was never completed since the school year had ended. The investigation was re-initiated in October

of 2016. On at least fifteen occasions between October and November of the 2016-2017 school year, the minor child, J.R. was observed leaving a residence in East Orange and being driven to a West Orange school bus stop. The student was never observed leaving in the morning from the West Orange address on file with the West Orange School District (R2) or any other West Orange address. A residency hearing was conducted on November 14, 2016, wherein the West Orange BOE voted to remove J.R. from the West Orange School District. Notice of the BOE's action was forwarded and addressed to T.M., the mother of J.R. (R4).

Mr. Zawacki further testified that all documents presented to the West Orange School District upon J.R.'s registration on August 25, 2015 list T.M. as "Legal Guardian 1" and C.R. (the biological father), as "Legal Guardian 2." (R1). These forms were never modified to add and/or change any of the information provided. The address of residency provided for the minor child J.R. at that time was a West Orange address. Mr. Zawacki further produced a Statement of Landlord which was provided on August 25, 2015 to the West Orange School District. M.M. was not listed as an owner and/or tenant at that property. (R1).

M.M. averred in his petition that he is J.R.'s step-father, and he referred to the minor child J.R. as his son. But it was established through the testimony of M.M. and T.M. that M.M. is not J.R.'s step-father, biological parent or legal guardian nor does he have any written agreement with T.M. and/or C.R. giving him permission to have J.R. reside with him in West Orange. M.M. stated that T.M. and J.R. lived with him in West Orange when J.R. registered for school in the West Orange School District on August 25, 2015 and they then subsequently moved to East Orange. Both M.M. and T.M. described their relationship as boyfriend and girlfriend when they were residing together in West Orange. They believed this was enough to establish M.M. as J.R's legal guardian.

T.M. corroborated Mr. Zawacki's investigative findings by indicating that because of M.M.'s work schedule during the months of September through December, J.R. had to

sleep at her house in East Orange every night and then he would get picked up by M.M. in the morning and get dropped off at the bus stop in West Orange.

LEGAL DISCUSSION AND CONCLUSION

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

In the case at hand, M.M. contested the Board's decision that J.R. was not properly domiciled in the West Orange school district, having filed the Petition with the Board. Based on the testimony provided and the evidence submitted, I **CONCLUDE** that

M.M. is neither a parent or legal guardian of the minor child J.R. Moreover I **CONCLUDE** that J.R.'s biological mother and legal guardian is a domiciliary of East Orange, and that in accordance with N.J.S.A. 18A:38-1, J.R.'s education is the responsibility of the East Orange school district. Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that the minor child J.R. was not a domiciliary of the West Orange School District since July of 2016, and is thus ineligible for continued attendance in the West Orange public schools.

ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that the minor child J.R. is not a resident and domiciliary in West Orange, New Jersey, and was not domiciled within its school district and should be removed is hereby **AFFIRMED**.

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

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

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

March 30, 2017 *Elissa Mizzone Testa*

DATE **ELISSA MIZZONE TESTA**, ALJ

Date Received at Agency: March 30, 2017

Date Mailed to Parties: MAR 31 2017

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Petitioner:

M.M.

T.M.

For Respondent:

David Zawacki

LIST OF EXHIBITS

For Petitioner:

None

For Respondent:

R-1 West Orange School District Registration Forms

R-2 Residency Investigative Report dated November 14, 2016

R-3 Letter from superintendent dated November 9, 2016

R-4 Letter from superintendent dated November 15, 2016

R-5 Petition from T.M. dated 12/1/16

132-17

132-17JO

OAL DKT. NO. EDU 9007-15
AGENCY DKT. NO. 102-5/15

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
C.P., on behalf of minor child, E.V.,	:	
RESPONDENT.	:	

On February 3, 2016, a final agency decision was rendered in this matter, wherein the Commissioner found that E.V. was not a domiciliary of Hamilton for the 2014-2015 school year and was, therefore, not entitled to a free education in the District's schools during that time period. The Commissioner assessed respondent, Cristina Pineda, $13,113.28 in tuition costs, to be reimbursed to the Hamilton Board of Education for E.V.'s period of ineligible attendance in the District's schools pursuant to *N.J.S.A.* 18A:38-1. The Board subsequently notified the Commissioner that respondent had failed to reimburse petitioner as directed in the final decision, and requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Respondent offered no reasons why the judgment against her should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Cristina Pineda is now subject to entry of a judgment by the court in the amount of $13,113.28, which represents the total payment ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/10/17
Date of Mailing: 5/11/17

136-17

AWARD APPROVING SETTLEMENT AGREEMENT

In the Matter of the Tenure Hearing of Richard Chambers and the Camden City Public Schools	*	Department of Education Docket No. 46-3/17

Before: Joel M. Weisblatt, Arbitrator

Appearances: For the Teacher
Mellk, O'Neill
By: Arnold M. Mellk, Esquire
Edward Cridge, Esquire

For the District
Adams, Gutierrez & Lattiboudere
By: Adam S. Herman, Esquire

AWARD

At the arbitration proceeding commenced on April 12, 2017, the parties reached a resolution of the issues presented in the above-captioned matter. The Arbitrator finds that the terms of that settlement are clearly in the public interest. Therefore the Arbitrator issues this Award approving the terms of the parties' settlement.

Specifically, the Arbitrator has reviewed the record evidence, including: the charges, the answer, and documented materials in support of the charge. Additionally, there was consideration of the parties' proffer of proofs to be presented at hearing and the overall circumstances of the context of the conduct at issue.

The settlement provides for the withdrawal of the charges and the resignation of the charged party. It was achieved with the consent of both the charged and charging parties. The Stipulation of Settlement reflects a full explanation to the charged party of his rights and the implications of the resolution. The settlement represents a fair and equitable resolution of the parties' dispute and reflects a result serving the public interest as well as that of the parties.

Skillman, New Jersey
May 12, 2017

Joel M. Weisblatt, Arbitrator

On this 12th day of May, 2017, before me personally came and appeared Joel M. Weisblatt, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Attorney-at-law

ADAMS GUTIERREZ & LATTIBOUDERE, LLC.
The Legal Center
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Camden City Public Schools

In the matter of	:	
RICHARD CHAMBERS	:	AGENCY REFERENCE NO.: 46-3/17
CAMDEN CITY PUBLIC SCHOOLS	:	**STIPULATION OF SETTLEMENT**

The Camden City Public Schools (the "Board"), whose principal office is located at 201 North Front Street, Camden, New Jersey, and its successors, assigns, officers, employees, agents and representatives (collectively, "School Board"), and Richard Chambers, residing at 83D Bellhaven Court, Whiting, New Jersey 08759 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS Respondent is a tenured teaching staff member employed by the Board as a teacher; and

WHEREAS the State District Superintendent ("Superintendent") certified tenure charges of conduct unbecoming and other just cause to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Richard Chambers, State-Operated School District of the City of Camden* ("Tenure Charges"), under Agency Reference Number 46-3/17-12/14; and

WHEREAS, Respondent filed an answer opposing the charges; and

WHEREAS the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Joel Weisblatt ("Arbitrator") for a hearing; and

WHEREAS, Respondent has denied the allegations set forth in the tenure charges; and

WHEREAS, the Parties are aware of the uncertainty of the outcome of arbitration; and

WHEREAS, the Board with stringent budget limitations and due to the expenditure of resources due to multiple days of hearings with numerous witnesses; the concern that school personnel will be removed from their educational duties and responsibilities during that time; and the concern of having several young pupils participate in the litigation and being removed from instructional time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS the proposed Stipulation of Settlement is in the best interest of the Parties and the public because Respondent resigns from his employment without litigation and avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Concurrent with the execution of this Stipulation, Respondent shall submit an irrevocable letter of resignation to the Board, which shall provide for his resignation from the Board effective June 30, 2017, ("Effective Date"). (See Exhibit "A," to the Stipulation, a copy of Respondent's signed letter of resignation).

2. Upon final approval of the signed Stipulation by the Arbitrator, the Board shall and hereby does withdraw the instant Tenure Charges. The Board agrees to not pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the Board retains the right to file and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against him by the Board, and Respondent reserves the right to defend same.

3. Upon final approval of the signed Stipulation by the Arbitrator, Respondent will be returned to the payroll retroactively to March 6, 2017 and will remain on the payroll through June 30, 2017. All salary paid for said period shall be subject to all applicable and mandatory salary withholdings and deductions, including, but not limited to health insurance premium contributions. Respondent will be recorded as an employee on administrative leave with pay between March 6, 2017 and June 30, 2017.

4. The Board shall provide Respondent with health insurance coverage until August 31, 2017. Pursuant to Chapter 78, Respondent shall be responsible for his employee contribution for all health insurance provided pursuant to this Stipulation of Settlement. Respondent's required Chapter 78 contributions shall be deducted from the payments he will receive pursuant to Paragraph 3 of this Stipulation of Settlement.

5. This Stipulation is based upon the understanding that Respondent's separation from employment with the Board, effective June 30, 2017, will be deemed a voluntary resignation-in good standing. Upon inquiry from any third party to authorized employees or representatives of the Board, those employees or representatives will provide no information other than to confirm

Respondent's employment, position, salary and dates of employment, and state that the reason for his separation from employment was his voluntary resignation.

6. The Board expressly reserves the right to oppose any application by Respondent for unemployment benefits. Notwithstanding any other term or condition of this Agreement, Respondent does not waive or release his right to seek unemployment compensation, his entitlement to which shall be determined by the State of New Jersey, Department of Labor and Workforce Development.

7. In accordance with N.J.A.C. 6A:3-5.6 (a) 6, Respondent has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners. Additionally, pursuant to N.J.A.C. 6A:9B-4.4(a)1, Respondent has been advised of the Board's duty to notify the State Board of Examiners he has resigned. The Board is legally required to participate in proceedings initiated against Respondent's license by the State Board of Examiners resulting from the Commissioner's referral. Aside from such requirements, pursuant to the above-referenced regulation, the Board agrees to not independently seek the suspension or revocation of Respondent's teaching certification or license or seek to prevent him from applying for or receiving pension benefits on any grounds related to the Tenure Charges or his resignation pursuant to this Stipulation of Settlement.

8. As of the Effective Date, except as specifically provided in paragraph 5, all of Respondent's rights of employment with the Board, including but not limited to accrued salary, benefits, tenure and seniority, will permanently end.

9. Respondent will not apply for reemployment with the Board at any time. If Respondent does apply for reemployment with the Board and is approved for employment, the terms of this Agreement shall control and shall be grounds for termination of Respondent's employment.

10. In exchange for the consideration set forth in paragraphs 2, 3, 4 and 5 above, the sufficiency of which is hereby acknowledged, Respondent, through the date of his resignation, hereby waives, releases and discharges any and all claims or rights that he has or may have against the Board, the Superintendent, its Board of Education and its Advisory Board members, and any and all other Board officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the Board or separation from employment with the Board. It specifically includes, without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey

Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on his employment by and/or termination of her employment with the Board, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss. Respondent agrees to withdraw any and all other pending complaints or actions that have been filed against the Board or any of its employees or representatives.

11. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that he: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has seven (7) days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that he may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven (7) day period.

12. Respondent warrants that he has not commenced any legal proceedings of any type (including but not limited to charges filed with any governmental agency) against the Board or School Board. Further, Respondent agrees that he will not commence any legal proceedings against the Board or School Board arising from or relating to anything that has happened up to his date of resignation. Should any such legal proceedings be commenced on Respondent's behalf, Respondent agrees that he will not seek or accept any relief or recovery therefrom. In the event of a violation of this paragraph, Respondent agrees that the Board and School Board shall be entitled to immediate dismissal of the legal proceedings, and that he shall be responsible for the Board and School Board's attorneys' fees and costs incurred in connection with those legal proceedings. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the Board or School Board based upon any of the above-released claims in Paragraph 3, Respondent agrees not to seek or accept any resulting relief whatsoever, in accordance with this paragraph.

13. This Stipulation and all of its terms, are and will remain confidential to the maximum extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et al. Respondent is expressly forbidden from discussing this Stipulation with any person, other than his accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which he is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that he will inform the person to whom it is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this

Stipulation with others, any representative of the media, or any past, present, or prospective employee of the Board, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an important, integral part of this Stipulation. The Board agrees that it will keep this Stipulation confidential to the extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"). In the event that the Board receives an OPRA request, for which this Stipulation would be responsive to, the Respondent understands that the Board is legally obligated to disclose same under OPRA and that such disclosure would not be a breach of this Stipulation.

14. This agreement shall not constitute a precedent in any matters involving other Board employees.

15. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

16. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

17. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

18. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

19. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

20. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

21. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

23. Additionally, this Stipulation is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

Dated: April 28, 2017

Richard Chambers

RICHARD CHAMBERS

CAMDEN CITY PUBLIC SCHOOLS

Dated: 5/10/17

By: PAYMON ROUHANIFARD
STATE DISTRICT SUPERINTENDENT

CERTIFICATION

I, Richard Chambers, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: April 28, 2017

Richard Chambers
RICHARD CHAMBERS

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated: 5/11/17

Adam S. Herman, Esq.
ADAMS GUTIERREZ & LATTIBOUDERE
Attorneys for the City of Camden Public Schools

APPROVED:
Dated: 5/12/17

Joel Weisblatt, Arbitrator

EXHIBIT A

RICHARD CHAMBERS
83D Bellhaven Court
Whiting, New Jersey 08759

May 3, 2017

Paymon Rouhanifard
State District Superintendent
Camden City Public Schools
201 N. Front Street
Camden, NJ 08102

Dear Superintendent Rouhanifard:

Please accept this letter as my irrevocable resignation, effective at the close of business on June 30, 2017, from employment with the Camden City School District, for personal reasons, as resolved by the District's attorney, union attorney, and the Arbitrator appointed by the Commissioner of Education.

Very truly yours,

Richard Chambers

Richard Chambers

Cc: Arnold M. Mellk, Esq.
Adam Herman, Esq.
Emily Nielson, Chief Talent Officer

137-17

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing:

FREEHLD BORO REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION
PETITIONER
AND
BRETT D. HOLEMAN
RESPONDENT

Arbitrator's
Opinion
and
Award

Agency Docket No. 249 – 9/16

Before: Stephen J. Rosen, Arbitrator

APPEARANCES:

For the Petitioner:
Comegno Law Group, P.C.
By: Jeffrey R. Caccese, Esq.
By: Mark G. Toscano, Esq.

For the Respondent:
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
By: James R. Zazzali,Jr., Esq.
By: Aileen O'Driscoll, Esq.
By: Kaitlyn Dunphy, Esq.

This matter arises out of tenure charges filed with the Commissioner of Education by the Freehold Regional High School District against the Respondent, Brett D. Holeman, dated September 15, 2016. After determination that the charges warranted further action, the Bureau of Controversies and Disputes forwarded the applicable documents to me on or about October 11, 2016. Shortly thereafter, the parties were officially notified of my selection.

The first hearing via a conference call occurred on October 22, 2016. A second conference call with attorneys Aileen O'Driscoll, Jeffrey Caccese and James Zazzali took place

12, 2016. In addition to the attorneys of record, the meeting also included Superintendent Charles Sampson , Director of Human Resources, Dr. Jennifer Sharp and Dr. Brett Holeman. The meeting failed to bring about a settlement.

In response to the tenure charges, Attorney O'Driscoll contended that the Petitioner was unable to show just cause. Ms. O'Driscoll argued that the Petitioner had failed to comply with N.J.S.A. 18A: 6-17. Namely, the Petitioner's submission of evidence and a complete list of witnesses with a complete summary of their testimony was deficient. In addition, the parties had disagreed over the Petitioner's intent to issue subpoenas. The Respondent argued that the Board had not adhered to the timelines prescribed under the Statute and asked that the charges be dismissed. Based upon the positions of the parties, I concluded the matter should proceed. Attached is my decision concerning the dismissal of the Tenure Charges and the Petitioner's attempt through subpoena to obtain information from Respondent's previous employer.

Hearings were held on January 12, 2017, January 19, 2017, January 24, 2017, January 30, 2017, February 6, 2017, February 17, 2017, February 22, 2017, February 27, 2017, March 1, 2017, March 2, 2017, March 11, 2017 and March 16, 2017. A transcript was prepared for each hearing. Both parties elected to submit post-hearing briefs after receipt of the transcripts.

BACKGROUND

The Respondent, Brett D. Holeman, began his employment as a school psychologist with the Freehold Regional High School District in 2004. He holds a Doctorate in Psychology (Psy D) from New York University. In his capacity as a school psychologist, Dr. Holeman provided counseling, cognitive testing and individual educational plans as a case manager. A

school psychologist also serves as a member of child study teams and interacts with administrators, parents and colleagues.

In the Spring 2016, the administration was made aware of allegations concerning Dr. Holeman's behavior. The issues brought to the attention of Respondent's superiors were cited in an April 25, 2016 memorandum sent to Dr. Holeman by Director of Personnel Sharp. The memorandum was in reference to an April 26, 2016 investigatory conference which listed six (6) allegations made against Dr. Holeman. Dr. Sharp listed the following:

- Engaged in inappropriate behavior (inappropriate comments, language and expressions), including the use of profanity, reference to sexual activity in front of students; as well as the use of extreme volume with students and parents within a confidential counseling environment;
- Made repeated derogatory and demeaning remarks about and to colleagues and supervisors;
- Engaged in erratic and concerning behaviors that intruded into and unnecessarily disrupted the workplace of colleagues;
- Jeopardized the State mandated testing environment to which he was assigned;
- Demonstrated an overall lack of respect for authority; and
- Disregarded the District's organizational plan and failed to observe or use proper chain of command when raising issues or concerns.

A summary of the April 26, 2016 conference was drafted by Dr. Sharp (Board Exhibit 8) and submitted to Superintendent Sampson. In her summary, the Director of Personnel questioned Dr. Holeman regarding the District's concerns. Also in attendance were the Freehold Education Association President (FREA), the FREA Vice President and Mrs. Linda Jewell, Principal, Freehold Boro High School.

The April 26th meeting dealt with the allegations made against the Respondent. Dr. Holeman responded to several of the allegations and emphasized that he had received very

positive evaluations during his thirteen (13) years with the District. He refuted the validity of the allegations and commented he was "very passionate about his work."

Dr. Sharp informed Dr. Holeman that "given his erratic and concerning behaviors" he was advised to get a full psychiatric and medical evaluation that included appropriate blood tests to ascertain the presence of any mood altering drugs or metabolic steroids. The directive concerning medical and psychiatric examination reflected suspicion that Dr. Holeman may have used metabolic steroids, an inference denied by the Respondent. Director Sharp thought it best that Dr. Holeman initiate testing immediately. Although it was noted that a final decision regarding his status had not been made, the Respondent was placed on administrative leave. A similar directive was contained in a letter from Superintendent Sampson dated April 26, 2016. Dr. Holeman was informed his employment status would be discussed at the May 16, 2016 meeting of the Freehold Regional High School District Board of Education.

On August 12, 2016, Sworn Tenure Charges and a Written Statement of Evidence for conduct unbecoming an employee....were filed by the Board Secretary pursuant to N.J.S.A 18A: 6-11 et seq. One month later, on September 12, 2016, the Board reviewed and considered the evidence in support of the Sworn Tenure Charges against Dr. Holeman and determined there was sufficient evidence, "if true in fact, to warrant dismissal or reduction in salary."

In both email and regular mail dated September 12, 2016, Counsel for Dr. Holeman urged the Board to abstain, if considering the Notice of Tenure Charges, from voting on the charges. As an alternative, a request to approve a transfer to a different position within the District was made in behalf of Dr. Holeman.

The Board referred to a number of incidents which it alleged warranted suspension and further investigation into his conduct. In particular, the District characterized Dr. Holeman's

behavior prior to his suspension as troubling. It was alleged that Dr. Holeman had raised his voice during a counseling session prompting a supervisor to interrupt the session "to ensure the student's safety." Dr. Holeman, it was alleged, repeated this behavior with another student and parent. The Petitioner also referred to a due-process petition initiated by a parent against the Board in reaction to Dr. Holeman's management of a case and his interaction with the parent.

Dr. Holeman is also alleged to have spoken inappropriately to a student distraught over his break up with a girlfriend. The Board contended Dr. Holeman told the student the girlfriend was a "slut" and that he would soon leave for college and could "fuck 40 girls." The student had also allegedly conveyed to a staff member that Dr. Holeman had recommended a book titled, "F*ck Feelings," which is described as a "profanity-filled self-help book" that argues one should "value your actions over your emotions." It should be noted that Dr. Holeman denied these allegations.

Another accusation concerned Dr. Holeman's actions and demeanor during the administering of the state mandated PARCC test. The Petitioner described the Respondent's manner during the test session as disruptive. He allegedly was "cursing, talking loudly" to the extent he made his colleagues "uncomfortable." He supposedly expressed dissatisfaction with the "administration" and showed considerable annoyance when the test was delayed because computers for the students were not in the test room. The Petitioner contended that Dr. Holeman's behavior had a potential negative impact while the students were taking the PARCC test.

Apart from behavioral matters, the Board had also expressed dissatisfaction with Dr. Holeman's alleged failure to complete IEP's (Individual Education Plan) in a timely manner. It was charged that a number of reports were delinquent at the time Dr. Holeman was placed on suspension.

The Petitioner's investigation included a review of Dr. Holeman's email account. An examination of the Respondent's email account, the Board charged, revealed that Dr. Holeman had spent "a substantial amount of time nurturing his private counseling practice." It was also alleged that Dr. Holeman accepted pay for time counseling current and former students. It was noted Board policy prohibits accepting payment from a current student for services due to a teacher's employment in the District

In regard to Dr. Holeman's private practice, the Petitioner contended that Freehold Boro High School had been used as his official and registered business address. It was alleged that Dr. Holeman created a separate email address for his emails to private clients that were sent through the District system.

An additional charge proffered by the Petitioner concerned the allegation Dr. Holeman "solicited" students for private counseling from internal and administration confidential lists that identified students withdrawing from school. It was alleged that Dr. Holeman directly solicited these students for private counseling. Although some of these actions took place in 2013, if the Administration had known of this at the time, they would have initiated tenure charges. The Petitioner indicated it did not have knowledge if this solicitation has continued.

The Board identified emails that it charged violated confidential student information. One email cited was sent to Dr. Holeman's wife. The Petitioner alluded to the nature of this email as a violation of Board policy as well as disrespectful of the student and his family.

Additional allegation raised by the Board was the nature of emails sent to students which were interpreted as "overly familiar, even intimate." While there was no evidence of improper behavior, the Petitioner believed Dr. Holeman had failed to maintain an appropriate boundary with past and present students.

Petitioner also made reference to an incident concerning a student who was suspected of drug dealing. It was alleged that Dr. Holeman advised the student when confronted not to answer any questions concerning the matter. The Administration believed the advice not to cooperate was interference of the investigation. This 2013 incident was considered an example of previous "insubordinate and inappropriate conduct toward District Administration...."

The Board's submission to the Department of Education included a charge that Dr. Holeman had failed to disclose his previous employment with the West Morris Regional High School District as an interim School Psychologist and his abrupt termination from this position effective April 10, 2004. Freehold Regional High School's Professional Employment Application required a list of prior teaching and administrative experience. Dr. Holeman's failure to list his employment in the West Morris Regional High School District negated the opportunity to investigate the circumstances that resulted in his termination.

The Administration had taken into consideration the concerns expressed by Dr. Holeman's colleagues. Staff members stated that Dr. Holeman was "unprofessional and uncomfortable to be around." Dr. Sharp's Summary of the Investigatory Conference included comments submitted by colleagues that he "seemed erratic lately, speaking loudly in the office.... I feel like I have been walking on eggshells around him.... I feel very uneasy around him."

Among the charges were that Dr. Holeman had made derogatory and demeaning remarks about both colleagues and supervisors. According to the Administration, he ignored and disregarded the chain of command and the District's organizational plan. He was described as an individual who did not respect authority.

The District's submission to the Department of Education stated that Dr. Holeman was not truthful when asked about yelling incidents while counseling a student. The District's

submission contended that when the student was asked by the Guidance Supervisor if he was OK he did not respond, as claimed by Dr. Holeman, "Of course, I am OK. Why would you think I am not OK?" Furthermore, the Petitioner did not accept Dr. Holeman's assertion that the student commented that he "loved Dr. Holeman."

The Respondent denied that he demonstrated the behavior described by the Petitioner. Dr. Holeman, through his legal counsel, essentially contended the charges were not accurate and, in some instances, a misinterpretation of his counseling tactics. In certain situations, Dr. Holeman explained, it is necessary and appropriate to raise your voice.

Dr. Holeman contended his conference with Dr. Sharp on April 26, 2016, did not provide a "true opportunity to respond" to the allegations. He also denied he fabricated his responses to any questions put forth by Dr. Sharp.

In response to the reference to steroid use, the Respondent disputed the allegation that he told a colleague "that his wife asked him if he was using steroids again." Dr. Holeman's lab tests did not reveal any trace of steroids.

Dr. Holeman denied that he had admitted recommending the book the administration considered inappropriate. He also did not agree with the Petitioner's rendition of the distraught and suicidal student's counseling experience with Dr. Holeman.

The PARCC testing outcome was never in jeopardy as suggested by the Petitioner. The reference to a colleague being uncomfortable around him was something Dr. Holeman was unable to address.

Dr. Holeman disputed that he used school time or facilities in his private practice. He also denied privately counseling current District students for a fee and acknowledged he was familiar with Board Policy. Dr. Holeman indicated that he understood he was not able to offer private

counseling for pay until after a student had graduated. Furthermore, he denied directly soliciting students for professional services.

Dr. Holeman admitted temporarily registering 2 Robertsville Road, Freehold, NJ (District address) with the State Board of Examiners for his private business. However, this was only for a brief period of time while relocating his private practice. He always provided a private work phone number with the Board of Examiners as his official business contact number and never provided the school address for purposes of private counseling.

In one instance, the Petitioner charged, Dr. Holeman utilized the Board issued email account to contact a non-school related recipient. Board policy stipulates that its email system is restricted to messages that are school related. Dr. Holeman did not agree with the charge.

Dr. Holeman acknowledged being employed as an interim School Psychologist at the West Morris Regional High School District. In Dr. Holeman's submission to the Department of Education, Controversies & Disputes, he denied being terminated abruptly from this interim position. The Respondent also denied that he intentionally withheld employment information on his application to the Freehold Regional High School District. A newspaper article (Observer-Tribune) that stated he was asked to leave the West Morris Regional High School District was described as opinion or conjecture by the Respondent.

In many of the charges put forth by the Petitioner, the Respondent's legal counsel responded they were legal questions their client was unable to answer. A number of the charges, it was argued, were described as redundant.

POSITION OF THE PETITIONER

After the administration became aware of Dr. Holeman's inappropriate, insubordinate, erratic and volatile behavior in the Spring of 2016, it was determined that a thorough investigation of both his behavior and performance was warranted. The investigation in the Spring of 2016 revealed "a trail of lies, willful deceit, manipulation and frightening conduct...."

In spite of the statements submitted and testimony of co-workers and administrators, Dr. Holeman "steadfastly refused to acknowledge that his conduct either occurred or was inappropriate." Dr. Holeman, the District argued, has shown an inability to work collaboratively with colleagues.

In formulating the Tenure Charges, the Board considered a number of incidents and occurrences that supported removal from the District. Dr. Holeman was deemed to have violated several Board policies including the "Code of Ethics of the Education Profession along with elements of the New Jersey Administrative Code." Given these violations, the District can no longer trust him or his judgment.

Among the allegations was the charge Dr. Holeman after school hours, in late February/early March, sent text messages to Supervisor Rosalia Minervini. Ms. Minervini reported her concerns about the texts to Principal Linda Jewell. Ms. Minervini found Dr. Holeman's texts inappropriate. "For example, he would refer to colleagues as 'mentally ill' and 'not stable to work with children.' He called them evil and sick. He once labeled staff members 'fucking bitches.' "

In an IEP team meeting with a parent around March 23, 2016, Dr. Holeman became 'noticeably volatile.' Marla Reich, the District's Speech Language Pathologist testified that Dr.

Holeman inappropriately raised his voice during the meeting. Dr. Sharp testified Dr. Holeman advised the parents on "working around" the administration. Superintendent Sampson testified Dr. Holeman's conduct in the March 23rd meeting escalated an already uneasy situation with the parents and ultimately led to litigation.

District Guidance Counselor Holly Fabian testified that a student informed her Dr. Holeman told him that he would go to college and fuck many girls. Dr. Holeman also told the student his ex-girlfriend was a slut banging other guys. Ms. Fabian testified that Dr. Holeman's comments were "extremely inappropriate" and she would no longer refer students to Dr. Holeman.

The Petitioner's concerns included Dr. Holeman's volatile behavior directed toward students. "On April 18, 2016, Student QH reported to Principal Jewell that Dr. Holeman yelled at her." Dr. Holeman did admit he "raised" or elevated his voice when he spoke to QH on the telephone. While Dr. Holeman explained he had served as the student's counselor for a long period of time and believed it was necessary to be firm. Although Dr. Holeman suggested QH call him back, she never called back and complained about Dr. Holeman's behavior to Principal Jewell.

District Supervisor Suzanne Gallo testified that on the same day as the QH incident she found it necessary to instruct Dr. Holeman to lower his voice because students and parents outside his office were able to hear him. After leaving his office, Dr. Holeman resumed speaking in a loud voice that prompted Ms. Gallo to report the matter to Ms. Jewell.

Principal Jewell testified that she spoke to the student who had been in Dr. Holeman's office at the time Ms. Gallo had asked that the Respondent to lower his voice. The student told

Ms. Jewell that "he deserved to be yelled at," a comment that Principal Jewell found disturbing. In her opinion, Ms. Jewell felt "she was sitting across from a battered woman."

When Principal Jewell addressed the matter with Dr. Holeman, he admitted he spoke in a raised voice but not loud enough for others to discern what he said. Dr. Holeman testified that it was sometimes necessary to speak in a loud voice to inspire students and to convey his passion. However, Dr. Holeman's own witness and mentor Samuel Grove, a retired Freehold Boro psychologist, testified that raising one's voice was not something he would recommend.

The District had regarded Dr. Holeman's behavior during the PARCC test and his interaction with colleagues as inappropriate and disruptive. Talking in an elevated and loud voice while complaining about the administration was not conducive to a test environment.

The Board also gave weight to the tone and substance of emails sent by Dr. Holeman. In particular, the Respondent's criticism of the administration and colleagues was unprofessional. Dr. Holeman had accused Ms. Minervini of "caving" in to a parent and used profanity in his email to her. Dr. Holeman had expressed to Ms. Jewell that he was disappointed in her. The Petitioner characterized the emails as "insubordinate, inappropriate, and disparaging of other professionals."

When Supervisor Minervini had addressed in a meeting Dr. Holeman's loud voice with a student, she described Dr. Holeman's reaction as uncooperative. He told Ms. Minervini that the administration did not have "a clue as to what effective counseling is." Ms. Minervini testified that Dr. Holeman was very "disrespectful, inappropriate and volatile toward her and, as such, she had to end the meeting."

The District had stressed the importance of completing IEP reports on a timely basis. Dr. Holeman shifted responsibility and blame for the backlog in submission of the IEP's to others

and took no responsibility for not having his IEP's completed. When questioned about the submission of IEP's, Dr. Holeman told Ms. Minervini he was up to date. Despite the fact he was informed in a 2013 performance review that he was not in compliance with IEP timeliness, he expressed surprise the issue (Exhibit 12) was raised by the Petitioner.

In a meeting with Ms. Jewell and Freehold Regional Education Association President Deborah Gates-Kane, on or about April 22, 2016, Dr. Holeman was informed there were concerns about his behavior. Told that he would be placed on administrative leave, he became very upset. Ms. Gates-Kane testified in a telephone conference call that at one point Dr. Holeman stood up and was alarmed there was going to be a physical confrontation with Ms. Jewell. Ms. Gates-Kane confirmed that Dr. Holeman also "threatened" Principal Jewell stating, "You better sleep with one eye open."

Dr. Sampson testified that he would have sought tenure charges in 2013, if he had known at the time Dr. Holeman had accepted a counseling fee of $130 from the parents of a student enrolled in the District. Although the student was on home instruction, Dr. Holeman failed to ask a supervisor or administrator if accepting a fee was permissible. The student's parents had informed Dr. Holeman that they were waiting to meet with Superintendent Sampson. The Respondent did not admit that he was in violation of a policy that prohibited accepting a fee for counseling a student on home instruction.

The charges also listed the use of the District's resources to advance his private counseling business. Dr. Holeman admitted he used the District email for his private business. He acknowledged that he signed the District email using his company's name, "Psyched Up," rather than creating a separate business email address.

In correspondence to the New Jersey State Board of Examiners, Dr. Holeman used the address of Freehold Borough High School. Dr. Holeman explained that he did not want to use his home address for privacy reasons, yet was willing to provide an address where students are located.

Staff member Lindsay Pantaleo testified she was "uncomfortable" when she learned Dr. Holeman had placed her name and school email address on a pregnancy website without her consent.

In the course of the investigation, the District discovered inappropriate emails sent to parents of students and current and former students. Dr. Holeman revealed confidential information in an email to his wife. Dr. Holeman had referred to a former student as "my little girl." In another email exchange with a former student, he discussed a then current student. Superintendent Sampson alluded to student privacy as a "sacred trust" that had been violated by Dr. Holeman.

The District made reference to Dr. Holeman's interference with a prior investigation involving a student discipline matter. In the course of the investigation for alleged drug involvement, Dr. Holeman advised the student not to answer any questions. The accusation was confirmed by credible witnesses who observed the incident.

Superintendent Sampson stated that Dr. Holeman does not respect authority. In addition, he does not take responsibility for his behavior, blames others and "exhibits narcissism in the extreme." The Superintendent testified that he did consider Dr. Holeman's employment history, but concluded the Respondent's "other behaviors were too extreme," to be overlooked. The District cannot trust Dr. Holeman as a professional, cannot expect he will keep student confidentiality, or maintain "appropriate ways with staff members, with school community

members and follow rules and procedures." Superintendent Sampson concluded that there is no way that Dr. Holeman will be fit to return to either the Freehold Regional High School or any position in the District.

POSITION OF THE RESPONDENT

The Respondent argued that the charges were flawed on several levels. These included a failure to interview individuals who were identified and quoted by the Petitioner. Director of Personnel, Dr. Jennifer Sharp, failed to provide Dr. Holeman with the opportunity to adequately respond to the allegations and speak directly with colleagues and administrators who were regarded as central to the decision reached by the Board. Furthermore, Dr. Holeman's many years of exemplary service and excellent evaluations were ignored.

Doubt concerning Dr. Sharp's expertise to conduct the investigation was called into question by the Respondent's legal representative. "Other than learning 'general interviewing,' and 'affirmative action investigation'... her training was limited to classes taken in 2004 for her Principal's certificate." Neither Dr. Sharp or Principal Linda Jewell interviewed staff members or students connected to the allegations. Instead, they relied upon written statements requested by Ms. Jewell. Dr. Sharp never "truly attempted to find additional witnesses" or corroborate statements.

Dr. Sharp testified that the first time she was alerted to a concern regarding Dr. Holeman was on or after April 18, 2016. Those concerns were brought to her attention by Principal Jewell who had questions about Dr. Holeman's conduct in the guidance suite. Ms. Jewell specifically stated that colleagues informed her Dr. Holeman was erratic and loud with students. Shortly thereafter, Dr. Sharp put Dr. Holeman on suspension.

At this point Dr. Sharp reported her concerns to Superintendent Charles Sampson who authorized her to look into Dr. Holeman's emails. Ms. Jewell was instructed to collect statements from staff prior to a meeting on April 21, 2016 between the Principal, Union Vice-President Debbie Gates Kane and Dr. Holeman. A second meeting was convened on April 26th that included Dr. Sharp and Union President James Huebner. It was from the April 26th meeting that Dr. Sharp wrote her Investigation Summary (Exhibit 8).

In answer to the charge Dr. Holeman had failed to complete IEP's in a timely fashion, the Respondent noted the heavy caseload he was assigned. He also argued that the IEP's identified could not be completed since he had been placed on Administrative Leave. In addition, the completion of IEP's were dependent on the input and collaboration of other staff members in addition to Dr. Holeman. The Respondent explained that as the School Psychologist there were occasions when he had to deal with emergencies and crises.

One such crisis was the death of a Freehold Boro High School student. In response to the tragedy, Dr. Holeman visited classrooms and spoke to staff members. The time spent in grief counseling diverted him from preparation of reports. His efforts in providing support to the school community were recognized by Principal Jewell as well as others.

Supervisor Rosalia Minervini commended Dr. Holeman for the emotional support he provided. Ms. Minervini wrote that Dr. Holeman's classroom visits were well received. "She wrote that she was personally settled and calmed by Dr. Holeman's approach.

Dr. Holeman contended when employed at the District, Secretary Fran Ellner was the only person authorized to submit IEP's. Ms. Ellner was responsible for the "final step" for over 400 students in two high schools. Apart from Ms. Ellner's clerical burdens, delays could occur due to rescheduling meetings with parents or conflicts with staff members.

Ms. Minervini never discussed non-compliance of IEP reports with Dr. Holeman nor did she issue him any warning that he was delinquent in the completion of reports. Ms. Minervini testified that it was her practice, if a problem persists, to issue a written memo and, if necessary, prepare a corrective action plan.

Dr. Holeman did bring the extended lunchtime taken by guidance counselors to the attention of Principal Jewell. The extended lunchtime counselors had taken was addressed by the administration.

The inappropriate behavior charge was without merit. The characterization of 'overly familiar, even intimate' emails was misinterpreted. A number of the emails were from former students who had reached out to Dr. Holeman. These former students used their private email addresses and sent messages to Dr. Holeman's Freehold Boro High School address, the only address they possessed. Any purported policy violations were under a policy that was enacted after those identified by the Petitioner. Principal Jewel conceded that the content of certain emails, in her opinion, did not violate District policy.

The allegation concerning a lunch invitation to a student at the on-campus, Five Star student culinary restaurant was with his two daughters. Dr. Holeman wanted to recognize the "very quiet" student who had won a "Senior of the Month" award. When accompanied by a faculty member, students are permitted to have lunch at the Five Star restaurant.

One email identified by the Petitioner was sent after Dr. Holeman was suspended. Dr. Holeman had counseled the student for a few years and he thought she should understand why he could no longer work with her. The Petitioner contended that Dr. Holeman was instructed not to have contact with students. Dr. Holeman believed the student would have regarded his

disengagement as another rejection in her difficult life and wanted her to be aware of the reason he no longer could offer counseling.

Dr. Sharp testified that Dr. Holeman had identified his FRHS email account as "Psyched Up LLC Company" in an effort to acquire a "Labrada" shirt. "This was the sole email or evidence produced by the District to reflect Dr. Holeman spending a 'substantial' amount of time during his school day regarding his private practice." Dr. Sharp was unable to ascertain if this email was written on school time or during the Respondent's lunch period. Dr. Holeman testified that the shirt he requested from a nutrition/health company was a possible motivational influence for athletic teams he worked with at Freehold.

The emails in Exhibit 25 purported to have been sent during the workday in 2014 and 2015 were mostly transmitted during the summer or during non-work hours. Dr. Sharp acknowledged the emails were not likely violations of Board Policy. In fact, several emails were parent initiated and dealt with student related issues.

Both Superintendent Sampson and Principal Jewell acknowledged staff often worked during the time they were not scheduled to be on duty. Dr. Holeman testified he often worked during his lunch period and break time in addition to evenings and weekends. It was not uncommon for Dr. Holeman to work beyond his contractual hours.

Dr. Holeman explained that the one private patient (although without pay) he counseled on school grounds was Ms. Jewell's niece. Dr. Holeman was asked to counsel Principal Jewell's niece at her request and the session was held at the school due to a transportation problem. The niece was not a student at Freehold Boro Regional High School. However, Dr. Holeman saw the niece pro bono at the school after his scheduled workday until she was able to meet him in his Springfield office. As a private patient in Springfield, the Respondent received payment for his

services. Ms. Jewell's request to him was a reflection of her confidence in Dr. Holeman's professional competence. Furthermore, Superintendent Sampson stated there was no Board policy that prohibited counseling students who did not attend Freehold Boro Regional High School.

The charge Dr. Holeman accepted a counseling fee in regard to a student on suspension and home instruction, identified as A.V., was not improper. The student was suspended for allegedly putting visine into a staff member's drink. Mr. Sampson stated he did not know if A.V. returned to the District. Ms. Jewell claimed not to have any recollection of the student. Dr. Holeman stated that previous school administration had informed him that he was not prohibited from seeing a student who was on home instruction or designated as an out-of-district placement. Only, if a current student was on campus was he prohibited from counseling a student in his private practice.

Dr. Holeman testified that A.V. was awaiting a pending expulsion hearing, a situation known to both Dr. Sharp and Superintendent Sampson. It was understood that A.V. would not return to the school. Furthermore, A.V.'s parents were in accord with Dr. Holeman's private counseling role.

The hearing record confirmed that Dr. Holeman did not violate the prohibition against accepting compensation for services provided in behalf of students enrolled at Freehold Regional. Exhibit 22 shows that Dr. Holeman informed a parent that he could not accept a fee until after the student graduates. As an alternative, he offered the parents a referral to another therapist. The offer to provide the name of other therapists was made to parents who requested private counseling when there was a question of violating Board Policy.

Three witnesses with knowledge of Dr. Holeman as a therapist testified that he never suggested private counseling. One witness was not even aware Dr. Holeman had a private practice until after her son graduated.

The charge that Dr. Holeman had used his position as a School Psychologist to promote or profit in his private practice was unsubstantiated. The suggestion Dr. Holeman had access to confidential lists that he used for personal gain was neither documented nor supported by any evidence. In addition, the Petitioner did not establish such a list even existed.

The Respondent addressed the allegation that he had omitted a previous position on his application to the District in 2004. Dr. Sharp testified that the Respondent's application that a prior employment section had been whited out. The application was 14 years old and described by Respondent's legal counsel as stale. Dr. Holeman denied he had been terminated from a previous, short-term position. The Board witnesses had acknowledged that applications submitted by current employees were never examined.

The reference to the Due Process Complaint filed by a parent was prompted by the legitimate decision to declassify her child. The decision to declassify the student was based upon valid reasons and supported by Dr. Holeman's colleagues. Contrary to Dr. Sharp's incorrect assertion, a formal Due Process complaint had not been filed against the District by the parent.

An additional erroneous charge was the accusation Dr. Holeman was yelling at the meeting with the parent. Ms Minervini admitted declassification meetings are often difficult. Furthermore, the Due Process complaint letter to the State was "type written, unsigned, undated and no author or parent was ever produced to authenticate or verify" the conclusions reached by Dr. Sharp.

The Respondent disputed the insubordination charge. It was not uncommon for staff members to express their frustrations and criticisms of administrators to each other. However, at no time did Dr. Holeman refuse to perform his duties. Ms. Jewell did not file a complaint or report alleging that Dr. Holeman was insubordinate. He testified that he had a good relationship with Ms. Jewell who "welcomed open discussion." On occasions Ms. Jewell and others would come into Dr. Holeman's office to discuss personal issues. Yet this positive relationship changed just prior to Dr. Holeman's suspension.

Dr. Holeman denied that he had made a "threatening gesture" toward Ms. Jewell in a meeting attended by former Union President Gates-Kane. The Respondent denied he threatened Ms. Jewell and testified that as a psychologist and father of two daughters he would never threaten a woman.

Legal counsel for the Respondent identified and submitted numerous positive evaluations that he received throughout his "unblemished 13 year career in the District." His evaluations refer to professionalism, cooperation, dedication and enthusiasm. Despite the absence of any negative evaluations, Dr. Holeman was not afforded the benefit of progressive discipline.

In its Legal argument, the Respondent's representative alluded to the Tenure Act, N.J.S.A., 18A: 28-1 through 18. A tenured teacher may be dismissed or reduced in compensation only for "inefficiency, incapacity, unbecoming conduct, or other just cause." The District failed to meet its burden of proof by a preponderance of credible evidence that these stipulations applied to Dr. Holeman.

The Respondent further argued that the credibility of the witnesses was questionable. Dr. Sharp failed to properly interview witnesses and present their statements and allegations to Dr. Holeman. Dr. Sharp was inconsistent in her testimony and showed a lack of understanding of

Dr. Holeman's duties. The Administration did not take into account the possibility Guidance staff colleagues may have been disturbed when Dr. Holeman reported their extended lunch period to Ms. Jewell.

Principal Jewell was unable to remember facts, dates and reference to certain students. Ms. Jewell's reliance on "uncorroborated, non-supported, hearsay by unproduced witnesses" discredited her testimony.

Although Superintendent Sampson signed the tenure charges, he demonstrated a lack of familiarity of the facts. Mr. Sampson acknowledged he was not personally familiar with Dr. Holeman or the events that constituted his removal.

The charges and allegations were considered minor by Respondent's counsel. Except for the use of an elevated voice, none of the charges amounted to just cause.

Upon instructions from the District, Dr. Holeman submitted to both a psychological exam and a blood test. The laboratory report found no evidence of steroids. A Psychiatric Consultant, Daniel Gollin, M.D. concluded that Dr. Holeman was fit to resume his duties as a School Psychologist. After requiring an employee to undergo a fitness for duty examination, the Board cannot "arbitrarily reject both the physician's conclusion" and the result of the blood test.

"The District investigation was never about determining the truth of a matter or ascertaining both sides of a story. Rather, the investigation was about tailoring its process, its collection of selective 'facts' and framing its results for one simple objective: "remove Dr. Holeman from the District."

DISCUSSION AND FINDINGS

The matter addressed in this award differs from many of the tenure decisions arbitrated under the TEACHNJ Act. The intent of the Statute is to "raise student achievement by improving instruction through the adoption of evaluations that provide specific feedback to educators, inform the provision of aligned professional development, and inform personnel decisions:"

The Statute addresses the development of a corrective action plan "to correct deficiencies and improve a teacher's effectiveness" in the classroom. Under the Act the employee receives an annual summative evaluation rating of "ineffective, partially effective or effective." Since Dr. Holeman is not a classroom teacher, the provisions regarding classroom effectiveness are not applicable. However, one might argue that a counselor has an impact on student achievement.

The responsibilities of a School Psychologist include providing counseling services, obtaining appropriate services for student mental problems, diagnostic assessment of pupils with educational disabilities, individual and group therapy, preparation and submission of required reports and interaction with school personnel and community mental health and social welfare agencies.

Under the District's job description, the School Psychologist reports to his or her Appropriate Supervisor, Principal and, or Central Administrator as designated by the Superintendent. The duties of the School Psychologist specify that he or she "upholds and enforces school rules, administrative regulations, and Board policies." The requirements of the School Psychologist include "makes an effort to establish and maintain cooperative working relationships with students, parents, peers, employees and community."

The Petitioner charged that Dr. Holeman's behavior was in violation of several requirements for that of a School Psychologist and that of a District staff member.

Charge 1. Dr. Holeman engaged in inappropriate behavior as a school counselor and a professional, habitually made disparaging and demeaning remarks about colleagues, staff members, and administration, and failing to meet his professional obligations to special education students.

The hearing record supports the charge. While the Respondent contended that it was not uncommon for the staff to criticize administrators it does not negate the fact that he made disparaging comments about his superiors and colleagues. Principal Jewell and Supervisor Minervini cited comments that were inappropriate and considered disrespectful by both administrators.

Although Ms. Jewell believed AV reminded her of a "battered woman," the student's state of mind cannot be confirmed. However, Psychologist Samuel Grove, a counselor with considerable experience, testified he would not recommend yelling when counseling a student. Thus, I have determined this charge had been sustained.

Charge 2. Dr. Holeman engaged in inappropriate and unethical conduct by soliciting former and current students for his private practice.

The evidence did establish that Dr. Holeman accepted a counseling fee from the parents of a then current student in 2013.

Dr. Holeman's explanation he was told that receiving a fee for counseling a student on home instruction was acceptable is not credible. At a later date he informed a parent he could not accept a fee if a student was currently enrolled at Freehold Boro Regional High School. There was no evidence, except for the 2013 fee, that established Dr. Holeman received a fee for

counseling a current District student. Furthermore, There is no policy prohibiting the acceptance of a counseling fee for services rendered in behalf of a former student.

Charge 3. Dr. Holeman spent a substantial amount of time during the school day working at his private counseling practice, and even utilized his school office for his private practice; all of which resulted in a severe dereliction and failure to complete his assigned responsibilities and obligations to the students he was assigned to evaluate and/or case manage.

The District was unable to prove that Dr. Holeman spent a substantial amount of time conducting private business on school time. The Respondent testified that he often sent emails before his workday began or on lunch break or during non-assigned periods. While the allegation may have merit, the District did not establish Dr. Holeman utilized "substantial" work time when conducting non-school activities.

The Respondent did use the school mailing address in his correspondence with the New Jersey State Board of Examiners. Dr. Holeman admitted he did use his Freehold Borough High School email address on occasion to set up or manage appointments for his private counseling practice. It is understandable why for numerous reasons, including liability, the District would prohibit the use of its email system for non-school activities. Dr. Holeman's use of the District's email system both during and after school hours in the conduct of his private counseling practice was ill advised.

The District had also charged that Dr. Holeman had been delinquent in the completion and submission of IEP's. Ms. Minervini testified that she was led to understand that the Respondent's IEP's were compliant with State requirements. This ceased to be correct after January 2016.

Dr. Holeman stated that he was not the only staff member responsible for completion of IEP's. He testified that other members of the Child Study Team had time restraints and that the final button was "pushed" by the guidance department secretary. This reference to the secretary was not accurate in that he actually "pushed" the button. Although it was correct that the student load had increased over time, the secretary was not responsible for the delay. Dr. Holeman had an obligation to apprise Ms. Minervini of any delay in submission of IEP's.

Charge 4. Dr. Holeman inappropriately and unethically shared confidential student information outside the District.

Dr. Holeman did share information concerning a student with his wife. His wife is a social worker employed in a neighboring school system. There is no evidence the email was read by any other individuals. While it is a violation of confidentiality and according to confidentiality requirements should not have been shared. If sensitive information is shared with a spouse, it is more prudent not to email this information.

Charge 5. Dr. Holeman interacted with students in an inappropriate and unethical manner.

While there is no evidence that Dr. Holeman had an inappropriate relationship with any student the content of emails could have been more carefully thought out. One might conclude that Dr. Holeman did not always exercise good judgment, especially in regard to comments concerning colleagues and administrators.

Although the Petitioner signaled out emails exchanged with former students, contact with former students is not addressed by District Policy.

Charge 6. Dr. Holeman failed to disclose a former employer on his application, ostensibly because he was terminated from his position.

The charge that Dr. Holeman omitted his brief employment with the West Morris Regional High School on his application is correct. On examination of the application, it appears that a section listing previous experience may have been covered with white out liquid. It is difficult to ascertain why the Freehold District did not explore the question of any omissions at the time Dr. Holeman submitted his application.

Dr. Holeman testified he was not terminated by the West Morris District. The evidence obtained through a local newspaper and West Morris District Board of Education minutes confirm that he was abruptly dismissed from the District. Given the failure on the part of the Freehold District to question Dr. Holeman when he submitted his application in June of 2004, and the number of years that he had been employed by the District, I believe the application matter is "stale."

An additional concern dealt with suspicion Dr. Holeman had taken steroids. Staff member Lindsay Pantaleo stated that Dr. Holeman had told her that his wife had expressed concern about his use of steroids. Ms. Pantaleo repeated Dr. Holdman's comment to Susan Guercio. The result of a blood test required by the Petitioner revealed no evidence of substance abuse.

The District requested that Dr. Holeman also undergo a psychiatric exam. The psychiatrist concluded that Dr. Holeman could return to his position as a School Psychologist.

However, of particular concern are the repercussions generated by Dr. Holeman's behavior. The statements and testimony contained in the hearing record show a breakdown in Dr. Holeman's relationship with colleagues and administrators.

As previously noted, several individuals testified that in his interaction with students and parents Dr. Holeman was excessively loud to the extent he was asked to lower his voice.

Supervisor Gallo testified that although she asked Dr. Holeman to lower his voice he continued to be heard outside his office by both parents and students.

Ms. Pantaleo alleged that during the PARCC exam Dr. Holeman talked negatively about administrators in a voice she believed could be heard by students. She noted in her written statement that she found Dr. Holeman visibly agitated and erratic. Ms. Pantaleo commented that she also found Dr. Holeman's language inappropriate.

It is important that the guidance department, teaching staff and administration maintain a cooperative relationship. The hearing record reveals the relationship between Dr. Holeman and others had been damaged.

Dr. Holeman sent an email containing profanity to Supervisor Minervini stating that she "caved." He also "inappropriately and insubordinately" told Ms. Minervini in an email to tell a co-worker, Lisette Salguero, not to refer him any cases. Para professional Susan Guercio alleged that Dr. Holeman had mistreated and talked down to her. Supervisor Minervini stated she found it necessary to abruptly end a meeting with Dr. Holeman due to his "disrespectful, inappropriate and volatile[behavior] told her...."

Dr. Holeman testified that he had a very good relationship with Principal Jewell. After Ms. Jewell was informed that Dr. Holeman's behavior had become erratic, their relationship changed. It became especially tenuous in a meeting attended by Freehold Boro Regional High School Union President Debbie Gates-Kane and Principal Jewell. Ms. Gates-Kane stated that she found it necessary to move in between Ms. Jewell and Dr. Holeman for concern of a physical confrontation. Ms. Gates-Kane testified she was "called in" because his colleagues "were afraid of him...." She also stated that Dr. Holeman said to Ms. Jewell that she should "sleep with one eye open." Rarely does an Association representative provide potentially negative testimony. It

is also unusual for colleagues to criticize a fellow staff member in writing and through testimony.

There is reason to conclude that it would be inadvisable to reinstate Dr. Holeman. The record indicates irrevocable differences between the administration, staff members and Dr. Holeman. In order to effectively serve the needs of students it is important the school Guidance Department function free of conflict.

AWARD:

For the reasons described above, the Tenure Charges submitted by the Freehold Boro Regional School District against Dr. Brett Holeman are sustained.

5/12/17
Date

Stephen J. Rosen

State of New Jersey}
County of Essex}

On this 12th day of May 2017 before me personally came and appeared Stephen J. Rosen, to me known to be the individual described in foregoing instrument, and he acknowledged to me he executed the same.

Susan G. Rosen
SUSAN G. ROSEN
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 8/4/2019

ADDENDUM

In the Matter of the Tenure Hearing
Brett D. Holeman
and
Freehold Boro Regional High School District
Agency Docket No. 249 – 9/16

Ruling on Respondent's Motion to Dismiss

For the Respondent: Zazzali, Fagella, Nowak, Kleinbaum & Friedman
By: Aileen O'Driscall, Esq.

For the Petitioner: Comegno Law Group, P.C.
By: Jeffrey R. Caccese, Esq.

Stephen J. Rosen, Arbitrator

Background:

The matter concerns the dismissal of Brett D. Holeman, Psy.D., a tenured psychologist employed by the Freehold Regional School District and assigned to the system's high school.

At its September 12, 2016 meeting, the Board of Education considered allegations made against Dr. Holeman and voted to support the Sworn Tenure Charges submitted by Superintendent of Schools, Charles B. Sampson. The Board decided that Dr. Holeman's behavior warranted removal and revocation of his tenure status.

As required under New Jersey law, the allegations were forwarded to the Commissioner of Education. After review of the allegations, the Commissioner of Education determined that the matter should be referred to arbitration.

Specifically, the Board identified a number of allegations that were contained in its submission to the Commissioner. The Board characterized Dr. Holeman as unprofessional, unethical and engaging in illegal activities. The contentions prepared by Superintendent Charles B. Sampson included the following accusations:

a) Dr. Holeman engaged in inappropriate behavior as a school counselor, and a professional, habitually made disparaging and demeaning remarks about colleagues, staff members, and the Administration, and failing to meet his professional obligations to special education students.

b) Dr. Holeman engaged in inappropriate and unethical conduct by soliciting former and current students as patients for his private counseling practice.

c) Dr. Holeman spent a substantial amount of time during the school day working at his private counseling practice, and even utilized his school office for his private counseling practice; all of which resulted in a severe dereliction and failure to complete his assigned responsibilities and obligations to the students he was assigned to evaluate and/or case manage.

d) Dr. Holeman inappropriately and unethically shared confidential student information outside of the District.

e) Dr. Holeman interacted with students in an inappropriate and unethical manner.

f) Dr. Holeman intentionally failed to disclose a former employer on his application, ostensibly because he was terminated from his position.

g) Dr. Holeman does not suffer from any psychological defect or condition that explains or justifies his conduct.

h) Dr. Holeman does not have a substance abuse problem that contributed to his conduct.

The submission filed by the Board contained very specific allegations that it argued justified Respondent's removal from his tenured position.

Through his attorneys, Respondent answered each of the Tenure Charges filed by the Board. Dr. Holeman denied the accusations made against him by the Board through his legal counsel Aileen O'Driscoll, Esq. In response to the Tenure Charges, Attorney O'Driscoll contended that the Petitioner had failed to sufficiently show just cause. Ms. O'Driscoll argued that based upon deficiencies in the Board's case the charges be dismissed.

In addition to the failure to establish just cause, the Respondent charged the Petitioner had failed to comply with the provision of N.J.S.A. 18A: 6-17. The language cited by the Petitioner is that the District:

> "shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses."

Attorney O'Driscoll argued in the instant matter the District "produced a wholly deficient witness list which includes a large number of individuals, and unacceptable summaries of the testimony each person will offer." The intent of the statute, Ms. O'Driscoll stated, requires hat pertinent documents held by the Petitioner are to be forwarded as soon as the case is referred to the arbitrator. The Legislature intended that tenure charges be decided expeditiously.

Also noted in Respondent's argument for dismissal was a reference to IMO Ebert and State Operated School District of New Jersey, Agency DKT. No. 49 – 3/15. The citation emphasized the necessity of full disclosure of witnesses and a summary of their testimony. Respondent's attorney considered this not only a requirement of the Statute but also an entitlement given that the "teacher is in a reactive posture."

The list was described by Respondent's counsel as "wholly deficient." The list identified more than twenty-five (25) names with vague summaries of their testimony. Respondent also argued the list had been delayed and not produced until requested by counsel. Ms. O'Driscoll contended that this delay alone warranted dismissal of the charges.

An additional matter contested by the Respondent concerned Petitioner's issuance of subpoenas. In preparation of the charges, the Petitioner sought to obtain, through subpoenas, the personnel records of two other school districts. The districts, West Morris Regional School

District and Marlboro Regional Township, were considered pertinent by the Petitioner for purposes of credibility and ethics. West Morris Regional School District was identified as Dr. Holeman's previous employer. The Marlboro Township School District Administration had been contacted by the Petitioner in regard to a recent application for employment submitted by Dr. Holeman after the tenure charge process commenced. The Petitioner speculated that the Marlboro application might contain false information.

Respondent's attorney argued the issuance of subpoenas was improper. Ms. O'Driscoll contended the subpoenas were untimely since they were not issued until October 28, 2016, two days after the parties' conference call on October 26, 2016. Ms. O'Driscoll also argued that the issuance of subpoenas rests solely with the arbitrator. Neither N.J.S.A. 18A: 16-17 and AAA rules allude to the issuance of subpoenas by an attorney. Omission of subpoena authority, Respondent's attorney argued, reflects her position regarding the issuance of subpoenas.

In my opinion, an attorney of record in New Jersey can issue a subpoena. This view is based on interpretation of the following:

> A subpoena may be issued by either: „ The clerk of the court. „ An attorney. „ A party in the name of the clerk. (N.J. Ct. R. 1:9-1). Practitioners most commonly issue subpoenas by signing the subpoena in the name of the clerk. In certain specialized proceedings, the following may also issue subpoenas: „ Judicial officers and sometimes law enforcement officers in municipal proceedings (N.J. Ct. R. 7:7-8). „ Judges and non-lawyer representatives in administrative proceedings (N.J. Admin. Code ξ 1:1-11.1). „ Arbitrators in arbitration proceedings (N.J. Stat. Ann. ξ 2A: 23B-17).
>
> Under its Labor Arbitration Rules of the American Arbitration Association:
>
> 27. Evidence and Filing of Documents
>
> The parties may offer such evidence as is relevant and material to the dispute, and shall produce such evidence as he arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator or other person authorized by law to subpoena witnesses and documents may do so independently or upon request of any party....

Discussion of Motion to Dismiss

As indicated, it is my opinion that the State of New Jersey allows an attorney to issue subpoenas. However, the weight to be given to the information sought by the Petitioner is questionable. The Marlboro Regional School District subpoena is not relevant to the tenure charges since it represents a post termination document. Furthermore, the Petitioner does not know with certainty that its suspicions are valid.

The West Morris Regional School District subpoena has limited weight given that the Respondent has been in the employ of the Freehold District for approximately thirteen (13) years. During the years of Dr. Holeman's employment, the Freehold Regional District did not investigate or question his previous experience.

The release of personnel records is resisted by employers. Thus, the Petitioner's efforts to obtain personnel records have limited chance of success without a directive from the Court.

The witness list was acknowledged by Petitioner to be longer than the actual number of individuals who would likely be called to testify. The summary of witness statements is vague. While the relationship of possible witnesses can be culled from the tenure charge filed with the Commissioner of Education, I have instructed Petitioner to forward a more accurate list of witnesses and a more precise synopsis of their anticipated testimony.

The Respondent had taken issue with the failure on the part of Petitioner to adhere to the timelines prescribed under N.J.S.A. 18A: 6-17.1. As described below:

> (3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide

all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

I have taken into consideration the above and other issues raised by Respondent's attorney and do not believe they warrant dismissal of the Tenure Charges.

The Bureau of Controversies and Disputes forwarded the applicable file to me on or about October 11, 2016. The parties were informed of my selection a few days later and preferred to delay selection of hearing dates until they were officially notified of my appointment. This has resulted in delay of the process. The first hearing date was convened with the attorneys and arbitrator via a conference call on October 26, 2016. A second conference call was initiated on November 22, 2016. Hearing dates have been selected and various issues and concerns were expressed by both attorneys on November 22, 2016. A meeting to discuss a possible settlement is scheduled for December 12, 2016.

Selection of hearing dates has been complicated by the prior commitments of both representatives. Strict adherence to N.J.S.A. 18A: 6-17.1 timelines has been unavoidable. Neither party has deliberately delayed selection of hearing dates.

Given the above conclusions, I have determined that Dismissal of the Tenure Charge should not be granted.

12/3/16
Date

Stephen J. Rosen
Stephen J. Rosen, Ed.D.
Arbitrator

138-17

KATHLEEN DONOHUE,	:	
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
KATHLEEN DONOHUE,	:	
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a former Paterson school teacher who retired on September 1, 2015, after teaching for approximately 28 years – filed multiple petitions with the New Jersey Department of Education, Bureau of Controversies and Disputes, beginning in April of 2016. The allegations in all of the petitions relate to events that occurred during Ms. Donahue's prior service as a teacher in the Paterson school district, and involve charges of nepotism and favoritism by district administrators, as well as various wrongs she claims to have been subjected to – including being denied use of sick days. The respondent school district filed a motion to dismiss, contending that the petitions were late filed pursuant to *N.J.A.C.* 6A:3-1.3(i).

The ALJ found, *inter alia*, that: many of the allegations – which petitioner stated were motivated by her belief that Paterson school children have not received the thorough and efficient education they deserve because resources have been squandered by the administration, and because of inadequate supervision of the performance of teaching staff – assert the rights of third parties rather than those of petitioner herself; petitioner does not have standing to bring allegations that only assert the rights of others and not wrongs allegedly visited upon her; further, those allegations that do relate directly to wrongs against petitioner occurred during her employment in the school district, which ended September 1, 2015; the earliest petition of the several filed by Ms. Donahue was not filed until April 29, 2016. The ALJ concluded that all of the petitions were untimely and must be dismissed for failure to comply with *N.J.A.C.* 6A:3-1.3(i).

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

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

Issued 5/18/17

OAL DKT. NOS. EDU 08806-16 and EDU 09476-16 (consolidated)
AGENCY DKT. NOS. 123-4/16 and 150-5/16

KATHLEEN DONOHUE,	:	
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
KATHLEEN DONOHUE,	:	
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, along with petitioners' exceptions – filed pursuant to *N.J.A.C.* 1:1-18.4 – and the District's reply thereto.

In her exceptions, petitioner expresses dissatisfaction with the Administrative Law Judge's (ALJ) Initial Decision. Petitioner argues that this matter is not out of time because many of her allegations continued after her employment with the District and are still ongoing. Petitioner also argues that she has standing because she was a teacher in the District, but could not bring her claims while working out of fear of retaliation.

In reply, the District argues that petitioner's exceptions simply air her grievances, rather than taking exception to specific findings of fact or conclusions of law. The District argues that the ALJ's decision is well reasoned and urges the Commissioner to affirm the Initial Decision.

Upon review, the Commissioner does not find petitioner's exceptions to be persuasive. The Commissioner concurs with the ALJ that petitioner does not have standing to bring allegations that only assert the rights of others. The Commissioner further agrees with the ALJ that any allegations of wrongdoing by the District aimed at the petitioner are out of time – as petitioner retired on September 1, 2015, and the first petition was not filed until April 2016. As such, the matter is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i).

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons thoroughly expressed therein – and the petition is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/18/17

Date of Mailing: 5/18/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
(CONSOLIDATED)
OAL DKT. NO. EDU 08806-16
AGENCY REF. NO. 123-4/16
AND
OAL DKT. NO. EDU 09476-16
AGENCY REF. NO. 150-5/16

KATHLEEN DONOHUE,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,
Respondent.

Kathleen Donohue, petitioner, pro se

Robert Murray, Esq., for respondent

Record Closed: March 3, 2017 Decided: April 6, 2017

BEFORE **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Kathleen Donohue (Donohue or Petitioner), is a former Paterson school teacher who retired on September 1, 2015. Donohue filed four Petitions in the

form of letters with the Department of Education, Bureau of Controversies and Disputes. The first Petition, containing ten allegations, is dated April 21, 2016, and was filed on April 29, 2016. The second Petition, containing two allegations, is dated April 26, 2016, and was filed on April 29, 2016. The third Petition, containing twenty-four allegations, is dated May 16, 2016, (with a notarized signature dated May 13, 2016) and was filed on May 23, 2016. The fourth Petition, containing two allegations, is dated May 16, 2016, and was filed on May 23, 2016. Many of the allegations are repetitive.

Subsequently, on August 27, 2016, Donohue filed an Amended Complaint (i.e., Amended Petition) with the Office of Administrative Law alleging various forms of mismanagement at Paterson Public School Number 25 and seeking relief on behalf of students and the general public, and alleging wrongs perpetrated against her.

The Amended Petition of August 27, 2016, follows the format of the four previously filed Petitions and even reiterates the allegations according to the dates of her previously filed Petitions, as set forth above. The first Petition's ten allegations pertain only to wrongs allegedly visited upon third parties. The second Petition's two allegations pertain only to wrongs allegedly visited upon Donohue. In the third Petition, twenty-four allegations, numbers 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, and 23, all pertain to wrongs allegedly visited upon third parties; three allegations, numbers 8, 15, and 24, pertain to wrongs allegedly visited upon Donohue. The fourth Petition's two allegations pertain only to wrongs allegedly visited upon Donohue.

In short, Donohue makes the following seven allegations on her own behalf: the two allegations from her second Petition; allegation numbers 8, 15, and 24 from her third Petition; and the two allegations from her fourth Petition. She seeks relief for these wrongs.

The Amended Petition reiterates all of the allegations contained in the four previously filed Petitions. Donohue sets forth allegations of wrongs visited upon her by the District and she sets forth requests for relief as follows: (1) an explanation for the

denial of her request for non-accumulated sick days in December 2014, an apology for alleged untruthful statements made about her in connection with said request, and the purging from her personnel file of any statements that might malign her character; (2) cash compensation for time spent defending herself from false statements in connection with the denial of her request for non-accumulated sick days and for attending "Back To School Nights" and "Report Card Distribution Nights," and for time spent on "all of the work I had to complete on a daily, weekly basis, after hours, on weekends, and early in the morning"; (3) an explanation for why her name appears on assessment data, evaluation-type documents, Infinite Campus, and other documents for a time period while she was on medical leave; (4) an explanation for why she was not granted an interview when she applied for an ELA on-site supervisor position; (5) an explanation for why her e-mail to Carole Smelter went unanswered; (6) cash compensation for her personal instructional materials in her classroom which were allegedly destroyed or thrown out over the course of the summer of 2013, and to be informed of the results of an investigation into this incident by Luis Rojos, the director of the Labor Relations Office of the Paterson public schools; and (7) an explanation for why she was denied the use of a microphone at a "You Are Special To Me Tea" event in the 2013–2014 school year, as well as an apology.

The matter (Agency Reference Number 123-4/16) was transmitted to the Office of Administrative Law on June 13, 2016, and filed on June 14, 2016, as a contested case. Another matter (Agency Reference Number 150-5/16) was transmitted to the Office of Administrative Law on June 27, 2016, and filed on June 27, 2016, as a contested case. On June 13, 2016, Robert E. Murray, Esq., filed the respondent's Answer to the first, third and fourth Petitions, and on July 22, 2016, he filed the respondent's Answer to the second Petition. The tribunal held an initial conference by telephone on July 13, 2016. The tribunal issued its Pre-Hearing Order on July 15, 2016, and an Amended Pre-Hearing Order on July 27, 2016. The cases were consolidated by the Order of Consolidation dated July 18, 2016.

At present, this case is before the tribunal for the disposition of three motions:

The first motion is a "Motion to Request Additional Documents" was filed by the petitioner on October 20, 2016.

The second motion is a "Motion to Dismiss" was filed by the respondent on October 20, 2016; and

The third motion is a "Discovery Motion" was filed by the petitioner on November 3, 2016.

While the tribunal was reviewing the motions, it came to its attention that, in regard to the service of the petitioner's August 27, 2016, Amended Complaint (i.e., the Amended Petition) petitioner apparently did not receive the green return receipt card back from the U.S. Postal Service, which would indicate whether or not the respondent has actually received a copy of the Amended Petition. After checking its file and finding no filed Answer to the Amended Petition, the tribunal sent an e-mail to both the petitioner and the respondent on February 27, 2017. In this e-mailed letter the tribunal brought the issue of the service of the Amended Petition to their attention, seeking to find out—one way or the other—if respondent received the Amended Petition. On March 3, 2017, the tribunal received respondent's faxed correspondence and its Answer to the Amended Petition. The tribunal has accepted the Answer to Amended Petition *nunc pro tunc*, since there are no substantive differences between the allegations contained in the original four petitions and the Amended Petition.

FINDINGS OF FACT

The following facts are not in dispute:

1. Donohue served as a teacher in the Paterson School District for approximately twenty-eight years until she retired on September 1, 2015.

2. The events described by Donohue in her Petitions occurred during the period of time encompassed by her dates of her employment.

3. Donohue's Petitions were filed with the Bureau of Controversies and Disputes on April 19, 2016 (ten allegations); April 29, 2016 (one allegation); May 23, 2016 (twenty-four allegations); and May 23, 2016 (two allegations).

4. Donohue's Amended Complaint (i.e., Amended Petition) was filed on August 27, 2016.

5. Donohue's Motion to Request Additional Documents, filed on October 20, 2016, asks the Tribunal "to issue an Order requiring Respondent to submit any and all additional documents that the Petitioner requests that are necessary to support the validity of the accusations/violations of regulations."

6. Respondent's (the District's) Motion to Dismiss, filed on November 3, 2016, argues that Donohue lacks standing to bring the Petitions she has filed and also argues that she filed all of same out-of-time.

7. Donohue's "Discovery Motion", filed November 3, 2016, complains that the Respondent did not make "a good faith effort to provide ethical, truthful, complete and certified answers" and impliedly asks the Tribunal to compel same.

8. Although Donohue provided this Tribunal with copies of the Interrogatory Questions that she served on the Respondent, Donohue did not provide this Tribunal with copies of the respondent's answers to the Interrogatories.

9. Various opposition papers and correspondences from the parties were received and reviewed by the Tribunal, including a letter from the Petitioner received December 8, 2016. In this letter, Petitioner enclosed a newspaper article from the (Bergen) Record dated December 3, 2016, entitled "Paterson Schools Fill Lucrative Staff Positions," which petitioner cited in support of her position in the controversy at bar.

ISSUES TO BE DECIDED

The first issue to be decided is whether petitioner Donohue has the requisite standing to bring an action against the District.

The second issue to be decided is whether Donohue filed her petitions in accordance with the time limitations set forth in the regulations.

APPLICABLE LAW

Standing

In New Jersey, the Appellate Division, in the case of LDM v. Princeton Regional Health Commission, 336 N.J. Super. 277 (App. Div. 2000), stated:

> Standing is a threshold determination which governs the ability of a party to initiate and maintain a suit before the court. In re Adoption of Baby T., 160 N.J. 332 (1999). Generally, in New Jersey, "[e]ntitlement to sue requires a sufficient stake and real adverseness with respect to the subject matter of the litigation." New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Commission, 82 N.J. 57, 67 (1980) (quoting Crescent Park Tenants Association v. Realty Equities Corp. of N.Y., 58 N.J. 98, 107 (1971)). Additionally, [a] substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision is needed for purposes of standing. Ibid. (quoting Home Builders League of S. Jersey v. Berlin Twp., 81 N.J. 127, 134-35 (1979))."
>
> [See also New Jersey Citizen Action v. Riviera Motel Corp., 152 N.J. 361 (1998).]

The Chancery Division ruled that litigants, generally, have no standing to assert the rights of third parties. Bank of New York v. Raftogianis, 418 N.J. Super. 323, 451-52 (Ch. Div. 2010).

Time Limits for Filing

N.J.A.C. 6A:3-1.1(a) states:

> This chapter sets forth the rules of procedure established by the Department of Education for the filing of petitions with the Commissioner of Education to hear and decide controversies and disputes arising under school laws in accordance with N.J.S.A. 18A:6-9.

N.J.A.C. 6A:3-1.3(a) states:

> To initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, a petitioner shall prepare a petition of appeal conforming to the requirements of N.J.A.C. 6A:3-1.4 [including a statement of the specific allegations and essential facts as well as the section or sections of the school laws under which the controversy has arisen] and serve such petition upon each respondent, together with any supporting papers the petitioner may include with the petition. The petitioner then shall file proof of service on each respondent . . . and the original petition and supporting materials, if any, with the Commissioner . . . .

N.J.A.C. 6A:3-1.3(i) sets forth a ninety-day time limit for the filing of petitions, as follows:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

Case law in New Jersey supports a strict adherence to the ninety-day time limit. In Riley v. Hunterdon Central High Board of Education, 173 N.J. Super. 109 (App. Div. 1980), the petitioner was notified by letter of the nonrenewal of her contract on April 13, 1976. Rather than filing a petition with the Commissioner of Education, she opted to pursue her grievance through an arbitration process. After receiving an unsatisfactory result from arbitration, she decided to pursue an appeal to the Commissioner by filing a

petition on June 20, 1977. Her filing was more than a year after she received the notice of nonrenewal. The Commissioner dismissed the petition as untimely. The Appellate Division upheld the Commissioner's dismissal of the petition as untimely.

In Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572 (1993), the Supreme Court affirmed the Appellate Division holding that the Commissioner of Education had authority from the Legislature to adopt regulations establishing a ninety-day limitation for school personnel to file disputes under school laws; that administrative regulations were presumptively valid; that a ninety-day limitation afforded an aggrieved school employee a meaningful opportunity to file his/her petition; that ninety days was a reasonable procedural requirement; and, that anyone challenging such a regulation bears the burden of proving its invalidity. Kaprow, supra, 131 N.J. at 580-83. The Supreme Court also stated that the reason for a limitation period is twofold: "to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend," and "to penalize dilatoriness and serve as a measure of repose." Id. at 587.

It is therefore settled that when an employee has a grievance with his or her employer arising out of the school laws of New Jersey, his/her petition must be filed within ninety days from the date of the employer's allegedly wrongful act or from the date of the notice of the employer's adverse action.

LEGAL ANALYSIS AND CONCLUSIONS

The threshold question is whether Donohue has standing to bring the allegations contained in her petitions.

In all of her petitions, Donohue alleges that there is ongoing nepotism and favoritism whereby certain employees are not required by their superiors to perform the duties associated with their positions, particularly the instruction of schoolchildren.

Moreover, Donohue alleges that the school's administrative staff fails to perform its duties in regard to properly supervising and evaluating the performance of teachers and other school personnel. Donohue alleges that the school district's financial resources have been wasted because unqualified people have been hired, and that undeserving people have been given promotions. Throughout her petitions Donohue has stated that her complaints are primarily motivated by her belief that the schoolchildren have not received the thorough and efficient education they deserve because of the school administration's squandering of resources and failure to adequately supervise the performance of those responsible to instruct the children.

All of the aforementioned allegations, however sincerely motivated, assert the rights of third parties rather than Donohue herself. However appalled Donohue may feel because of her belief that the children are being shortchanged, it is the children who are the aggrieved parties rather than Donohue. Donohue's allegations of the District's failure to properly teach the children do not demonstrate that she has suffered or is in imminent danger of suffering some harm in the event of an adverse outcome in court. As noted above, in order to have standing Donohue would have to demonstrate that she has a sufficient stake in the subject matter. She has failed to do so. Moreover, as noted above, Donohue cannot gain standing in this case by asserting the rights of third parties. I **CONCLUDE** that Donohue has no standing to bring any allegations that only assert the rights of others and that do not address allegations of wrongs visited upon her by the District.

We now turn to Donohue's allegations of wrongs visited upon her by the District. Donohue has asserted that she was unfairly denied use of unaccumulated sick days in December 2014 and that the executive director of labor relations, Louis Rojas, made incorrect and maligning statements about her. These are the types of allegations that Donohue would have standing to bring. Furthermore, Donohue alleged that classroom materials and decorations that she purchased and placed in her classroom were destroyed or disposed of in 2013 and/or 2014. Again, without commenting on the veracity of these allegations, these are things that Donohue would have standing to allege in a petition. Donohue alleges that an administrator wrongfully denied her the

use of a microphone at a "You Are Special To Me Tea" event. This too is an allegation that Donohue would have standing to allege in a petition. Donohue alleges that her name appears on assessments, evaluations, and other types of documents composed during a period when she was out on medical leave. This is an allegation that Donohue would have standing to allege in a petition. Donohue alleges that she was unfairly denied cash compensation for her attendance at Back-To-School Nights and various other after-school activities and/or events. This is an allegation that Donohue would have standing to allege in a petition. Donohue alleges that she was unfairly denied an interview for the position of ELA on-site supervisor. This is an allegation that Donohue would have standing to allege in a petition. I **CONCLUDE** that all of the above-mentioned wrongs that Donohue alleges were visited upon her by the District are things for which she would have standing to petition the Commissioner and/or the tribunal for relief.

Regarding the timeliness of Donohue's petitions, as noted above, N.J.A.C. 6A:3-1.3(i) states that a petitioner has ninety days from the date of a notice of a final order, the date of a ruling, or the date of some other action by the district to file her petition. A review of all of the facts contained in Donohue's allegations in all of her petitions shows that all of the wrongs allegedly visited upon her by the District occurred at times during her employment. She retired on September 1, 2015. Therefore, all of the wrongs allegedly visited upon Donohue by the District were more than ninety days before the filing of any of her petitions. That is to say, Donohue failed to file a petition alleging a wrong visited upon her by the District—a final order, a ruling, or an action—within ninety days of its occurrence. For this reason, I **CONCLUDE** that all of Donohue's petitions have been filed in an untimely manner. I further **CONCLUDE** that all of Donohue's petitions must be and hereby are dismissed for failing to comply with N.J.A.C. 6A:3-1.3(i).

ORDER

Based upon the foregoing, I hereby **ORDER** that the motion to dismiss filed by the respondent is hereby **GRANTED**, and all petitions of the petitioner are hereby **DISMISSED**.

The petitions of the petitioner, having been dismissed as untimely filed, I hereby **ORDER** that petitioner's motion to request additional documents is **DENIED**; and I hereby **ORDER** that petitioner's discovery motion is **DENIED**.

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

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

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

April 6, 2017

DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: April 10, 2017

Date Mailed to Parties: April 10, 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

139-17

OAL DKT. NO. EDU 06155-16
AGENCY DKT. NO. 75-3/16

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
K.J., ON BEHALF OF MINOR CHILDREN, N.L.M. AND C.M.,	:	
RESPONDENT.	:	

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

Upon review, it is noted that the settlement makes reference to a payment to be made on January 31, 2017. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

Subject to the foregoing, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed – subject to compliance with the terms of the settlement – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/18/17

Date of Mailing: 5/18/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6155-16
AGENCY DKT. NO. 75-3/16

TOWNSHIP OF HAMILTON BOARD OF EDUCATION, MERCER COUNTY,
Petitioner,
v.
K.J. ON BEHALF OF MINOR CHILDREN, N.L.M. AND C.M.,
Respondent.

Christopher B. Parton, Esq., for petitioner (Kenney, Gross, Kovats & Parton, attorneys)

Seth N. Broder, Esq., for respondent (Broder Law Group, P.C., attorneys)

Record Closed: March 9, 2017 Decided: April 6, 2017

BEFORE **SUSAN M. SCAROLA,** ALJ:

This matter was transmitted to the Office of Administrative Law on April 21, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

April 6, 2017
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: 4/7/17

Date Mailed to Parties: 4/7/17

/cb

SETTLEMENT AGREEMENT AND RELEASE

THIS AGREEMENT is entered on this ____ of December, 2016, by and between the Hamilton Township Board of Education ("Board") and Kenette Johnson on behalf of minor children C.M. and N.L.M. in full and final settlement of a student residency matter. The undersigned representatives of the parties enter this Agreement knowingly and with the authority to do so, in consideration of the promises made herein.

NOW THEREFORE, the parties agree as follows:

1. This matter arises out of a claim by the Board that minor children C.M. and N.L.M. attended school in the Hamilton Township School District without legal eligibility to do so during certain parts of the 2014-2015 and 2015-2016 school years.

2. In compliance with the provisions of N.J.S.A. 18A:38 and N.J.A.C. 6A:22, the Board issued Initial and Final Notices of Ineligibility, which Ms. Johnson has disputed, and the parties have both filed Petitions of Appeal which are pending hearing before the Office of Administrative law under the jurisdiction of the Commissioner of Education (the "Litigation").

3. Subsequent to the legal procedures set forth above, the parties, through their authorized representatives, entered into negotiations for the resolution and closure of this matter, resulting in this Agreement.

4. The parties acknowledge the existence of their respective claims and positions, and mutually acknowledge that they could pursue said claims pursuant to the regulations of the New Jersey Department of Education and the Office of Administrative Law, and agree that there is a value in resolving this matter instead of pursuing further litigation, expense, time and uncertainty.

5. Therefore, Ms. Johnson shall pay to the Board, in full and final settlement of all claims related to this matter, the sum of two thousand dollars ($2,000.00), which amount shall be paid as follows via valid and negotiable check or money order, made payable to the

Hamilton Board of Education, and received at 90 Park Avenue, Hamilton, NJ 08690 as follows:

a. $1,500 received by January 31, 2017.
b. $500 received by June 30, 2017, in lump sum or in payments at Ms. Johnson's discretion, but to be fully paid no later than June 30, 2017.

6. The Board accepts this payment in lieu of pursuing further litigation, and in consideration of full and faithful performance by Ms. Johnson of the obligations set forth in herein, for monies claimed due and owing for the 2014-2015 school year. For purposes of settlement, the Board waives its claims for tuition monies owed for the 2015-2016 and 2016-2017 school years.

7. The parties expressly acknowledge and mutually consent that in the event that valid payment is not made and received as set forth above, and upon ten (10) days notice to Ms. Johnson, the Board has the legal authority and intention to resume litigation of this matter, and Ms. Johnson has the right to resume litigation of her defenses and affirmative claims via proceedings in the OAL and before the Commissioner of Education.

8. In consideration of the terms of this Agreement, the parties waive all claims related to this matter, provided that C.M. and N.L.M. remain eligible for continued enrollment in the Hamilton School District. Moreover, Ms. Johnson and the Board, in entering this agreement and subject to full performance of all obligations set forth herein, forever waive any and all claims against each other, absolutely and without exception, whether at law, in equity, under the applicable administrative regulations or otherwise, arising out of the Litigation.

9. This Agreement is legally enforceable under New Jersey law, and is binding upon both parties, their heirs, successors and privies.

10. All terms of this Agreement shall be kept strictly confidential except to the degree that disclosure is required by applicable law.

11. Legal counsel enters and executes this Agreement on behalf of the parties with the authority to do so as conferred by their respective clients. The Board's entry of this agreement is subject to approval by the Board in lawful executive session at its December 19, 2016 meeting.

12. This Agreement constitutes the parties' entire understanding and resolution. There are no other promises or obligations established by this Agreement, and none shall be added

unless the parties mutually agree to do so via a written and executed document modifying this Agreement.

KENETTE JOHNSON o/b/o MINOR CHILDREN C.M. and N.L.M.

By: Kenette L Johnson
Kenette Johnson

Date: 12/27/16

HAMILTON TOWNSHIP BOARD OF EDUCATION

By: _____
Christopher B. Parton, Esq.

Date: 12/29/16

WITNESS:

_____
Seth N. Broder, Esq.

RATIFIED BY ACTION OF THE HAMILTON TOWNSHIP BOARD OF EDUCATION:

Pamela A Kelly
~~**Anthony Celentano, President**~~
Pamela Kelly

Katherine Attwood
Katherine Attwood, School Business Administrator / Board Secretary

Date: 1/31/17

I. Opening of the Meeting

A. Call to Order

The Hamilton Township Board of Education met in Regular Session on Wednesday January 25, 2017 at 6:32 P.M. in the board room of the Administration Building located at 90 Park Avenue Hamilton, NJ 08690. In accordance with board policy #0168, only the Presentations and Awards portions of the meeting will be video recorded.

B. Meeting Notice

Notice of this meeting dated January 17, 2017 was read by Katherine Attwood, Board Secretary. Furthermore, on that date, a copy of such notice was sent to The Times, The Trentonian and the Clerk of the Township of Hamilton. It was also posted on the bulletin board at the entrance to the Board Room in the Hamilton Square Administration Building.

C. Flag Salute

D. Roll Call

Present: Richard Kanka, Dr. Susan Ferrara, Susan Lombardo, Christopher Scales, Jessica Young and Pamela Kelly presiding.

Ms. Episcopo, Ms. Kraemer and Mr. Celentano were absent.

Also present were: Dr. Thomas Ficarra, Interim Superintendent; Katherine Attwood, Business Administrator/Board Secretary; Nate Webber, Director of Secondary Education; Jay Morris, Director of Elementary Education; Sylvia Zircher, Director of Curriculum and Instruction; Michael Giambelluca, Director of Human Resources; Marta Audino, Director of Student Services; Keith Bonds, Technology Manager; Patrick Carrigg, Board Attorney; Merna Abdel-Gleil, William James and Alex Robb, Student Representatives and interested members of the community.

Kelly Scales

Whereas Board Member Kraemer is unable to attend the Board Meeting in person as a result of her recovery from surgery and has notified the Board President sufficiently in advance to allow for a good quality electronic connection to be set up, I move that Ms. Kraemer be permitted to participate in the public portion of this meeting through electronic means. Due to security concerns, Ms. Kraemer shall not participate in executive sessions of the Board at this meeting.

Motion pulled - Ms. Kraemer not available to participate by phone for this meeting.

II. Award(s) and Presentation(s)

1. Recognition – Hamilton Township Board of Education Appreciation Month.
2. Recognition – School Resource Officers – In honor of National Law Enforcement Day (January 9, 2017)

III. Announcements

A. Superintendent

1. None

B. Board Members

1. Dr. Ferrara attended "Real Men Read" at Klockner elementary school. Everyone came in their pajamas. The fathers read stories and parents were given a presentation on cyber bullying from the Mercer County Prosecutor's office.
2. Dr. Ferrara stated the HTEA received grant funding for FAST (Family and Students Together). The grant allows for 24 events, of which 8 have been held already. Last night's event was attended by 150 people where dinner was provided and then parents attended workshops.

C. Student Representatives

1. Mr. Robb gave an update on Nottingham's activities which include:
    - On January 20th a junior basketball player was honored after scoring 1,000 points.
    - Outreach for the Stars collected $450 for a student at Klockner.
    - Collections by the Key Club are ongoing.
    - 8th grade orientation was a success.

Mr. Robb welcomed the new board member, Ms. Young and wished her good luck.

2. Mr. James provided an update on Steinert's activities which include:
    - Musical "Anything Goes" will be held February 23rd – 25th.
    - January 10th was 8th grade orientation.
    - GALRE competed in a mock trial competition against Hamilton West in preparation for their competition today.
    - The district orchestra performed their winter concert last week.
    - Annual talent show will be hosted by SGA.
3. Ms. Abdel-Gleil gave an update on West's activities which include:
    - The recent annual job fair was a good opportunity for students to find a job.
    - Hornet Buzz is now on Facebook and Twitter.
    - 8th grade orientation was one of our best.
    - West is bringing back the semi-formal dance for all grades on February 10th.
    - The Junior class is holding a fashion show to fundraise for the prom.
    - Practices are starting for the school musical "Cinderella", which will be held in the Spring.

IV. Committee Reports

A. Ms. Lombardo – Residency

1. Central Administration implemented a new online registration process using Gateway software.

2. Would like feedback from staff and the community regarding the new process so that the district can make any necessary improvements to the system.

B. Mr. Scales – Policy
1. The committee met on January 12th. The agenda for the meeting focused on three policies, all of which are on tonight's agenda. The policies discussed include: Student Activity Fund, Drones and Opioid Antidote.

Dr. Ferrara and Mr. Scales discussed the drone policy and the changes in wording for that policy.

C. Mr. Kanka – Negotiations
1. Met with the HTSSA on January 11th. During this meeting the ground rules for upcoming negotiations were set. The next meeting is scheduled February 8th at 5:00 P.M.
2. The committee met with the administrators on January 17th and had a first exchange of proposals. The next scheduled meeting is January 31st.

D. Suspension Report
1. Board members discussed the Suspension report.

E. Monthly HIB Report
1. None

F. Monthly Health Report
1. None

Ms. Kelly read board policy 0167 "Public Participation in Board Meetings."

V. Hearing of the Public

Dr. Dave Perry
- Thanked teachers who showed up tonight. The HTEA asked that every school attend a board meeting to stay involved. Tonight's schools that were represented were Alexander, Sunnybrae and Grice.
- Thanked Ms. Zircher, supervisors and Dr. Ficarra for attending FAST events. It has been a very successful first year.
- He feels Aramark menus are not what they are supposed to be. Some schools are encountering shortages of meals during the last lunch of the day.
- Thanked Dr. Ficarra, Mr. Webber and Mr. Giambelluca for fast response on the mold issues.
- The HTEA Pride committee is hosting a "Frozen" dinner dance for senior citizens on February 18th.

George Fisher
- Asked why the agenda does not include the referendum?
- Commented on the withdrawal from Capital Reserve.
- Asked how it was determined what projects are or aren't included.

- Voiced his disapproval on the cost for the new bleachers at Hamilton West.

VI. Business of the Board
Curriculum and Instruction Motions

Scales Ferrara
(C & I 2 - 5)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the revisions to Board Policy #2468, Independent Educational Evaluations, (R/C), as per C & I Enclosure 2.

Upon the recommendation of the Interim Superintendent that the Board of Education approves the revisions to Board Policy # 6660 Student Activity Fund, (R/C), as per C & I Enclosure 3.

Upon the recommendation of the Interim Superintendent that the Board of Education approves the revisions to Board Policy # 7481, Unmanned Aircraft Systems (UAS Also Known as Drones), (R/C), as per C & I Enclosure 4.

Upon the recommendation of the Interim Superintendent that the Board of Education approves the revisions to Board Policy #5330.04, Administering An Opioid Antidote, 1st Reading, (R/C), as per C & I Enclosure 5.

Roll Call
Motions Carried: 6 in favor 0 opposed

Scales Ferrera
(C & I 1, 6 – 12 & 15 - 18)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the payment for pupils sent to out-of-district schools as per C & I Enclosure 1.

Upon the recommendation of the Interim Superintendent that the Board of Education approves the disposal of textbooks, as per C & I Enclosure 6, as per our Policy #7300 – Disposition of Property. This shall include selling used textbooks to textbook companies, offering the books on the NJDOE textbook sharing website, and distributing text books to students as an at home resource.

Upon the recommendation of the Interim Superintendent that the Board of Education approves the additional potential student field trip destination(s), as per C & I Enclosure 7.

Upon the recommendation of Interim Superintendent that the Board of Education approves the ESEA Accountability Action Plan - Participation Rate and Assurances for submission to the Mercer County BOE on January 27, 2017, as per C & I Enclosure 8.

Upon the recommendation of the Interim Superintendent that the Board of Education authorizes the District to approve the Fiscal Year 2017 Amendment 1- Basic and Preschool, for Individuals with Disabilities Education Improvement Act (IDEIA) to include FY2016 Basic carryover of $338,892 for a total FY17 Basic Grant of $3,794,147 and FY16 Preschool carryover of $59,673 for a total FY17 Preschool Grant of $180,289. The Basic carryover amount will be used to supplement tuition. The Preschool carryover amount will be used to supplement the preschool curriculum. Further, that Dr. Thomas Ficarra, Interim Superintendent, be designated authorized representative for the district.

Upon the recommendation of the Interim Superintendent that the Board of Education approves the additional Winter 2017 Workshop Series - Instructional Technology, as per C & I Enclosure 10. Furthermore, that the Board of Education authorizes teachers to be paid for attendance/facilitation throughout the 2016-2017 school year for these workshops, at the cost not to exceed $13,200 from Title II account #20-271-100-101-00-00-60.

Upon the recommendation of the Interim Superintendent that the Board of Education accepts the following donation, as per C & I Enclosure 11.

Upon the recommendation of the Interim Superintendent that the Board of Education approves the Professional Travel Events, as per C & I Enclosure 12.

Upon the recommendation of the Interim Superintendent that the Board of Education accepts the Amended Overnight Student Field Trips, as per C & I Enclosure 15.

Upon the recommendation of the Interim Superintendent that the Board of Education approves the purchase of Teaching Strategies Creative Curriculum for preschool as per C&I Enclosure 16.

Upon the recommendation of the Interim Superintendent that the Board of Education authorizes the District to submit the FY16 NCLB Amendment Application to the NJDOE for changes to the scope of the Title III program as per C & I Enclosure 17.

Upon the recommendation of the Interim Superintendent that the Board of Education approves Educational Testing Service (ETS) to pilot the program "The Language Muse Activity Palette" in the Hamilton Township School District middle schools at no cost to the district, as per C & I Enclosure 18.

Motions Carried: 6 in favor 0 opposed

Finance and Operations Motions

Kanka Scales
(F & O 14)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the Resolution Authorizing the Submission of other Capital Project documents to the Department of Education and the withdrawal from Capital Reserve Account for the following summer capital projects:

1.) Sayen - ADA Accessible Bathroom - $28,000
2.) Kuser - Repair Sink Hole in Parking Lot - $35,000
3.) Klockner - Roof Replacement - $545,000
4.) Administration Building - ADA Accessible Ramp and bathroom - $248,000
5.) Hamilton West - Stadium Bleachers - $900,000
6.) Steinert - Walk-in Freezer Replacement - $68,000
7.) Lalor - Roof Replacement - $285,000
8.) Robinson - Roof Replacement - $650,000
9.) Yardville - Roof Replacement - $540,000
10.) Yardville Heights - Roof Replacement - $150,000
11.) Langtree - Windows - $500,000

Board members discussed the cost and other issues regarding the stadium bleachers at Hamilton West.

Roll Call
Motion Carried: 6 in favor 0 opposed

Kanka Ferrara
(F & O 1 - 13)

Upon the recommendation of the Interim Superintendent that the Minutes of the meetings of the Hamilton Township Board of Education be approved and released (as appropriate) at this time. (F & O 1)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the Secretary's report as of November 30, 2016, as per the attached. (F & O 2)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the Financial Certification, as per the attached. (F & O 3)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the November 30, 2016 Treasurer's Report, as per the attached. (F & O 4)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the line item transfers, as per the attached. (F & O 5)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the Food Services Financial Report, as per the attached. (F & O 6)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the Transportation Items and Bus Evacuation Drills, as per the attached. (F & O 7)

Upon the recommendation of the Interim Superintendent that the Board of Education approves Building Use Applications, as per the attached. (F & O 8)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the bills list in the amount of $$5,292,577.64 and ratifies the payrolls, in the amount of $10,875,133.90 and checks issued between meetings, in the amount of $2,097,630.84 for a grand total of $18,265,342.38 as per the attached reports. (F & O 9)

Upon the recommendation of the Interim Superintendent that the Board of Education approves payment to Tozour Energy Systems in the amount of $472,941.04 for work associated with the district's ESIP, as per the attached. Payment to Tozour will be released at the discretion of the Interim Superintendent upon satisfaction of any outstanding issues. (F & O 10)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the bid awards and/or bid rejections for supplies, equipment and contracted services for the 2016-2017 school year in the amount of $382,000.00 as per the attached. (F & O 11)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the Individual School Agreements with Faith Christian Academy, Our Lady of Sorrows School, St. Gregory the Great Academy, St. Raphael School, Little Friends Day School and Trenton Catholic Academy for non-public security aid, as required by the NJ Department of Education. (F & O 12)

Upon the recommendation of the Interim Superintendent that the Board of Education approves an agreement with Spiezle Architectural Group, the district's Architect of Record, for architectural, design and construction administration services associated with Hamilton High West Bleacher Replacement, as per the attached. (F & O 13)

Mr. Kanka asked a question regarding a payment and Ms. Attwood responded.

Motions Carried: 6 in favor 0 opposed

Personnel Motions

Lombardo Scales
(P 1 – 15)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Appointment(s) as per the attached. (P 1)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Promotion(s) as per the attached. (P 2)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Transfer(s) as per the attached. (P 3)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Extension of Contract(s) as per the attached. (P 4)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Fulfillment of Contract(s) as per the attached. (P 5)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Rescind Appointment(s) as per the attached. (P 6)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Resignation(s) as per the attached. (P 7)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Retirement(s) as per the attached. (P 8)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Leaves of Absences and Extensions/Returns as per the attached. (P 9)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Salary Adjustment(s) as per the attached. (P 10)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Reimbursement for Unused Day(s) as per the attached. (P 11)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Stipend Adjustments for EDP/Coaching for the 2016 - 2017 School Year, due to the New HTEA Contract as per the attached. (P 12)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Salary Adjustments for the 2016 - 2017 School Year, due to the New HTEA Contract as per the attached. (P 13)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Job Description for the Night Custodial Supervisor as per the attached. (P 14)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Agreement as per the attached. (P 15)

Roll Call
Motions Carried: 6 in favor 0 opposed
(Mr. Scales abstained on P motion #1 part F. Dr. Ferrara voted no on P motion #3 item #1)

VII. Additional Reorganization Business

Scales Ferrara

RESOLVED, that the Board of Education appoints Christopher Scales as the Delegate to the New Jersey School Boards Association effective January 25, 2017, until the next Reorganization Meeting of the Board.

RESOLVED, that the Board of Education appoints Pamela Kelly as the Alternate Delegate to the New Jersey School Boards Association effective January 25, 2017, until the next Reorganization Meeting of the Board.

RESOLVED, that the Board of Education appoints Jennifer Kraemer as the Board Delegate to the Mercer County School Boards Association effective January 25, 2017, until the next Reorganization Meeting of the Board.

Roll Call
Motions Carried: 6 in favor 0 opposed

Lombardo Ferrara

RESOLVED, that the Board of Education establishes the following standing committees in accordance with the Board of Education Bylaw.

Board of Education Standing Committees (including Subcommittees)
Curriculum Committee
Curriculum Subcommittee
Policy Subcommittee
Special Services Subcommittee
Finance and Operations Committee
Facilities Subcommittee
Budget Subcommittee
Audit Subcommittee
Personnel Committee
Human Relations Subcommittee
Residency Subcommittee

RESOLVED, that the Board of Education establishes ad hoc committee(s) as listed below and additional committees as deemed necessary.

Ad-Hoc Committees
Negotiations Committee
Space and Enrollment Committee
Technology Committee

RESOLVED, that the Board of Education establishes liaison assignments to schools and other organizations.

Alexander School	Yardville Heights School
Greenwood School	Crockett Middle School
Kisthardt School	Grice Middle School
Klockner School	Reynolds Middle School
Kuser School	Hamilton High School East
Lalor School	Hamilton High School North
Langtree School	Hamilton High School West
McGalliard School	
Mercerville School	Alternative High School
Morgan School	Hamilton Education Program (HEP)
Robinson School	
Sayen School	Hamilton Educational Foundation (HEF)
Sunnybrae School	Mercer County Vo-Tech
University Heights School	Municipal Government
Wilson School	Parent/Teacher Association
Yardville School	

Motions Carried: 6 In favor 0 opposed

VIII. Other Business

Lombardo Scales
To approve Interim Superintendent contract extension to February 28, 2017.

Roll Call
Motion Carried: 6 in favor 0 opposed

1. Dr. Ferrara conveyed her feelings about a sitting board member being a founding member of a proposed charter school in the district. She understands no laws were broken by not divulging this information but feels there should be a policy in place and that this information needs to be disclosed to the board in the future.

Ferrara Kelly
Motion to instruct policy committee to bring forth a Charter School policy no later than March 20, 2017, since proposed charter school phase one applications must be submitted by March 31, 2017.

Board members and Dr. Ficarra discussed several issues regarding charter schools, including the need for a board policy due to the potential conflict of interest of board members being involved with Charter Schools.

Motion Carried: 6 In favor 0 opposed

2. Ms. Lombardo stated she would like to discuss two topics at the next board meeting:
   a.) The overcrowding at Nottingham and
   b.) The Demographic Study. She feels this needs immediate attention.

IX. Hearing of the Public

Dr. Dave Perry
- Stated he feels if you aren't looking out for the district's best interest then you should not run for a position on the board.
- He feels the price for the bleachers at West is too high. He doesn't think we should spend that kind of money on bleachers when special education programs are struggling.

George Fisher
- Stated that charter schools are to be competitive with districts and show public schools a way to improve.
- He feels it is ridiculous to spend $900,000 on bleachers for West. He feels the money should be used for educational needs.
- He stated his concerns that some of the issues the district is having with repairs could have been avoided if the district had a Strategic Plan in place.

Kate Hamm
- Asked if the sign-up sheet for public comment could be kept outside the boardroom because some people might not feel comfortable walking up to the front of the room to sign in.
- She stated she is very disappointed that $900,000 for the West bleacher project was approved. ADA accessibility should be considered before athletics. Athletics are not a legal obligation but ADA accessibility is.

Christine Reuter
- Very upset over the approval of $900,000 for bleachers at West.
- Asked if the sign-in sheet for Public Comment be moved because she often comes late to meetings and doesn't want to walk to the front of the room disrupt the meeting.

Dr. Ficarra stated that Capital Reserve money can only be used for certain things. The money cannot be used for books, paper, classroom supplies, etc.

X. Executive Session

Kelly

WHEREAS, N.J.S.A. 10:4-13 requires adoption of a resolution of the Board to go into Executive Session; BE IT RESOLVED, that the Board, pursuant to the Open Public Meetings Act, New Jersey Title 18A and the Hamilton Township Board of Education Bylaw No. 0166 hereby enters Executive Session to discuss a matter involving:

A. Human resources Matters
   1. Interim Superintendent
B. Negotiations(s)
   1. HTSSA status update
   2. HTASA status update
C. Student Matters
   1. Administrative Hearing
   2. Settlement Agreement

BE IT FURTHER RESOLVED, that the minutes of this Executive Session shall be made public following formal action by the Board and/or at the conclusion of any investigation(s), due process proceeding, or litigation, so long as not prohibited by law and so long as the need for maintaining confidentiality no longer exists.

Kanka Ferrara
To recess to Executive Session.
Motion Carried: 6 in favor 0 opposed

The Board recessed to Executive Session at 8:08 P.M.
The Board resumed in Regular Session at 9:12 P.M.

XI. Curriculum & Instruction Motion

Scales Ferrara
(C & I 13 & 14)

Upon the recommendation of the Interim Superintendent that the Board of Education accepts the findings of the Administrative Hearing Committee for H.N. effective January 25, 2017, as per Confidential C & I Enclosure 13.

Upon the recommendation of the Interim Superintendent that the Board of Education accept the settlement agreement, as per Confidential C & I Enclosure 14.

Roll Call
Motions Carried: 6 in favor 0 opposed

XII. Adjournment
Kelly Scales
To adjourn the meeting.
Motion Carried: 6 in favor 0 opposed

The meeting adjourned at 9:16 P.M.

Respectfully submitted,

DRAFT
Katherine Attwood
Board Secretary

140-17

S.W.,

PETITIONER,

V.

BLACK HORSE PIKE BOARD OF EDUCATION, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner filed a *pro se* residency appeal on his own behalf, seeking a determination that he is entitled to a free public education in the Black Horse Pike Regional School District. The respondent Board contended that a residency investigation had determined that petitioner resides at an address in Winslow Township, outside of the Black Horse Pike Regional School District.

The matter was transmitted to the Office of Administrative Law (OAL) and a hearing was scheduled for March 21, 2017. Petitioner failed to appear at the scheduled hearing. The OAL sent a notice of petitioner's failure to appear to the Commissioner on April 4, 2017, and subsequently returned the file to this agency. Petitioner has provided no explanation for his failure to appear, despite having had the opportunity to do so.

Upon review of the record, it was determined that this matter is no longer a contested case before the Commissioner. Accordingly, the Commissioner dismissed the petition with prejudice.

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

May 18, 2017

OAL DKT. NO. EDU 545-17
AGENCY DKT. NO. 295-11/16

S.W.,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BLACK HORSE PIKE BOARD OF EDUCATION, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter – transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, and including an advisement of petitioner's failure to appear at the scheduled March 21, 2017 OAL hearing – has been reviewed. Petitioner filed no explanation for his failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/18/17
Date of Mailing: 5/18/17

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

THOMAS STRASSLE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured teacher, challenged the actions of the respondent Board in failing to pay his salary after he was suspended without pay for 120 calendar days after the certification of tenure charges. Petitioner contended that the Board's action to withhold his pay subsequent to reinstatement to his tenured position, by way of an October 5, 2016 arbitration decision under the TEACH NJ Act, is unlawful pursuant to *N.J.S.A.* 18A:6-8.3. The arbitrator's decision found that petitioner had engaged in unbecoming conduct, and determined that the appropriate penalty for his actions would be the forfeiture of the 120 days of pay already withheld following the certification of tenure charges. The respondent Board asserted that its actions are a proper exercise of its authority under *N.J.S.A.* 18A:6-14, as petitioner collected unemployment compensation during his 120-day suspension without pay, and that his actions in applying for and receiving such compensation are in contravention of the arbitrator's decision that petitioner forfeit 120 days of pay already withheld following the certification of tenure charges. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; pursuant to *N.J.S.A.* 18A:6-8.3, petitioner was suspended from his teaching position with pay, pending the Board's investigation of petitioner's alleged unbecoming conduct; on April 28, 2016, the Board certified tenure charges against petitioner, and his suspension converted to a suspension without pay under *N.J.S.A.* 18A:6-14; petitioner's suspension converted back to a paid suspension on September 1, 2016, as more than 120 days had elapsed since the certification of tenure charges; an arbitration award was rendered on October 5, 2016, setting forth petitioner's penalty as the forfeiture of the 120 days of pay already withheld following the certification of tenure charges; at the time of the arbitration decision, petitioner was on paid suspension since September 1, 2016; the Board ceased paying petitioner on November 30, 2016, having determined that petitioner was not entitled to his salary because he had collected unemployment benefits during the months of July and August 2016, and was not so entitled as a ten-month employee; however, *N.J.S.A.* 18A:6-14 specifically legislates the time period when the Board may exclude payments to a tenured employee and does not regulate the compensation that the employee may receive while he or she is not being paid; and the Board's assertion that there is an exception to the requirements of *N.J.S.A.* 18A:6-14 when an employee receives unemployment benefits is without merit. Accordingly, the ALJ granted the petitioner's motion for summary decision, and ordered that the Board restore petitioner's salary commencing with the pay period ending November 30, 2016.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

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

Issued 5/18/17

OAL DKT. NO. EDU 00311-17
AGENCY DKT. NO. 312-12/16

THOMAS STRASSLE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Administrative Law Judge's recommended decision for the reasons expressed therein. Accordingly, petitioner's motion for summary decision is granted. Respondent is directed to restore petitioner's salary effective November 30, 2016. A copy of this decision will be forwarded to the Department of Labor and Workforce Development, Unemployment and Disability Insurance Services.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/18/17
Date of Mailing: 5/18/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 00311-17
AGENCY DKT. NO. 312-12/16

THOMAS STRASSLE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,
Respondent.

Edward A. Cridge, Esq., for petitioner (Mellk O'Neill, attorneys)

Christopher B. Parton, Esq., for respondent (Kenny, Gross, Kovats & Parton, attorneys)

Record Closed: March 3, 2017 Decided: April 13, 2017

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, a tenured teacher challenges the actions of the Old Bridge Board of Education ("the Board") in failing to pay petitioner his salary after he was suspended without pay for one-hundred twenty calendar days (120-day) after the certification of

tenure charges. Petitioner contends that the Board's decision to withhold his pay after an arbitrator's decision under TEACH NJ Act and the Tenure Employees Hearing Law, N.J.S.A. 18A:6-1, to reinstate petitioner in his tenure positon and without back pay, violates the provisions of N.J.S.A. 18A:6-8.3 and 18A:6-14.

The Board contends that its actions are a legally proper exercise of its authority under N.J.S.A. 18A:16-14, as petitioner collected unemployment compensation during his 120-day suspension without pay. The Board further contends that it is not obligated to pay petitioner his salary, which they have withheld since November 30, 2016, as petitioner's actions are in contravention of the arbitrator's decision that petitioner forfeit 120 days of pay already withheld following the certification of tenure charges.

Petitioner filed a Verified Petition of Appeal with the Commissioner of Education on December 8, 2016, challenging the actions of the Board and seeking immediate restoration of his salary. Thereafter, on December 29, 2016, petitioner filed a Notice of Motion for Summary Decision with the Commissioner of Education under N.J.A.C. 6A:3-1.12. On January 3, 2017, the Board filed an Answer to Verified Petition of Appeal with the Commissioner of Education.

On January 5, 2017, the Commissioner of Education transmitted this matter to the Office of Administrative Law for a hearing on the merits of the underlying claims raised in the petition. The same was filed with the OAL Clerk's Office on January 9, 2017.

On January 20, 2017, the Board filed with the OAL Clerk's a certification in opposition to petitioner's Motion for Summary Decision, a response to statement of material facts and a brief in opposition to the petitioner's motion for summary decision. [1]

[1] Petitioner had initially filed a Motion for Summary Decision with the Commissioner of Education under N.J.A.C. 6A:3-1.12. However, once the matter is transferred to the OAL, applications for summary decision shall be filed with the ALJ in accordance with applicable rules of the OAL. Summary decision motions in the OAL are governed by N.J.A.C. 1:1-12.5.

Petitioner wrote to the undersigned on January 25, 2017, requesting oral argument in connection with the motion for summary decision. The Board initially opposed petitioner's Motion for Summary Decision, urging that material issues of fact necessitated a plenary hearing. However, after a telephonic prehearing conference on February 24, 2017, the parties agreed that this matter would proceed without the need of a plenary hearing and instead, each party would submit supplemental pleadings in connection with the motion for summary decision and a ruling would be made thereafter. On March 3, 2017, petitioner and the board filed their respective pleadings requesting a ruling by summary decision as to the legal issues raised in the petition and answer.

DISCUSSION

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

A determination whether a genuine issue of material fact exists that precludes summary judgment requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Our courts have held that the "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Anderson, supra, 477 U.S. at 252.

Conversely, it is critical that a favorable ruling on a summary judgment motion not "shut a deserving litigant from his [or her] trial." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 77 (1954).

Both parties concede that the factual background which led to the filing of the petition is not in dispute. Petitioner is a tenured teacher employed by the Board as a ten-month employee, receiving twenty bi-weekly paychecks. On or about September 29, 2015, petitioner was suspended from his teaching positon, with pay pursuant to N.J.S.A. 18A:6-8.3, pending the Board's investigation of petitioner's conduct. On April 28, 2016, the Board certified tenure charges against petitioner to the Commissioner of Education and petitioner's suspension converted to a suspension without pay under N.J.S.A. 18A:6-14. Petitioner's unpaid suspension took effect on May 1, 2016 and continued through June 2016 and the summer months that followed. On September 1, 2016, petitioner's suspension converted to a paid suspension, as more than one-hundred twenty days had passed since the tenure charges were certified on April 28, 2016 (N.J.S.A. 18A:6A-14).

On October 5, 2016, pursuant to the TEACH NJ Act and the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et. seq., an Arbitration award was rendered adjudicating the tenure charges filed against petitioner by the Board. In a written opinion, the arbitrator ruled that petitioner "shall be reinstated to his positon as tenured teacher in the District. The penalty for the proven allegations as set forth ...above shall be reduced from termination to a forfeiture of the 120 days of pay already withheld following the certification of the tenure charges. Therefore, there shall be no back pay awarded in connection with this 120 days loss of pay."

This is where the parties' understanding of "suspension without pay" differs and why this matter is in dispute. At the time the Arbitration award was entered on October 5, 2016, petitioner was on paid suspension since September 1, 2016. The Board ceased paying petitioner on November 30, 2016, as it determined that petitioner was not entitled to his salary because he had collected unemployment benefits during the summer months

of July and August 2016.[2] The Board opined that petitioner was not entitled to unemployment benefits as he is a ten-month employee and is not paid for the summer months, and in addition, he was on suspended pay for 120 days, for the months of May through August 2016. The Board determined further, that petitioner was not entitled to his salary on November 30, 2016, as it interpreted the Arbitration award as ruling that a "forfeiture of pay" against petitioner included all compensation received by petitioner during his 120 suspension-including the unemployment compensation.

The Board has decided to withhold petitioner's pay effective November 30, 2016, pending a determination by the OAL and the Commissioner of Education, as to the correct amount to release to petitioner, net petitioner's salary that the Board is holding in escrow. The Board acknowledges that under N.J.S.A. 18A:6-14, the 120-day suspension period "generally" includes, summer months "even" for 10-month employees like petitioner. The Board is of the opinion, however, that petitioner did not comply with the 120-day suspension period by applying for and receiving unemployment compensation during the said period. The Board does not present any exception to the 120-suspenson rule in N.J.S.A. 18A;6-14 as proof, but does cite several cases for the proposition that any delay that negatively impact the 120-day suspension is counted against the employee, and not counted towards the 120-day period. The same are not dispositive of the issue before the OAL as the petitioner did not cause any delay in the accumulation of the 120-day suspension.

The Board also relies upon the Arbitration Award for authority to withhold petitioner's salary. A review of the Award indicates that the arbitrator's ruling was consistent with N.J.S.A. 18A:6-14; a "forfeiture of the 120 days of pay already withheld following certification of the tenure charges. Therefore, there shall no back pay awarded in connection with this 120 day loss of pay." The Arbitration proceeding is governed by

[2] Petitioner had applied for unemployment compensation on July 10, 2016, and received unemployment benefits through the end of August 2016. Thereafter, petitioner refiled for unemployment benefits in December 2016 (after the Board withheld his November 30 paycheck), and was granted the same. It appears from the pleadings submitted that the Board did not contest the July 10 unemployment filing and did contest the December filing, which initially denied petitioner unemployment benefits. This decision was reversed by the Appeal Tribunal on February 7, 2017, and petitioner was granted unemployment benefits from November 27, 2016 through April 2017. The Appeal Tribunal informed the Board that they can notify the Department of Labor as to any back pay that petitioner received after November 15, 2016.

N.J.S.A. 18A:6-16, and the arbitrator has ruled consistent with the applicable law for said proceedings as allowed under N.J.S.A. 18A:6-14. There is no exception to the 120-day suspension as the Board has carved out for petitioner. The Board argues that the arbitrator had some greater power than allowed by N.J.S.A. 18A:6-14, as the award was not the typical "suspend and restore" decision but an actual "penalty" imposed by the arbitrator. The Board fails, however, to present regulatory proof or cite a case that substantiates this argument.

N.J.S.A. 18A:6-14, provides specifically that the Board is to pay the employee commencing on "the one hundred twenty-first day [following the 120 calendar days of suspension] until such determination is made [excluding the 120 days]." This statutory language explicitly legislates the time period when the Board may exclude payments to a tenured employee and does not regulate the compensation that the employee may receive while he or she is not being paid. For the Board to now imbue an exception to N.J.S.A. 18A:6-14 when an employee receives unemployment benefits, or any compensation, is contrary to the statutory language.

The Board also makes an argument that petitioner should not be allowed to collect unemployment as he has abused the system regulating unemployment benefits. The petitioner cites N.J.S.A. 43:21-5(b), regarding the return of unemployment benefits collected when an individual receives back pay during the unemployment period. Moreover, the Appeal Tribunal ruled that the Board was not prevented from notifying the Department of Labor of any back pay issued to petitioner while he received unemployment compensation after November 15, 2016, which is the date of petitioner's last paycheck.

Accordingly, the Board's motion for summary decision is **DENIED**. Petitioner's motion for summary decision seeking relief in the form of an order directing his restoration to full paid status to November 30, 2016 is **GRANTED**.

ORDER

It is hereby **ORDERED** that the Board's motion for summary decision be **DENIED**. It is hereby **ORDERED** that petitioner's motion for summary decision is **GRANTED**. It is hereby **ORDERED** that the Board is to restore petitioner's salary commencing with the pay period ending on November 30, 2016 through the date of this decision.

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

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

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

April 13, 2017
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: April 13, 2017

Date Mailed to Parties: APR 17 2017

lr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

144-17

ROBERT REILLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the decision of the respondent Board to terminate his employment as Athletic Trainer when the position was abolished due to a reduction in force (RIF) and the responsibilities of his former position were transferred to an outside vendor. Petitioner alleged that his tenure rights were violated, asserting that the Athletic Trainer position was not abolished and that the vendor was given the position without acknowledgment of the petitioner's recall rights. The RIF occurred following a period when petitioner had been suspended with pay pending the outcome of an IAIU investigation concerning allegations of child abuse, which ultimately determined that the allegations against petitioner were unfounded. Petitioner subsequently filed the within petition, and the parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: petitioner's motion for summary decision stated that there were no material facts in dispute; however, petitioner contradicted this in his opposition to the Board's motion for summary decision, where he stated that the Board's motives for outsourcing the position of Athletic Trainer were not based solely on reasons of efficiency and economy; further, petitioner alleged that his position was eliminated due to retaliation based on his filing a notice of claim and providing information that another employee had a criminal history; despite this allegation, petitioner failed to provide documents, statements of potential witnesses or anything else to support this position; respondent, on the other hand, has demonstrated that there was a clear economic reason for the Board to abolish the position of Athletic Trainer and to contract the services to an outside vendor, as petitioner's last salary was $100,363, or $40,000 more than the cost of contracting with the outside vendor to provide Athletic Trainer services. The ALJ concluded that petitioner failed to provide any evidence that the Board's abolition of the Athletic Trainer position was arbitrary, capricious or done in bad faith, and that the Board's contract with the outside vendor was undertaken for reasons of economy, resulting in a savings of $40,000 for the school district. Accordingly, the ALJ denied petitioner's motion for summary decision and granted the Board's motion for summary decision, thereby dismissing the appeal.

Upon comprehensive review, the Commissioner concurred with the ALJ that the Board's decision to abolish the Athletic Trainer position was not arbitrary, capricious or unreasonable. Further, the Commissioner found that the Board's decision to contract with an outside vendor for economic reasons did not violate petitioner's seniority rights. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter and the petition was dismissed.

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

Issued 5/22/17

OAL DKT. NO. EDU 13301-16
AGENCY DKT. NO. 208-7/16

ROBERT REILLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Robert Reilly, and the East Orange Board of Education's (Board) reply thereto.[1]

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons set forth in the Initial Decision – that the Board's decision to abolish the petitioner's athletic trainer position as a result of a reduction in force was not arbitrary, capricious or unreasonable. The Commissioner also finds that the Board's decision to contract the athletic trainer services to an outside vendor for economic reasons did not violate the petitioner's seniority rights. See, *Gillian Impey v. Board of Educ. of the Borough of Shrewsbury*, 273 *N.J. Super* 429, 435 (May 24, 1994) (Unlike a scenario involving "the re-titling of the position ... in order to remove a tenured incumbent, this case involves a statutorily authorized administrative change in the method of providing an educational service for the sole purpose of

[1] The petitioner submitted a response to the Board's reply exceptions that was not considered because there is no provision that authorizes a reply to reply exceptions.

saving money.") Finally, the Commissioner is not persuaded that the exceptions submitted by the petitioner dictate a different result.[2]

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/22/17
Date of Mailing: 5/22/17

[2] Despite the fact that the petitioner filed a motion for summary decision at the OAL stating that there are no material facts in dispute, his exceptions suggest that this matter should not have been decided on summary decision and instead there should have been a hearing with witness testimony regarding the Board's intent behind the elimination of his position. The petitioner also attempts to argue in his exceptions that his motion for summary decision only concerned his recall rights and what occurred after his position was abolished, not the Board's conduct before his position was abolished.

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 13301-16
AGENCY DKT. NO. 208-7/16

ROBERT REILLY,

Petitioner,

v.

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

Respondent.

Paul W. Tyshchenko, Esq., for petitioner (Caruso Smith Picini, attorney)

Avis Bishop-Thompson, Esq., for respondent, (DeCotiis, Fitzpatrick, Cole & Giblin, attorney)

BEFORE: **KIMBERLY A. MOSS**, ALJ

Record Closed: March 27, 2017 Decided: April 11, 2017

STATEMENT OF THE CASE

Richard Reilly, (Reilly or Petitioner) contests his termination by East Orange Board of Education (Board or respondent) due to a reduction in force. On April 28, 2016, Reilly was informed by the Board that his position as Athletic Trainer was going to be abolished effective June 30, 2016 for reasons of economy. On May 10, 2016, the

Board passed a resolution abolishing the position of Athletic Trainer. Petitioner appealed the Board's decision. The appeal was filed with the Office of Administrative Law on September 1, 2016.

PROCEDURAL HISTORY

Petitioner filed a motion for summary decision on March 7, 2017. Respondent filed a reply to that motion on March 31, 2017. Respondent filed a motion for summary decision on March 10, 2017. Petitioner filed opposition to respondent's motion on March 22, 2017. Respondent replied to the opposition on March 27, 2017.

FACTUAL DISCUSSION

Having reviewed the petitioner and respondent's briefs in support of and opposition to motion for summary disposition, I **FIND** the following **FACTS**:

Reilly was a certified, tenured Athletic Trainer at East Orange Campus High School (Campus). He began working for the Board in 2001. Reilly's annual salary for the 2015-2016 school year was $100,363. Reilly was suspended with pay pending an allegation of child abuse and neglect on September 9, 2015. On September 11, 2015, the Board entered a contract with outside vendor SD Gameday to provide a licensed certified Athletic Trainer for Campus due to the suspension of Reilly. On November 3, 2015, petitioner was informed that the investigation was unfounded. He was directed to report to campus on November 9, 2015. Petitioner filed a Notice of Claim against the Board for among other things civil rights violation, retaliation and harassment on December 9, 2015. The Board approved family leave absences for petitioner from November 16, 2015 to November 23, 2015 and January 13, 2016 to June 30, 2016. SD Gameday continued to provide the services of Athletic Trainer at Campus through the end of the 2015-2016 school year.

In March 2016, Dr. Gloria P. Watson, the Acting Superintendent of East Orange School District from March 15, 2015 to June 30, 2016, and the Senior Cabinet began the process to implement a reduction in force due to declining aid from the State,

increase in charter schools and the rising cost of goods and services. During this time Dr. Watson, became aware that the contract with SD Gameday was a significant savings in comparison to petitioner's salary.

On April 28, 2016, petitioner was informed that it was recommended that his position among other positions was to be abolished. On May 3, 2016 petitioner was informed that his position as Athletic Trainer was to be abolished due to budgetary restraints and that he would be non-renewed for the 2016-2017 school year. On May 10, 2016, the Board approved a resolution which included non-renewal of Reilly and abolishing the position of Athletic Trainer. On June 28, 2016, the Board passed a resolution to contract with SD Gameday to hire an Athletic Trainer from July 15, 2016 to June 21, 2017, in an amount not to exceed $60,000.

Reilly alleges that the position of Athletic Trainer was not abolished and that S.D. Gameday was given the position, without given him his recall rights. Petitioner also contends that the Board's motives for outsourcing the Athletic Trainer position were not solely based on efficiency and economy in his opposition to respondent's motion. Petitioner did not address motives of the Board in his motion for summary decision. Petitioner did not include any evidence of any type that the position of Athletic Trainer was abolished in retaliation for his filing of a notice of claim or in bad faith.

LEGAL ANALYSIS AND DISCUSSION

Both parties are requesting summary decision. The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of Rule 4:46-2 and the New Jersey Supreme Court's decision in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523

(1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

In Martin v. Rutgers Cas. Ins Co 346 N.J. Super 320, 323 (App. Div. 202) The Court stated "The record is barren of any evidence that plaintiff had such a license other than her own self-serving assertion to that effect. That is clearly insufficient to create a question of material fact for purposes of a summary judgment motion."

In this matter petitioner's motion for summary decision states that there are no material issues of fact in dispute. Petitioner contradicts this in his opposition to respondent's motion for summary decision states that respondent's motives for outsourcing the position of Athletic Trainer were not based solely on reasons of efficiency and economy and therefore questions of motive or intent are not appropriate for summary decision. Petitioner alleges that his position was eliminated due to retaliation based on filing a notice of claim and providing information that another employee had a criminal history. Other than the allegation of petitioner in the petition there is no evidence of this. Petitioner has not provided any documents, statements potential witness or anything to support this position.

I **CONCLUDE** that Reilly has not presented any evidence to show that the abolition of the position of Athletic Trainer was arbitrary, capricious or done in bad faith.

In his motion for summary decision petitioner's contention is that by outsourcing the position of athletic trainer to SD Gameday instead of re-employing him in the position that the Board violated N.J.S.A. 18A 28-12. In Impey v. Shrewsbury Bd of Education 273 N.J. Super. 429 (App. Div 1994) Impey was a tenured speech correctionest. Shrewsbury abolished her position and contracted with Educational Services Commission of Monmouth County for speech correction services at a savings

of $12,000. Impey alleged that this violated her tenure rights and sought reinstatement. Id. at 431. In Impey the Court stated:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.
>
> The Board's decision to contract with an ESC to provide the speech correction services previously performed by appellant eliminated the need for the position of speech correctionist within the district. Moreover appellant stipulated that the Board would save more than $ 12,000 per year by contracting with an ESC to provide these services. Therefore, we are satisfied that the Board properly abolished appellant's position of speech correctionist "for reasons of economy" and thus did not violate her tenure rights. Klinger v. Board of Educ. of Cranbury, 190 N.J.Super. 354, 357, 463 A.2d 948 (App.Div.1982) ("[R]eduction in force is entirely within the authority of the board if done for reasons of economy."), certif. denied, 93 N.J. 277, 460 A.2d 678 (1983). Id at 434

In this matter like Impey there is a clear economic reason for position of Athletic Trainer to be abolished and the services to be contracted to an outside vendor. Reilly's salary of $100,363 is $40,000 more than the Board will pay SD Gameday for the Athletic Trainer services.

I **CONCLUDE** that the Board abolished the position of Athletic Trainer on May 16, 2016 and contracting those services to an outside vendor, SD Gameday, with a savings of $40,000.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Reilly's motion for summary Decision is **DENIED**.

It is **FURTHER ORDERED** that East Orange Board of Education's motion for Summary Decision is **GRANTED**.

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

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

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

4-11-17

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

Date Mailed to Parties: APR 11 2017

ljb

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

- Petitioner and Respondent's, motions, briefs and exhibits.

PURSUANT TO THE REFERRAL BY THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY

IN THE MATTER OF THE TENURE HEARING OF BELINDA MENDEZ-AZZOLLINI	:	**BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY**
BY THE SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY	:	**AGENCY DOCKET NO. 219-8/16**

BEFORE: CAROL F. LASKIN, ESQUIRE, ARBITRATOR

APPEARANCES:

On behalf of Belinda Mendez-Azzollini
Caruso Smith Picini, P.C.
Nick Poberezhsky, Esquire
Paul W. Tyshchenko, Esquire
W.P. Tyshchenko, Esquire

On behalf of Irvington Board of Education
The Law Firm of Hunt, Hamlin & Ridley
Ronald Hunt, Esquire

PROCEDURAL BACKGROUND

Pursuant to *N.J.S.A.* 18A:6-16, as amended by *P.L. 2012, c. 26* ("TEACHNJ"), tenure charges were brought by the Board of Education, Irvington Public School, Essex County ("Petitioner", "District" or "Irvington") against Belinda Mendez-Azzollini ("Respondent" or "Mendez-Azzollini" or "Azzollini") on August 19, 2016. Respondent filed an Answer of Evidence/Position in Opposition to the Tenure Charges on September 21, 2016. This matter was referred to me by the Bureau of Controversies and

Disputes on October 3, 2016, for hearing and decision. The hearings in this matter were conducted on November 15, 2016, December 16, 2016, February 15, 2017, and March 2, 2017. Final submissions were received by April 11, 2017, whereupon the record was closed.

THE CHARGES

The Sworn Tenure Charges brought against Belinda Mendez-Azzolini in pertinent part state:[1]

"A. Just Cause Termination
The Respondent had been charged with the following conduct and/or other good cause necessitating the need to terminate her employment with the Irvington School District (hereafter 'Petitioner') for Conduct Unbecoming a Public School Guidance Counselor:

7. During this same time frame, June 16, 2016, it was discovered by the Supervisor of Guidance, Claire Hamm, during an audit of senior transcripts that J.D. had not obtained a passing grade in Geometry, a requirement for graduation.

8. J.D. had obtained a failing grade in Geometry during the 2013-2014, school year and had never made up the grade. Ms. Hamm informed the Respondent of this at the time of the initial senior transcript review in the beginning of the 2015-2016, school year.

9. On June 17, 2016, Ms. Hamm again reminded the Respondent that J.D had not passed Geometry to which Respondent suggested that she check the Historical Grades screen in Power School

[1]With regard to the original charges 1 through 6, the parties stipulated,: "The historical record should reflect that prior to the alleged events giving rise to the instant tenure charges, the district alleges that another incident involving respondent occurred earlier in the same school year for which the district had already taken disciplinary action against respondent. Respondent is challenging the discipline imposed in connection with the earlier incident in a separate grievance procedure, and as such the counts of the district tenure charges against respondent pertaining to that earlier incident are not part of the instant tenure proceedings."
IT 6/6 to 18

and not rely on the student's transcript.

10. Thereafter, Ms. Hamm checked the Historical Grades screen for J.D. and observed a grade of "D" for the 2013-2014 school year. Ms. Hamm was somewhat puzzled by the discovery and questioned how the "D" grade suddenly appeared when the grade on his printed transcript reflected an "F" just two weeks earlier.

11. When questioned, the Respondent could not explain the change, but only mentioned that they should rely on the Historical Grades screen and not the transcript.

12. Thereafter, while reviewing the Historical grades screen, Ms. Hamm discovered that J.D.'s Geometry grade had been changed from an "F" to a "D" on June 15, 2016 at 11:02 am by Belinda Mendez-Azzollini.

13. On June 20, 2016, during the Senior Transcript meeting with the Superintendent, High School Principal, Ms. Hamm and the Respondent, the Respondent was asked directly if she changed J.D.'s. grade, to which she replied "no." Thereafter in a later meeting with her Union President present, the Respondent was again asked whether she changed the grade and again replied "no."

14. At that point, the Respondent was shown a copy of the Historical Grades screen showing that her user code was used to modify the student's grade. She then admitted that she had changed the grade and claimed for the first time that the student had informed her in September 2015, that he had passed Geometry in summer school.

15. Subsequent review of the summer school rosters for 2014 and 2015, did not demonstrate evidence that J.D. ever attended summer school. Additionally, J.D. was questioned on the subject and wrote a statement confirming that he *never* attended summer school or had a conversation with the Respondent about summer school.

16. The Respondent was unable to produce any documentation to support her action of modifying the student's grade. Her conduct constitutes unbecoming conduct for a public school employee." (R-1, P-2)[2]

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[2]Exhibits shall be referenced as J-Joint, P-Petitioner, and R-Respondent. The transcript of the hearing conducted on December 15, 2016 shall be referenced as 1T followed by page/line. The transcript of the hearing conducted on February 15, 2017 shall be referenced as 2T followed by

ISSUE PRESENTED

Has the School District of the Township of Irvington, Essex County, met its burden of establishing by a preponderance of the credible evidence the tenure charges against Respondent, Belinda Mendez-Azzollini?

If so, do the tenure charges warrant dismissal or a lesser discipline?

EVIDENTIARY FINDINGS

At hearing, the parties were zealously represented. Each was given a full opportunity to present testimony, written evidence, cross-examine witnesses and submit post hearing briefs.

Petitioner Irvington proffered:

Claire Hamm - Supervisor of Guidance
Sandra Y. Boone-Gibbs - High School Principal
Bevin Subocz - Director of Technology and Media Services
Dr. Neely Hackett - Superintendent of Schools

Petitioner Belinda Mendez-Azzollini testified on her own behalf in addition to:

Eleanor Gatling - School Counselor - Transcript Coordinator Blue Knights Academy
Eileen Wesley - Irvington High School Social Studies Teacher, President-Irvington Education Association

Based upon a through review of the record, including all relevant exhibits, arguments and observations of the demeanor of each witness, I ***find*** the following as fact:[3]

Irvington Public Schools is a kindergarten through twelfth

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page/line. The transcript of the hearing conducted on March 2, 2017 shall be referenced as 3T followed by page/line.

[3]Controverted evidence will be identified and discussed in *Position of the Parties* below.

grade district, classified as special needs, referred to as an "SDA District." The Superintendent of Schools, Dr. Neely Hackett attended Irvington Public Schools as a child. With the exception of a short tenure as High School Principal at Franklin High School in Somerset County, Dr. Hackett has been employed by the District as a teacher and in a series of progressive administrative positions. (2T236/21-237/11)

Upon her appointment as Superintendent five (5) years ago, Irvington High School's graduation rate was fifty percent (50%). The District is being monitored; the State is seeking a graduation rate of eighty-five percent (85%). The last school year - 2015/2016, Irvington High School's graduation rate was seventy percent (70%). (2T 242/5-22)

Respondent, Belinda Mendez-Azzollini, was hired in 2004 as a Guidance Counselor at the Union Avenue School by its then Building Principal, Dr. Hackett (then known as Nettie Settle). Dr. Hackett was replaced at the middle school by Mr. Joy and ultimately Ronald Bligh. In 2010, Ms. Mendez-Azzollini's contract for employment was non renewed based upon the District's mistaken belief the Petitioner had not worked long enough to obtain tenure. In addition to seeking tenure before the Commissioner of Education, in 2010, Ms. Mendez-Azzollini filed a civil action in Superior Court against Ronald Bligh, then Superintendent Ethel Davion and the Board of Education. On November 7, 2013, Ms. Mendez-Azzollini executed a Settlement Agreement and Release after receiving Eighty

Thousand Dollars ($80,000.00). Neither the District nor the named Defendants made any admission of liability. (J-1)

When Respondent returned to the District, she was assigned to the Blue Knights Academy, a night school program within Irvington Public Schools. When a position opened for a guidance counselor in the high school, Ms. Mendez-Azzollini applied for the transfer which was granted by Dr. Hackett. Thus, Respondent transferred from the night school to Irvington Public High School in or around April 2014. Prior to June 2016, Ms. Mendez-Azzollini was not issued discipline; she earned consistent positive evaluations. (R-10)

GUIDANCE DEPARTMENT

Claire Hamm was appointed Supervisor of Guidance prior to the 2015/2016 school year. Approximately twenty-two (22) guidance counselors service all schools within the District. As to the duties of a high school guidance counselor in Irvington, Ms. Hamm revealed,

> "Q. What does a guidance counselor do?
>
> A. A guidance counselor's role is to support their students in a caseload academically, social development and behavioral development. At the high school level, that means ensuring that your student and your caseload have all the required courses to graduate to make sure that they are progressing academically, make sure their attendance is not becoming an issue, make sure there's no behavior issues to prepare them for colleges and applications and careers, so they really have the full circle of responsibilities for high school students." (1T 13/5-17) (See also R-9 - *Guidance Counselor* Position Description)

At Irvington High School, it is the duty/responsibility of each guidance counselor to ensure students are assigned to courses which fulfill the New Jersey State requirements for graduation. Ms. Hamm disclosed courses required to complete:

> English Language Arts, four years or 20 credits
> Mathematics, three years or 15 credits
> Social Studies, three years
> Science, three years including a lab science - one must be biology
> Physical Education - every year enrolled
> One year of a World Language
> One year of Art
> One year of a career or practical Art
> One half year of financial literacy
> (IT 15/16 to 16/6)

The Guidance Supervisor is responsible for assigning duties to each guidance counselor in the high school. Dr. Hackett informed that within the last three (3) years these assignments have been tweaked. One counselor may be assigned all English learning language students, one counselor may be assigned only Freshman students, one counselor may be assigned special education students.

Since her reassignment to the high school in 2014, Respondent was "responsible for between 250-275" students every school year. (3T429/17) Counselors are also assigned additional duties. These include, *inter alia*, HIB specialist, college and career fairs, college visits, senior awards ceremony, translating transcripts from students of a foreign country. There is an attempt to equalize these roles between the Counselors. (2T319/14 to 321/8) In the school year 2015/2016, Ms. Mendez-Azzollini's

additional duties included assignment as the high school HIB specialist (Harassment Intimidation and Bullying).

SEPTEMBER 2015

Counselors meet their students throughout the year and schedule courses for the next school year. In order to ensure seniors have scheduled all required courses to graduate in June, Principal Boone-Gibbs meets in September separately with the Supervisor of Guidance and each Guidance Counselor. Consistent with this process, in September 2015, Principal Boone-Gibbs and Ms. Hamm requested each Guidance Counselor to provide, for their 2016 graduating students, transcripts and schedules. (1T 126/3-13)

Upon receipt, Ms. Hamm reviewed the approximately three hundred (300) graduating student transcripts before the meetings. In the event a student's transcript evidences he or she will have problems with graduation, students can be assigned a credit recovery course embedded during the school day, after school on the premises, and at the Blue Knights Academy. (1T 126/14 to 127/11) This process was designed to ensure graduating seniors are on track to graduate; given an opportunity to take all required courses.

In preparation for the September meeting, Guidance Supervisor Hamm created a form identifying all graduation requirements with a check list for completion to graduate in June 2016. During this process, she discovered that student J.D. had failed "geometry." (P-4)

The meeting on September 29, 2015, was conducted by Principal Boone-Gibbs and Guidance Supervisor Hamm. When Respondent met with them to review her senior case load, she was informed student J.D. had failed geometry and needed to pass this mathematics course in order to graduate in June 2016. (1T 21/2 to 22/18; 3T 452/19 to 453/21)

NOVEMBER 2015

Upon her transfer to the high school in April 2014, Respondent was assigned Sophomore student J.D. She remained his counselor throughout J.D.'s Junior and Senior years of high school. After J.D. failed geometry during the 2013-2014 school year, Ms. Mendez-Azzollini never addressed this deficiency by scheduling J.D. to another geometry class, credit recovery, or Blue Knights Academy.

Prior to the September 29, 2015, meeting with the Principal and Guidance Supervisor, J.D.'s official transcript evidenced grade F and zero credit for geometry in his Sophomore year. On November 10, 2015, Ms. Mendez-Azzollini changed J.D.'s geometry credit from zero credit to five credits.[4]

Acknowledging she made this change, on cross, Respondent testified,

"Q Now I think I heard your testimony today, it was a

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[4]This change was not discovered by the District until the Fall of 2016, after Respondent's suspension. Director of Technology Bevin Subocz, upon request of Dr. Hackett, conducted an in depth review of all grade changes made by Respondent in Power School during the 2015-2016 school year.

little confusing to me but I want to be clear about what you said, I think you said you changed his credits on November 10th, to five credits; is that accurate?
A Yes.
Q On what authority did you do that?
A Because guidance counselors are able to update information.
Q Okay, and what updated information did you get that he had five credits?
A Well, like I said, like I testified before that I don't actually recall it, recall it but if that was the cause and in November we were getting information in to update the audit sheet or their transcripts I may have mistakenly changed it thinking it was summer school grade.
Q Let's stop there, let's stop this.

You know at this point in time in 2014/15, how long have you been a guidance counselor?

ARBITRATOR LASKIN: You mean 15/16?

Q 15/16, how long had you been a guidance counselor?
A Twelve years.
Q You would be considered like a veteran at that point, right, yes, more or less?
A Yeah.
Q It is a very serious thing to change a grade or to give anyone credits that he hasn't earned, you would agree with that statement, wouldn't you?
A Yes. I would never intentionally do that.
Q Let's forget intentionally.
A I would never intentionally fabricate or change any grade.

(3T 453/22 to 455/4)

...
Q Okay, I think the testimony was in November you changed the credit; is that accurate?
A Yes.
Q Did you change the credit and the grade or just the credit?
A Just the credit.
Q What was the grade that you left, was it an F?
A I don't know." (3T 457/3 to 10)

JUNE 2016

The final graduating senior review, under the direction of Dr. Hackett, is conducted every June with each guidance counselor, together with the Supervisor of Guidance and the High School Principal. Each Guidance Counselor's case load of graduating seniors is reviewed to confirm all requirements were met; the student(s) had earned their Irvington High School diploma.

In preparation for this meeting, on June 9, 2016, Guidance Supervisor Hamm directed her secretary to print out all senior transcripts and historical grade screens. (1T 65/25 - 66/7) Ms. Hamm reviewed these records for each the approximately three hundred (300) graduating students. On Friday, June 17, 2016, in preparation for the review meeting scheduled on Monday, June 20, 2016, Claire Hamm sent questions to counselors requesting updated information.

At 8:21 a.m., Supervisor Hamm emailed Ms. Mendez-Azzollini as follows,

> On Fri, June 17, 2016 at 8:21 AM, Claire Hamm <chamm@irvington.k12.nj.us> wrote:
>
> Just a couple of questions that I have after reviewing your senior transcripts...
>
> 1) For J. D., I don't see a Geometry course listed on his transcript. Please advise.
>
> 2) For L. J., I am seeing five years of studies, but only four PE classes. Please advise.
>
> 3) For T. L., if he fails Spanish II and African American History, he will not have enough credits to graduate. Do we have an update from both teachers regarding his status in

both classes at this time?

4) For S. L., I don't see Financial Literacy (or an equivalent) on his transcript. Please advise.

5) For A. M., I don't see an visual/performing art elective. Please advise.

I will need your updates on these five students before you leave for the day today because, as you know, I am meeting with Dr. Hackett tomorrow to review all transcripts.

Thanks so much,
Claire"

Respondent replied, by email:

"From: Belinda Mendez-Azzollini
Date: Fri, Jun 17, 2016 at 1:18 PM
Subject: Re: URGENT: QUESTIONS RE SENIOR TRANSCRIPTS - RESPONSES DUE TODAY FRI JUNE 17, 2016
To: Claire Hamm

can you please call me" (P-11)

Prior to receipt of the Friday email, on Wednesday, June 15, 2016, at 11:02 a.m., utilizing Power School, Respondent modified J.D.'s geometry class grade and credit. To accomplish this task, Ms. Mendez-Azzollini made multiple changes in various quarters of his tenth grade geometry class resulting in the change of the final grade from F to D and credit from zero to five. (P-8)

Complying with Respondent's request, Guidance Supervisor Hamm called asking if J.D. earned a passing grade for Geometry. Ms. Mendez-Azzollini insisted he did. Guidance Supervisor Hamm advised Respondent that J.D. had an F in geometry. Respondent insisted her Supervisor was looking at the wrong computer screen. At hearing, Guidance Counselor Hamm reiterated this conversation

as follows:

> "I am very worried. Does this student have a passing grade for geometry?
>
> And she said to me: Yes, yes, he is fine. Everything is fine. He has a passing grade.
>
> And I said: Well, how can that be? Because I have a transcript that has an F and zero credits.
>
> And she said: No, no, he is fine. You must be looking at the wrong screens.
>
> And I said: Well, I am looking at Historical. Is that not what I am supposed to be looking at?
>
> And she said: Well, yeah, but you must be looking at the wrong thing, because look at it now.
>
> And so while I was on the phone with Ms. Azzollini I did go into the Power School, I did go into the historical grade screen, and sure enough, I saw something different. I saw a D with five credits. So I was very puzzled at that moment and I kept saying to Ms. Azzollini, I don't understand this. How could I have a transcript that says F with zero credits that was printed out a couple of weeks ago and now I am looking at a screen that says a D with five credits? I am really confused.
>
> And she just kept saying: No, its right, it's right. You were probably looking at the wrong screen."
> (1T 28/20 to 29/23)

During this conversation, Ms. Mendez-Azzollini failed to advise her Supervisor that J.D.'s Sophomore Geometry record was changed by her two (2) days previous, on June 15, 2015.

After speaking to Ms. Mendez-Azzollini, Ms. Hamm immediately contacted Director of Technology Bevan Subocz, communicating her concern of "Big Problems with Power School" believing it was a "computer glitch" which caused the grade change. Ms. Hamm added," I wouldn't have in my wildest dreams thought anybody would have gone in and changed a grade." (1T 34/2 to 35/2)

Director Subocz immediately investigated. Her testimony disclosed, upon clicking the final grade in the Power School data

base, an edit stored grade page is opened. Any change in a grade is saved and recorded with the notation of the user. (2T 203/5 to 204/1) Subocz's investigation revealed J.D.'s credit and grade was changed on June 15, 2016. Ms. Subocz relayed her findings; user 3309 made multiple manipulations on J.D.'s transcript. Ms. Hamm requested the identity of user 3309. Upon further investigation, Director Subocz identified 3309 as Respondent, Belinda Mendez-Azzollini. (P-8)

JUNE 20, 2016

Prior to the commencement of the senior transcript meeting, Ms. Hamm informed Dr. Hackett and Principal Boone-Gibbs about the Director of Technology's finding regarding J.D.'s geometry grade. When Ms. Mendez-Azzollini came before the committee, her senior transcripts were reviewed. The final student was J.D. Dr. Hackett's testimony, corroborated by Ms. Hamm, Principal Boone-Gibbs and Respondent exclaimed,

> "We get to J.D. and then she says fine. And Ms. Hamm says are you sure, she says yes, he is fine. So Ms. Hamm says we have an issue because I had a D - there was an F, I am sorry, and now the passing - Ms. Hamm said what did he get in geometry and Ms. Azzollini said a D. And Ms. Hamm said there's a problem because I saw an F when I did my review and now it is a D. So Ms. Mendez-Azzollini said, no, no, he is fine, he is fine. So I believe at that point I said, Ms. Mendez-Azzollini, did you change the grade, she said no.
>
> Q. Who was there when you said that, when you asked the question?
>
> A. Ms. Boone-Gibbs and Ms. Hamm. So I said again because now I am getting a little nervous, I said Ms. Mendez-Azzollini, did you change the grade. She said, no. I think I might have asked her two or three times.

Q. And her answer was the same?

A. Her answer was the same. At that point I knew something was wrong. I didn't quite know what it was. I knew something was wrong." (2T 247/5 to 24)

After the denials, Dr. Hackett interrupted the meeting directing Respondent to return with a Union representative. President of the Irvington Education Association, Eileen Wesley, a high school social studies teacher, returned to the meeting with Respondent. In the presence of her representative, Dr. Hackett again asked Respondent if she had changed any grades. Ms. Mendez-Azzollini expressed, she "had not." (3T 378/20 to 25) Thereupon, Dr. Hackett showed Respondent and Ms. Wesley a copy of the historical grade screen, researched by Technology Director Subocz evidencing that J.D.'s grade was modified by an individual using Respondent's user code. (P-6, P-8)

Soon thereafter, Ms. Mendez-Azzollini acknowledged she changed J.D.'s grade from F to D. Dr. Hackett asked why the grade change was from an F to a D instead of an A, B or C. The Superintendent sought documentation as to why Respondent changed the grade and why that grade was a D. Ms. Mendez-Azzollini informed she believed J.D. had taken Summer school. Thereupon, Director Hackett requested Ms. Wesley accompany Respondent to her office to find the Summer school documentation.

When they left the room, Dr. Hackett directed the Principal to meet privately the student. J.D. informed the Principal he

neither spoke of nor attended Summer school to rectify his geometry failure.

In addition to Ms. Wesley, another counselor and Guidance Secretary assisted to find Summer school lists. Approximately 15 to 20 minutes later, finding no documentation to support her claim, Respondent along with Ms. Wesley returned to the meeting informing the participants of the lack of documentation. Thereupon, Dr. Hackett instructed Ms. Mendez-Azzollini to leave the school grounds, notifying "she would be officially suspended pending further investigation." (2T 225/9 to 10; 3T 467/9 to 469/21)

POSITION OF THE PARTIES

The parties presented argument at hearing and through post hearing submissions; the essence of each is as follows:

School District of the Township of Irvington

The District maintains Respondent's conduct was deliberate and calculated, warranting dismissal from her guidance counselor position at the Irvington Board of Education. She engaged in a series of unethical acts. She had numerous opportunities to cure her failure to provide J.D. a geometry course and/or admit her changes in the Power School data base. Her conduct, the District avers, cannot be rehabilitated by interventions available to a school district.

Irvington views Respondent's defense as lacking genuine

candor as she blamed others and feigned confusion.

Arguing her behavior throughout the 2015-16 school year presents a series of deliberate actions, "unbecoming conduct," Counsel reflected upon her deportment during the senior transcript meeting,

> "The meeting of June 20, 2016, was the culmination of all deception demonstrated by the Respondent, but also another failed opportunity to admit her error and accept the consequences. On this occasion, when confronted with what appeared to be an unauthorized grade and credit change, the Respondent chose to lie to her Supervisor, Building Principal and Superintendent of Schools, when asked repeatedly and simply, did you change the grade? The transgression was further enhanced when the Respondent suggested that the Student himself had told her he had taken summer school and passed the class. This myth was quickly dispelled when the student was called and denied her version. The Respondent finally relented and suggested that she changed the grade in June because she was confused when she audited the student's transcript and noticed that he had an F and 5 credits. What she conveniently failed to disclose to the committee was that there was no confusion to her, since it was she who had changed JD's credits to 5 earlier that year on November 10, 2015. At no point in this process did the Respondent simply take a principled stance and admit her fault.
>
> Here, the Respondent's conduct did not only not meet the high standards expected of public employees, it demonstrated a lack of fundamental honesty and integrity in a position in which guidance is sought by our students. **In re Fulcomer**, 93 N.J. Super. 404 (App. Div. 1967)." (Brief pps 14-15)

Moreover, neither Respondent's years of service, positive evaluations, award recognition, or personal story nullify her conduct, avers the district. Trust is lost between the District and Guidance Counselor Belinda Mendez-Azzollini.

Accordingly, Irvington requests this arbitrator sustain the Tenure Charges and determine dismissal is the appropriate

discipline.

Belinda Mendez-Azzollini

Respondent maintains the fact pattern in this matter is "not illustrative of the type of nefarious, intentional, misconduct that would warrant loss of tenure." Ms. Mendez-Azzollini argues she held a good faith basis "at least in her mind" to change J.D.'s credit based upon her mistaken belief J.D. passed geometry when she made the credit change in November 2015. (Brief at 2, 3)

Acknowledging she is not free from blame, Respondent contends her "serious error" was unintentional. Counsel cites recent tenure cases arguing the loss of tenure in TEACHNJ decisions are predicated on more egregious conduct than Respondents. (See In re Gilda Nicole Harris, Agency Dkt. Nos. 342-11/14 & 379-12/14, final decision, (October 2, 2015); In re Carol Zepralka, Agency Dkt. No. 162-7/15, final decision, (September 4, 2015))

Comparing her actions to those in the cases cited by counsel, Respondent asserts her missteps do not warrant the forfeiture of tenure. (Brief at page 5) Particularly, Ms. Mendez-Azzollini is aggrieved to face punishment for an act that did not violate any District policy - reasoning the failure of the District to have a written policy for processing grade changes is a "severe, even fatal deficiency in the tenure charge."

In addition, Ms. Mendez-Azzollini claims her $80,000 settlement from the District in 2013, J-1, and Dr. Hackett's lack of knowledge of the settlement raises the inference of a potential

inappropriate factor in the District's decision to file tenure charges. Moreover, Dr. Hackett's failure to initially confront Ms. Mendez-Azzollini about J.D.'s grades without any effort to have her union representative present, violated her *Weingarten* rights to union representation.

Listing other mitigating factors, Respondent notes she was burdened with a work load disproportionate to that of other guidance counselors. And, reassignment to an elementary school would obviate the District's concern about any future grade changes. Finally, Respondent views the tremendous impact her loss of position on her family as a mitigating factor. Counsel concludes,

> "As a result, were Ms. Mendez-Azzollini to be terminated, her entire family would lose most of its income, its health insurance coverage, and its retirement income and associated benefits. Such a devastating impact is unwarranted given the foregoing fact pattern. Accordingly, Respondent urges the Arbitrator to exercise her discretion to refrain from penalizing Ms. Mendez-Azzollini beyond what would be appropriate for a first-time offender under the circumstances." (Brief at 12)

ANALYSIS OF EVIDENTIARY FINDINGS

Has the School District of the Township of Irvington, Essex County, met its burden of establishing by a preponderance of the credible evidence the tenure charges against Respondent, Belinda Mendez-Azzollini?

If so, do the tenure charges warrant dismissal or a lesser discipline?

New Jersey provides protection to tenured guidance counselors such as Belinda Mendez-Azzollini from dismissal for "unfounded,

flimsy or political reasons." Spiewak v. Rutherford Board of Education, 90 N.J. 63, 73 (1982) The Statute expresses, *inter alia*, tenured staff "shall not be dismissed or reduced in compensation except for inefficiency, incapacity or conduct unbecoming such a teaching staff member or other just cause...." *N.J.S.A. 18A:28-5.* While "conduct unbecoming" is not defined by statute, it is an "elastic standard" determined on a case by case basis, embracing a wide range of conduct. (In The Matter of Tenure Hearing of Thomas Strassle and the School District of the Township of Ulbridge, Middlesex County, Agency Dk. No. Number 131-5/16 (Biren, October 5, 2016).

At all times, the District maintains the burden of establishing by a preponderance of the credible evidence Brenda Mendez-Azzollini engaged in conduct unbecoming a public school guidance counselor. Upon consideration of this record, with emphasis upon resolution of the credibility of the witnesses, I ***find*** the District has met its burden.

The evidentiary findings above reveal the District has established Belinda Mendez-Azzollini engaged in the conduct outlined in *Charges 7 through 16, infra* at pages 2-3. Her behavior resulted in the inability of J.D. to graduate with his class in June 2016. J.D. had no knowledge of this possibility until the day the students practiced their graduation ceremony. From June 2014 through June 2016, Respondent failed to provide him

opportunity to obtain a passing grade in geometry, a requirement for graduation. While Respondent's conduct affected only one student, J.D., her actions from November 2015 through June 20, 2016 present a series of an intentional deliberate acts establishing conduct unbecoming.

During her testimony, and in argument, Ms. Mendez-Azzollini repeatedly claimed she did not "intentionally fabricate or change any grade"; that she "mistakenly changed" the credits and grade. Reviewing the record and Respondent's demeanor during hearing, I ***find*** her position unworthy of belief. Respondent's testimony was not credible.

Even after finally admitting she was "untruthful" to Dr. Hackett, Principal Boone-Gibbs and Guidance Supervisor Hamm at the senior transcript meeting, Respondent attempted to limit her culpability. On direct,

> "Q. Now you heard obviously the testimony from a number of people indicating that you were untruthful during the meeting, did you deny changing J.D.'s grade at all?
>
> A. At first, yes, I did. My mind wasn't clear in that meeting, I actually was coming back from suspension I was in the rubber room five days prior to that and I panicked, I was scared and I definitely wasn't thinking clearly." (3T 423/18 to 424/1)

Ms. Mendez-Azzollini intentionally, on November 10, 2015, changed J.D.'s geometry credit from zero (0) credits to five (5) credits. Ms. Mendez-Azzollini purposefully made numerous manipulations in Power School on June 15, 2016 resulting in J.D.'s final "D" geometry grade with five (5) credits. Ms. Mendez-

Azzollini deliberately, pre-meditatively, and wantonly lied to Guidance Supervisor Hamm on June 17, 2016 that J.D. had a passing grade, claiming "everything is fine" and the "wrong screen" was being viewed. Ms. Mendez-Azzollini, on at least three (3) occasions on June 20, 2016 at the senior transcript meeting, consciously lied to Superintendent Hackett, Principal Bone-Gibbs and Guidance Supervisor Hamm asserting she did not change J.D.'s geometry grade. And, when she finally acknowledged she made the changes, Ms Mendez- Azzollini "lied" on J.D- the student she was charged to protect.[5]

Accordingly, this record is patently clear. Irvington School District has established by a preponderance of the credible evidence Ms. Mendez-Azzollini engaged in the actions expressed in paragraphs 7 through 16 of the Tenure Charges, *Conduct Unbecoming a Public School Guidance Counselor.*

Does the finding of Conduct Unbecoming a Public School Guidance Counselor warrant dismissal or a lessor discipline?

Brenda Mendez-Azzollini, prior to the 2015-2016 school year, served both the District and her students in performing the duties of a guidance counselor (R-9). These duties included, *inter alia*,

> "(GUIDANCE COUNSELOR
>
> DUTIES
> The Guidance Counselor is responsible for, but not limited to the following duties:
>
> 1. Assemble, maintain and interpret information regarding

[5] See Dr. Hackett's rationale for seeking dismissal.(3T 264/12 to 267/5)

pupils

2. Plan and supervise advance scheduling and orientations as required

3. Counsel pupils individually and in groups

4. Consult with teachers and other school staff members regarding the adjustment of individual pupils

5. Conduct conferences with parents in order to help them better understand and assist in the educational, vocational, personal and social adjustment needs of their children

6. If necessary, adjust the programs of pupils having difficulty in school

7. Identify pupils who require evaluation by the Child Study Team, collate the data necessary for the referral and refer these pupils to the Team after notification to the child's parents

8. Schedule case conferences between the Team and the faculty

9. Coordinate the implementation of the Child Study Team recommendations in the school

10. Participate in the school testing program and assist in interpreting the test results to parents, pupils and teachers" (R-9)

The District views these duties as requiring ethics and the ability to be trusted, reviewing confidential documents and engaging with children, colleagues, supervision, and parents. If she had not changed J.D.'s grade, or had admitted her mistake, the District would not have sought her dismissal. Dr. Hackett, explained,

> "But she changed the grade so she wouldn't get in trouble. In my world and how I believe you take whatever consequence comes your way when you make a mistake but you do not change a grade and possibly allow a child to get a diploma who has

not earned it. You do not do that, you say Dr. Hackett, Ms. Hamm, Ms. Boone-Gibbs, I made a mistake, I never made sure this kid was re-enrolled in geometry. And then I would have to scramble and make it happen. I am not saying it wouldn't have been a consequence for her but it wouldn't have been tenure charges. It wouldn't have been my belief that tenure charges. Tenure charges came from the fact I cannot trust her again." 2T 265/16 to 266/3)

Seeking a lesser discipline than dismissal, Respondent raised defenses and requests for this arbitrator to consider mitigating factors as follow:

1. *Failure of the Board to have a written policy on grade changes*. This failure, Respondent argues, is a fatal flaw to the tenure charges. The record, however, does not support this position. Rather, testimony revealed all employees recognize documentation is necessary to change grades, and prior approval is required.

2. *Weingarten Rights*. Ms. Mendez-Azzollini claim her statutory rights were violated is not consistent with this record. Dr. Hackett appropriately stopped the senior transcript meeting, directing Respondent to return with Union representation, after Respondent lied about changing J.D.'s grade. She was not obligated to do so at the commencement of the meeting wherein the transcripts of all the seniors' Respondent counseled were reviewed.

3. *Bias and Burdens*. Respondent did not proffer any corroborative evidence supporting her inference Dr. Hackett held an inappropriate bias toward her due to the 2013 Settlement of her

2010 Civil Action, J-1. Dr. Hackett hired Ms. Mendez-Azzollini as a guidance counselor in 2004 and approved her request for transfer to the high school in 2014, after Respondent received eighty thousand dollars ($80,000) in settlement. Likewise, Respondent failed to present documentary or testamentary evidence in support of the assertion her duties and work burdens were greater than any other guidance counselor and/or affected her behavior.

Finally, Respondent's suggestion that placement in an elementary school could obviate District concern as these students do not receive grades, is not an appropriate request for mitigation. The district cannot be required to limit its ability to assign Guidance Counselors where needed.

Brenda Mendez-Azzollini's conduct in the school year 2015/2016 cannot be rehabilitated by workshops, professional development courses, or any interventions available to Irvington. Her conduct has broken the level of trust the District expects to rely upon for a guidance counselor to perform requisite duties, R-9.

AWARD

The School District of the Township of Irvington, Essex County has established Belinda Mendez-Azzollini engaged in the actions expressed in paragraphs 7 through 16 of the Tenure Charges, *Conduct Unbecoming a Public School Guidance Counselor.*

There is insufficient evidence in this record to support a

discipline less than dismissal. Accordingly, Belinda Mendez-Azzollini engaged in unbecoming conduct constituting just cause for dismissal.

DATED: 5/25/17

Carol F Laskin
CAROL F. LASKIN, ESQUIRE

STATE OF NEW JERSEY :

COUNTY OF CAMDEN :

I CERTIFY that on May 25, 2017

I, CAROL F. LASKIN, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Decision and Award.

DATED: May 25, 2017

Lynda A Green
NOTARY PUBLIC OF THE
STATE OF NEW JERSEY

LYNDA A GREEN
ID # 2316329
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires June 28, 2019

149-17

IN THE MATTER OF THE TENURE HEARING OF IVONNE SAAVEDRA, SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,

AND

IN THE MATTER OF THE TENURE HEARING OF IVONNE SAAVEDRA, SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In these consolidated cases, the petitioning Board alleged that respondent, a tenured clerical employee, illegally obtained and disclosed student records, improperly obtained free and reduced lunch benefits for her son, and abused sick leave. Tenure charges were filed with the Office of Administrative Law on November 15, 2011 and January 18, 2012; a criminal complaint alleging, *inter alia*, official misconduct in violation of *N.J.S.A.* 2C:30-2 was filed by the Hudson County Prosecutor on August 30, 2011. The matter was subsequently held in abeyance and placed on the inactive list. A lengthy procedural course culminated in a Superior Court order in May 2016, resulting in respondent's admission into a pre-trial intervention program (PTI) – a condition of which was that Ms. Saavedra forfeit her public employment with the school district, as well as any future right to public employment. Respondent successfully completed PTI, and the criminal complaint against her was dismissed in January 2017.

The ALJ found that the tenure charges against respondent have been rendered moot by the forfeiture of her position via order of the Superior Court. Accordingly, the ALJ ordered the charges against respondent dismissed as moot.

The Commissioner concurred with the ALJ's conclusion that the tenure charges against respondent are moot; as such, there is no justiciable controversy before the Commissioner. Accordingly, the Initial Decision was adopted as the final decision in this matter, and the tenure charges were dismissed as moot.

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

Issued 6/02/17

OAL DKT. NOS. EDU 13732-11 and EDU 00782-12 (consolidated)
AGENCY DKT. NOS. 301-10/11 and 370-12/11

IN THE MATTER OF THE TENURE HEARING OF IVONNE SAAVEDRA, SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	
	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
IN THE MATTER OF THE TENURE HEARING OF IVONNE SAAVEDRA, SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY.	:	

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

Upon such review, the Commissioner is in accord with the ALJ's conclusion – for the reasons set forth in the Initial Decision – that the tenure charges filed against respondent are moot. Respondent forfeited her public employment with the District, as well as any future right to public employment, as a condition of her entry into the pre-trial intervention program. As such, there is no longer a justiciable controversy before the Commissioner.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the tenure charges are hereby dismissed as moot.

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/02/17
Date of Mailing: 6/02/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 13732-11
AGENCY DKT. NO. 301-10/11

IN THE MATTER OF THE TENURE HEARING OF IVONNE SAAVEDRA, SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY.

OAL DKT. NO. EDU 00782-12
AGENCY DKT. NO. 370-12/11

IN THE MATTER OF THE TENURE HEARING OF IVONNE SAAVEDRA, SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY.

Kevin Hanly, Esq., for petitioner, North Bergen School District

Jamison M. Mark, Esq., for respondent, Ivonne Saavedra, (Mark Law Firm, attorneys)

Record Closed: April 17, 2017 Decided: April 18, 2017

BEFORE **ELLEN S. BASS**, ALJ:

PROCEDURAL HISTORY FINDINGS OF FACT

In these consolidated cases, the North Bergen School District, (the District) alleged that Ivonne Saavedra, (Saavedra), a tenured clerical employee, illegally obtained and

disclosed student records; improperly obtained free and reduced lunch benefits for her son; and abused sick leave. The New Jersey Department of Education transmitted the tenure charges to the Office of Administrative Law (OAL), where they were filed on November 15, 2011 and January 18, 2012.

On or about August 30, 2011, the Hudson County Prosecutor filed a criminal complaint against Saavedra alleging official misconduct in violation of N.J.S.A. 2C:30-2, and further alleging that she unlawfully took or exercised unlawful control over public documents. In light of the pending criminal charges, and upon transmittal to the OAL, the parties asked that the tenure charges be held in abeyance. The matter was placed on the inactive list.

The criminal matter took a lengthy procedural course, with an appeal ultimately being heard in the New Jersey Supreme Court in November 2014. In a decision dated June 23, 2015, the Court determined that the trial court properly denied Saavedra's motion to dismiss the indictment against her, and the matter was remanded to the trial court. See: State v Saavedra, 222 N.J. 39 (2015).

Via order of the Superior Court dated May 12, 2016, Saavedra was admitted into the pre-trial intervention program (PTI). As a condition of entry into PTI, the judge's order stipulated that Saavedra forfeited her public employment with the District, as well as any future right to public employment. (P-1). Saavedra successfully completed PTI, and the criminal complaint against her was dismissed on January 10, 2017. (P-2). Counsel for the District so advised me via letter dated April 14, 2017.

CONCLUSIONS OF LAW

I **CONCLUDE** that the tenure charges against Saavedra have been rendered moot by the forfeiture of her position via order of the Superior Court. This matter thus should be dismissed. An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For reasons of judicial economy and restraint it is appropriate to refrain from decision-making when an issue presented is hypothetical, judgment cannot grant effective relief, or the parties do not have a concrete

adversity of interest. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff'd, Comm'r (May 3, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>; S.J. v. Bd. of Educ. of Mountain Lakes, EDU 07081-03, Initial Decision (October 7, 2003), aff'd, Comm'r (Nov. 17, 2003), aff'd, St. Bd. (Feb. 3, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>. Saavedra has forfeited her public employment, rendering the issues raised by the pleadings academic.[1]

ORDER

Based on the foregoing, the tenure charges against Saavedra are **DISMISSED**.

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

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

[1] The order of the Superior Court was consistent with the spirit and intent of N.J.S.A. 2C:51-2, which provides for forfeiture of public employment upon conviction of a crime of the third degree or higher. Public misconduct is a crime of the second degree. N.J.S.A. 2C:30-2. While PTI is a diversionary program that allowed Saavedra to avoid conviction, clearly forfeiture of her employment with the District was the *quid pro quo* for admission into PTI. See e.g.: State v. Bender, 80 N.J. 84 (1979).

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

April 18, 2017

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: April 18, 2017

Date Mailed to Parties: APR 19 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Exhibits

For petitioner:

P-1 Order admitting defendant into PTI

P-2 PTI Order of Dismissal

For Respondent:

None

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
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Laura Sanders
Director & Chief ALJ

Robert J. Giordano, ALJ &
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Support Services
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BUREAU OF CONTROVERSIES & DISPUTES
DEPARTMENT OF EDUCATION
MS. KATHLEEN DUNCAN, DIRECTOR
100 RIVERVIEW PLAZA
P.O. BOX 500
TRENTON, N.J. 08625-0500
(609-292-5705)

Re: TRANSMITTAL OF FILES

We are hereby forwarding to you our complete file jacket(s) for the matter(s) listed via Lawyers Service.

Should a listed jacket not be included in this batch, please call or e-mail the undersigned.
EDU

13732-11 & 00782-12
IVONNE SAAVEDRA
(CONSOLIDATED)

April 19, 2017
DATE

S. WILSON (DR)
SANDRA A. WILSON, *OFFICE SUPERVISOR*
OFFICE OF ADMINISTRATIVE LAW

4/20/17
DATE

AGENCY RECEIPT

150-17

STEVEN BALDWIN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – who had been employed as Head Custodian in the respondent Board's school district since May 2004 – contended that his tenure rights were violated when he was reassigned to the position of Second Shift Custodian in January 2016, and his salary was reduced by the elimination of the additional salary/stipend he had previously received as Head Custodian. The Board denied that its action violated petitioner's tenure rights. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue, and the matter is ripe for summary decision; the Board's contention that petitioner is barred from seeking relief from the Commissioner because he failed to file a grievance regarding his reduction in salary is without merit, as is the Board's argument that the petition is time-barred; petitioner in this matter has tenure and the rights associated with that status, which include a right not to suffer a reduction in compensation unless guilty of the offenses statutorily defined in *N.J.S.A.* 18A:17-3; the "stipend" at issue here was not provided for services that were "extra-curricular" or "extra duty", but rather were part and parcel of petitioner's primary custodial duties; the "stipend" here was not distinguished from his base pay in the annual notices provided to petitioner of his salary for the next school year, and pension contributions were deducted based on his total compensation. The ALJ concluded that the contractual designation of a "stipend" does not override the actual treatment by the Board of the amount of money so designated in the contract. Accordingly, the petitioner's motion for summary decision was granted and the Board's cross-motion was denied. The ALJ ordered the Board to restore petitioner's salary to what he was receiving before his reassignment, with the stipulation that he shall receive that difference only until such time as the salary designated for custodians surpasses the current level designated for Head Custodians, including the so-called "stipend".

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

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

June 5, 2017

150-17

OAL DKT. NO. EDU 8132-16
AGENCY DKT. NO. 109-4/16

STEVEN BALDWIN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Administrative Law Judge's recommended decision for the reasons expressed therein. Accordingly, petitioner's motion for summary decision is granted and respondent's cross-motion for summary decision is denied, consistent with the terms set forth in the Initial Decision.[1]

IT IS SO ORDERED.[2]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/05/17
Date of Mailing: 6/06/17

[1] The Board shall restore to petitioner the salary he has not received since his reassignment from Head Custodian to Second Shift Custodian, *i.e.*, the difference between the Head Custodian salary – including the "stipend" – and the custodian salary. Furthermore, petitioner shall only receive the difference in salary until such time as the salary designated for custodian surpasses the current salary for Head Custodian (inclusive of the "stipend").

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8132-16
AGENCY DKT. NO. 109-4/16

STEVEN BALDWIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,
Respondent.

George T. Syrek, Esq., for petitioner (Bucceri & Pincus, attorneys)

Michael I. Goldman, Esq., for respondent (Florio, Perrucci, Steinhardt & Fader, attorneys)

Record Closed: February 23, 2017 Decided: April 19, 2017

BEFORE **JEFF S. MASIN,** ALJ t/a:

Steven Baldwin filed a Verified Petition on April 11, 2016, with the Commissioner of Education in which he complained that the Board of Education of West New York reduced his salary, in violation of his tenure rights, as guaranteed by N.J.S.A. 18A:17-3. According to the Petition, Baldwin was employed by the Board of Education as a Head Custodian, commencing on May 1, 2004. On January 14, 2016, he was notified that he would be reassigned to the position of Second Shift Custodian, a position he began working on January 15, 2016. According to his Petition, as a Head Custodian Mr. Baldwin received additional salary/stipend above that he would receive as a custodian. When he was reassigned to the position of Second Shift Custodian his salary was

reduced by the elimination of the additional salary/stipend. It is this reduction from which he seeks relief.

The Board of Education denied that its action violated Mr. Baldwin's tenure rights. The Commissioner transferred the contested case to the Office of Administrative Law on June 2, 2016. On December 5, 2016, petitioner Baldwin filed a motion for summary decision. The Board filed its own motion for summary decision on that date as well. The case was assigned to an administrative law judge, however, due to the judge's extensive calendar the matter was reassigned to this judge, sitting on recall, on March 15, 2017, for the purpose of resolving the cross-motions for summary decision. The parties each responded to the cross-motions and then filed replies. In addition, the parties filed a Stipulation of Facts and a Supplemental Stipulation of Facts. This Supplemental Stipulation was received on February 23, 2017, at which time the record closed for the purposes of determination of the motion.

The lengthy Stipulation of Facts, consisting of twenty-one numbered items with attached exhibits, and the Supplemental Stipulation of Facts, consisting of four additional numbered items and exhibits, are incorporated in this decision as exhibits. Additionally, **each of the numbered stipulations is adopted herein as FINDINGS OF FACT** as if recited in full.

According to the stipulated facts, Mr. Baldwin was employed by the Board beginning May 1, 2004 through June 30, 2004, as a Head Custodian. Thereafter, he was employed by the Board in each of the school years from 2004-2005 through 2015-2016. In each of the years he was again employed as a Head Custodian. The parties agree that Mr. Baldwin held tenure with the Board. Additionally, they agree that according to the contractual agreement between the Board and the West New York Education Association, "Individuals assigned to the position of Head Custodian received a stipend in addition to their annual salary." Exhibit J-20, which is a copy of the Agreement for the period July 1, 2012 through June 30, 2015, contains a provision that provides for a "Head Custodian stipend," which is designated at different levels for "High School" and "Elementary." The Stipulation also identifies a series of letters sent by the Board to Mr. Baldwin during various years which simply advise him that his salary for

the year identified in the letter is a specific dollar figure. As an example, the letter sent to Baldwin on April 30, 2014, reads as follows: "Dear Stephen Baldwin: This is to inform you that your salary for the 2014-2015 school year is $41,132."

The parties agree that for the 2015-16 school year Baldwin's base salary was $35,042, plus $1,350, an additional amount designated in the Agreement as a "Black Seal" "stipend" because he has a boiler license. In addition, the Head Custodian "stipend" applicable for him was $4,740.

On January 14, 2016, Baldwin was advised of his reassignment from Head Custodian to Second Shift Custodian at PS#4. His salary was then reduced by the "Head Custodian stipend" in the amount of $4,740 (pro rata). Mr. Baldwin continues to be employed as a custodian by the Board for the 2016-2017 school year, with a base salary of $35,042, plus the boiler license "stipend." The applicable head custodian "stipend" for 2016-2017 is $4,740.[1] The Supplemental Stipulation of Facts provides that

1. The contractual stipend paid to Head Custodians employed by the respondent is included and paid as part of their regular salary check. There is no separate check for the Head Custodian contractual stipend.

2. Standard deductions and withholdings such as taxes and pension contributions, are based on the full amount of the salary checks paid to Head Custodians. The full amount includes base salary plus Head Custodian contractual stipend.

It is also noted that the petitioner did not receive a salary notice for the 2015-2016 school year.

In response to the petitioner's motion for summary decision, the Board initially argues that Mr. Baldwin failed to utilize the administrative remedies provided under the collective bargaining agreement between the Board and the Education Association. Specifically, the Board points to Article IV, subsection C, which reads as follows

[1]The Board's notice to Baldwin of January 11, 2017, states that his salary "effective June 1, 2016 to March 30, 2017 will be "Step 16—$38,863.00." This amount does not reflect a salary that includes the "so-called "Head Custodian stipend."

> No employee shall be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional opportunity without just cause. Any such action asserted by the board, or agent or representative thereof, shall be subject to the grievance procedure set forth in Article 3.

As Mr. Baldwin never filed any grievance concerning the reduction in salary, he is barred from seeking relief from the Commissioner. In addition, the Board contends that the claimant is time-barred, because Article 3 of the Agreement provides that such a grievance must be filed within thirty school days from the event or condition, or from the time that the person knew or should have known about same. As no petition has ever been filed, Mr. Baldwin has waived his right to seek relief relating to the alleged claim.

In addition to these grounds, the Board contends that if the Commissioner asserts jurisdiction to decide this matter despite the failure of the petitioner to utilize the grievance procedure, the matter must be dismissed and the Board granted summary decision. This result is dictated because the Head Custodian stipend is not salary and therefore is not subject to the restriction on the reduction of salary contained in N.J.S.A. 18A:17-3.

In responding to the Board's motion, Mr. Baldwin contends that, since tenure rights are statutory, an allegation of a violation of tenure rights falls within the statutory jurisdiction of the Commissioner of Education. The grievance procedure contained in the collective bargaining agreement is inapplicable to the dispute. As the Verified Petition was filed with Commissioner within the required ninety days following the Board's action, it was timely filed. Finally, Baldwin asserts that the Board paid him a single salary, one which contained the Head Custodian "stipend" and from which deductions, including pension deductions, were made. Under applicable case law, the petitioner's right to receive that full salary without reduction unless such be based upon statutorily defined grounds is protected by the tenure statute.

N.J.S.A. 18A:6-9 provides that the Commissioner has jurisdiction over disputes regarding "Controversies and disputes arising under the school laws." It has been held in a number of cases that the Commissioner does not have jurisdiction over contractual

disputes. Board of Education, East Brunswick Township v. Township Council in East Brunswick, 48 N.J. 94, 102 (1966). Decisions involving disputes concerning non-tenured employees which arise under provisions of contracts and which do not involve "statutory educational entitlement" have been held to be outside the Commissioner's jurisdiction. However in the present matter, while the contractual provision cited by the Board states that an employee asserting that he has been reduced in compensation shall present a grievance, the employee here has tenure and the rights associated with that status are protected by a statute which clearly involves an "educational entitlement." Indeed, N.J.S.A. 18A:17-3 provides that "every public school janitor . . . hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended reduce compensation . . . or except for neglect, misbehavior or other offense. . . ." Mr. Baldwin's position with the Board, whether characterized as "Head Custodian" or merely as "custodian," most assuredly falls within the definition of "janitor." Thus, his right not to suffer a reduction in compensation unless guilty of the statutorily described offenses is protected by statute. The Commissioner most assuredly has jurisdiction over matters arising under the Tenure Act. While the Legislature has determined to provide for arbitration as the means for resolving at least one aspect of the protections accorded by the tenure, that is, the removal of tenure, at present, matters involving the protections associated with the holding of tenure, such as the right to certain positions or the right to be protected against the reduction of salary, have not been the subject of legislative action reassigning the jurisdiction to resolve such disputes. No authority has been cited by the Board suggesting the ability of parties to a negotiated contract between the Board of Education and an Education Association to oust the Commissioner from jurisdiction over a "dispute arising under the school laws." The rights accorded by the Tenure Act, and the protections thereunder, involve matters of educational expertise which absent some other legislative directions, are within the special expertise of the Commissioner. The Tenure Act defines the specific grounds which allow for reduction of compensation for a tenured employee such as a janitor. The collective bargaining agreement uses different language to describe the grounds upon which such action may be taken. While the contractual "just cause" may well encompass the statutory terminology of "during good behavior . . . neglect, misbehavior or other offense," it is entirely conceivable that the contractual term could incorporate conduct and actions falling outside the

appropriate definition of the statutory terms. Therefore, it appears that it is for the Commissioner and not an arbitrator to determine whether a tenured janitor may suffer a reduction in compensation that is otherwise protected by tenure rights. Therefore, the Board's application to dismiss the matter for failure to utilize the grievance procedure is **DENIED**. [2] Further, I **FIND** that the Petition was filed with the Commissioner in a timely manner.

Petitioner moves for summary decision based upon his tenured status as a custodian and his contention that the elimination of the money he was paid while serving as a Head Custodian is money protected from reduction due to that tenured status. All those holding the position of "janitor," regardless of how the position is styled, come within the statutory protection. In Barnes, et al. v. Bd. of Ed., City of Jersey City, 85 N.J. Super. 42, 45-46 (App. Div. 1964), certif. den. 43 N.J. 450 (1964), the court noted

> It is appellant's contention that the statutory coverage does not extend to the entire janitorial and custodial staff but is limited to the positions specified. Thus, appellant argues that an assistant janitorial supervisor is not covered, nor utility men, nor a groundskeeper.

The court rejected this approach

> Our consideration of the statutes in the light of the principle of liberal construction satisfies us that the Legislature used the terms janitor, custodian, etc., in a generic sense with the intent to include all janitorial and custodial employees.

Thus, petitioner does not argue that he had tenure in a position of Head Custodian, but that as a custodian his tenure right protected him from having his compensation reduced without cause as defined by the statute. The Board's contention, however, is that the additional money petitioner earned while acting as a Head Custodian is not part of that compensation protected by the petitioner's tenured status as a janitor.

[2] Of course, no arbitration of this dispute has occurred, so there is no concern that resort to the Commissioner is providing the petitioner with a second chance to avoid the reduction. No issue of collateral estoppel, or any concern about conflicting decisions, affects this case.

In Reinertsen v. Bd. of Ed., Tp. of East Brunswick, www/libweb/collections/oal/final/edu06574-07.pdf, the administrative law judge discussed a similar contention that money paid to Reinertsen as a head custodian was a stipend, and not protected by his tenured status.

> the petitioner has stated that this stipend was actually part of his base salary and was subject to pension payments. (Petitioner's letter brief in opposition to Respondent's Motion, Feb. 12, 1998). If this is shown to be correct, then the additional money is properly included as part of petitioner's compensation, and in order to be reduced the Board of Education must comply with the requirements of N.J.S.A. 18A:17-3 (reduction in compensation allowed only as the result of a reduction in force, or for misbehavior, neglect or other offense) and N.J.S.A. 18A:6-9 et seq. (hearing with the appropriate due process). The Board did not so comply.
>
> The Board of Education's argument that the additional money was merely a stipend must fail. A stipend is more closely associated with compensation to employees providing additional services than those normally included within their regular employment duties. For example, a teacher who doubles as a coach of a school's sports team or as a yearbook editor/supervisor is often paid by way of stipend. In these circumstances, the money is not considered part of the teacher's salary and is not subject to pension payments. . . . the petitioner in the present case was provided additional compensation for services directly related to his primary employment as a custodian. . . . the petitioner claims that the extra compensation was subject to pension payments. Pursuant to the Teachers' Pension and Annuity Fund Law, N.J.S.A. 18A:66-1 et seq., pension payments are deducted from only "salary" of all employees who are members of the fund. See N.J.S.A. 18A:66-107(a). Since it is found that the "stipend" was subject to pension payments, the money should be properly regarded as salary. Any reduction of this salary cannot be imposed by the Board of Education upon the petitioner except for neglect, misbehavior or other offense, or reduction in force, and only then after a hearing. N.J.S.A. 18A:17-3.

The Commissioner affirmed the judge's decision. Here too, according to the stipulated facts, standard deductions, including pension contributions, were made based upon the "full amount of the salary check paid to Head Custodians. The full amount includes base salary plus Head Custodian contractual stipend." And the Board made no distinction in its annual letters to Baldwin announcing his compensation for the coming year between the base salary and the stipend.

The Board attempts to distinguish Reinertsen because there is no mention in that decision of any collective bargaining agreement which, as here, sets out a stipend for the Head Custodian position.[3] However, as Judge Reback noted in Reinertsen, and as here, this "stipend" is not paid for activities that are unrelated to or outside of Baldwin's "primary employment as a custodian" and pension deductions were taken from the entire compensation, not only from the "base salary." The letters noticing Baldwin as to the compensation refer only to "salary" and do not separate out from that term, the so-called "stipend." While it is unclear whether there was actually a contract in Reinertsen that established the "stipend," the existence of the agreement here does not support a different outcome from that in Reinertsen.

The Board relies on two cases. Schipman and Zeitz v. Piscataway Twp. Bd. of Ed., 1989 S.L.D. 2010 (May 25, 1989) is not helpful, for the claim there was of tenure in a janitorial supervisor position, but here petitioner does not assert that he has tenure as a "Head Custodian," but only as a custodian. He claims that the salary he received is protected from reduction without resort to the provisions of the statute due to his "custodian" tenure, not through some claim based upon his being able to maintain himself through tenure as a Head Custodian. Dignan v. Bd. of Ed., Rumson-Fair Haven Regional School Dist., 1971 S.L.D. 336, aff'd. 1974 S.L.D. 1376 (State Board of Education); aff'd. 1975 S.L.D. 1083 (App. Div.) involved a claim regarding an extra-curricular assignment as a faculty advisor. The decision determined that there was no tenure protection for such extra duty assignments. Again, here, Baldwin's work as a Head Custodian was not "extra-curricular," was not "extra duty," but was a part of his "primary employment as a custodian." Neither of these cases affects the weight to be given here to the Reinertsen decision.

Based upon the stipulated facts, I **FIND** that Mr. Baldwin was for many years assigned as a Head Custodian and was paid a salary that included as a part thereof, what the agreement between the Board and the Education Association referred to as a stipend for the Head Custodian position. The Board provided notice yearly to Baldwin

[3]The initial decision refers to a "pay schedule."

of the "salary" to be paid to him for the next school year, without distinguishing between portions of that "salary" such as "base pay" and "stipend." The Board deducted pension contributions from this "salary," again without carving out from that from which said contributions were taken any amount designated as "stipend" or otherwise. The Board determined in January 2016, that Baldwin would be reassigned to a position as Second Shift Custodian PS#4. When he was reassigned, his "salary" was reduced by an amount equal to the "Head Custodian Stipend," pro-rated from $4,740. The Board did so without resorting to the grounds or the process provided in N.J.S.A. 18A:17-3 for reduction in compensation of a tenured "janitor." ("neglect, misbehavior or other offense").

I **CONCLUDE** that the Board's action cannot stand. The contractual designation of a "stipend" does not override the actual treatment by the Board of the amount of money so designated in the contract. Clearly, the case law, Reinertsen, supra, existing at the time that Baldwin was employed by the Board as a Head Custodian, May 1, 2004, and thereafter, taught that a stipend was something other than what Baldwin was given and was intended for services unlike those he provided, services that were neither "extra-curricular" nor "extra duty," but were instead part and parcel of his "primary" custodial duties.

Conclusion and Order

I **CONCLUDE** that the petitioner's motion for summary decision is **GRANTED** and the respondent's cross-motion for summary decision is **DENIED**. **IT IS HEREBY ORDERED** that the Board shall restore to Mr. Baldwin such salary as he has not received since his reassignment, the difference between the custodian salary and the Head Custodian salary, including the so-called "stipend." However, I agree with the Board that Baldwin is not entitled to receive the difference between the salary designated for a custodian and that for a Head Custodian indefinitely. He shall receive that difference until such time as the salary designated for custodians surpasses the current level designated for Head Custodians, including the so-called "stipend." See Potocki v. Bd. of Ed. of the Princeton Reg' Sch. Dist., http//www/libweb/collections/oal/final/edu06574-07.pdf.

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

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

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

April 19, 2017
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency: 4/19/17

Date Mailed to Parties: 4/19/17

mph

EXHIBITS

Joint Exhibits

J-A Stipulation of Facts, with attached J-1 through J-22

J-B Supplemental Stipulation of Facts, with attached J-23

J-C Agreement between West New York Board of Education and West New York Education Association, July 1, 2012 through June 30, 2015

For petitioner

None

For Respondent

R-1 Certification of Allan C. Roth, Esq.

R-2 Certification of Michael I. Goldman, Esq.

151-17

A.P., ON BEHALF OF MINOR CHILD, M.S.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In October 2016, *pro se* petitioner appealed the determination of the respondent Board that her daughter, M.S., is not entitled to a free public education in Neptune schools for the 2016-2017 school year. Petitioner contended that she resides in Neptune, but was staying temporarily at one of her rental properties in Asbury Park when the school district conducted a residency investigation. The Board argued that A.P. does not meet the residency requirements to be considered legally domiciled in Neptune Township, and that M.S. should be enrolled in Asbury Park schools. The Board filed a motion to dismiss in lieu of an answer to the petition.

The ALJ found that: petitioner failed to appear for a scheduled pre-hearing telephone conference on February 21, 2017, despite receiving appropriate notice of same; the matter subsequently proceeded, *ex-parte,* on the merits through certifications; petitioner failed to demonstrate that she is a resident of Neptune; M.S. still attends Neptune schools; petitioner has not requested a hearing before the Board; as of April 11, 2017, petitioner had attended school for 119 days during the current academic year; and the Board's certification indicates that the reimbursable tuition rate is $70 per day. The ALJ concluded that petitioner is not legally domiciled in Neptune, and M.S. is ineligible to receive a free public education in Neptune schools. Accordingly, the ALJ granted the respondent's motion to dismiss and ordered the petitioner to reimburse the Board in the total amount of $8,330 for tuition owed through April 11, 2017, and $70 per school day attended thereafter.

Upon review, the Commissioner rejected the Initial Decision, and directed the Board to provide petitioner with a board hearing. In so deciding, the Commissioner found that the Board failed to comply with *N.J.A.C.* 6A:22-4.3 when it issued a final notice of ineligibility, removing M.S. from the District without a hearing, rather than the required preliminary notice of ineligibility that must "provide for a hearing before the district board of education prior to a final decision on removal." The Commissioner accordingly dismissed the petition as premature.

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

June 5, 2017

151-17

OAL DKT. NO. EDU 00544-17
AGENCY DKT. NO. 279-10/16

A.P., ON BEHALF OF MINOR CHILD, M.S., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

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

Petitioner is challenging the Board's determination that she is not a resident of Neptune, and therefore her daughter is ineligible to attend Neptune Township schools. Petitioner received a final notice of ineligibility from the Board on October 7, 2016, disenrolling M.S. from the District and advising petitioner that she had 21 days to appeal the determination with the Commissioner in order for her daughter to remain enrolled during the pendency of the appeal. Petitioner timely filed the instant residency petition.[2]

N.J.A.C. 6A:22-4.3 explains the procedure for removing a currently enrolled student from a district. Specifically, *N.J.A.C.* 6A:22-4.3(b)(1) requires the chief school administrator to issue a preliminary notice of ineligibility that must "provide for a hearing before the district board of education prior to a final decision on removal."

[1] Petitioner's exceptions were filed out of time, and there is no indication that petitioner served the Board or copied the Administrative Law Judge (ALJ), as required by *N.J.A.C.* 1:1-18. Accordingly, petitioner's exceptions were not considered by the Commissioner.

[2] The Commissioner notes that although the ALJ made a determination of tuition owed by the petitioner – which was based on a supplemental certification submitted by the respondent Board during ex-parte proceedings – the Board has never filed a counterclaim for tuition.

In this matter, the Board did not send a preliminary notice of ineligibility providing petitioner with the right to a board hearing. Instead, the Board provided only a final notice of ineligibility, removing M.S. from the District without a hearing.[3] As the Board failed to provide petitioner with the right to a board hearing, petitioner is still entitled to an opportunity to present evidence to the Board regarding her domicile and her daughter's eligibility to attend school in the District.[4]

Accordingly, the Initial Decision of the ALJ is rejected. The Board is directed to provide petitioner with a board hearing, and the petition is hereby dismissed as premature.

IT IS SO ORDERED.[5]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/05/17

Date of Mailing: 6/06/17

[3] The final notice of ineligibility is dated October 7, 2017, the same date that the Superintendent certified that the Board first became aware that petitioner and M.S. were not residing within the District. As such, it is apparent that the final notice of ineligibility is the first communication that the Board sent to petitioner regarding this matter.

[4] The Commissioner reminds petitioner that at the board hearing, it is her burden to prove that she is a domiciliary of Neptune.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
FAILURE TO APPEAR
AND ON THE MERITS
OAL DKT. NO. EDU 00544-17
AGENCY DKT. NO. 279-10/16

A.P. ON BEHALF OF M.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE,
Respondent.

No appearance by or behalf of **A.P.,** petitioner

Joseph D. Castellucci, Jr., Esq. for respondent (Florio Perrucci Steinhardt & Fader, LLC, attorneys)

Record Closed: April 18, 2017 Decided: April 19, 2017

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

On January 13, 2017, this matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On January 31, 2017, the OAL mailed notice of the pre-hearing telephone conference in this matter for February 21, 2017. The OAL dispatched the notice to petitioner's address in Neptune, the address petitioner maintains is her residence for

purposes of this residency appeal. The petitioner failed to contact the OAL to provide a telephone number to contact her on the day of the prehearing telephone conference, and did not call or appear on said date. The Administrative Law Judge (ALJ) noted the failure to appear on February 21, 2017. The petitioner did not request any adjournment. The OAL obtained petitioner's telephone number from the respondent and contacted her on February 21, 2017, leaving a voice mail to contact this office. Petitioner made no contact as of February 23, 2017. On February 23, 2017, the ALJ wrote to petitioner at the Neptune, as well as at an Asbury Park address, paperwork of the investigation revealed as a potential residence. The correspondence advised of the failure of petitioner to contact the OAL with a means to communicate with her; and the fact that petitioner filed no response to respondent's motion to dismiss in lieu of answer. The ALJ advised petitioner in the correspondence that if petitioner provided no response by March 3, 2017, respondent's motion would be granted. The ALJ also requested, despite the fact, that the motion called for dismissal on the failure to exhaust administrative remedies, for the respondent to provide a certification as to the amount the respondent sought in recoverable education costs. The petitioner did contact the OAL on March 10, 2017, advising she did not receive the February 23, 2017, letter at either address. Petitioner then advised she did not oppose the motion. The ALJ noted the failure to appear. Pursuant to N.J.A.C. 1.1-14.4(d), the matter proceed on the merits ex-parte. Additional certifications regarding the number of days and cost per day for student educational reimbursement. The hearing closed on April 18, 2017.

FACTUAL DISCUSSION AND FINDINGS

I have reviewed the April 11, 2017, certification of Dr. Tami Crader, Superintendent of Schools and I **FIND**:

1. Petitioner failed to appear for the telephone pre-hearing conference and has represented to the OAL that she does not oppose the position of the respondent. Petitioner has failed to demonstrate that she is a resident of Neptune.

2. Petitioner's child still attends Neptune Township School district as she has not requested a hearing before the board, and accordingly, the board has taken no action. As of April 11, 2017, petitioner has attended 119 days this school year.

3. Respondent's reimbursable tuition is $70 per day, as of April 11, 2017, the total reimbursable tuition is $8,330, accruing at the rate of $70 per school date thereafter.

CONCLUSION

Accordingly, it is on this 19th day of April 2017, **ORDERED** that the Motion to Dismiss the petition in lieu of answer is **GRANTED,** on default for failure to respond to the motion.

On April 18, 2017 respondent submitted a supplemental certification of the tuition reimbursement amount. It is on this 19th day of April 2017, **ORDERED** the respondent is entitled to be reimbursed from petitioner the amount of $8,330.00 for tuition at the rate of $ 70.00 per diem for a current total of 119 days as of April 11, 2017; and continuing at the rate of $70.00 per day until petitioner removes her child from the school. This Initial Decision resolves all issues in this matter.

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

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

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

April 19, 2017
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 4/19/17

Date Mailed to Parties: 4/20/17

/lam

APPENDIX

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

None

LIST OF EXHIBITS

For Respondent:

Motion to Dismiss and supporting papers

R-1 Supplemental tuition certification

152-17

M.K. and M.K., on behalf of minor child, M.K., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

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

RESPONDENT. :

SYNOPSIS

Petitioners appealed the determination of the respondent Board that their son, M.K., was ineligible for a free public education in respondent's school district. Petitioners contended that they reside at an address within the Bridgewater-Raritan Regional school district. However, petitioners also asserted that M.K. – the mother of the minor child – frequently stays overnight at the home of her mother, the grandmother of the minor child, in South Bound Brook because the grandmother has chronic health conditions and requires assistance. The Board contended that a residency investigation revealed that petitioner M.K. and her son actually reside in South Bound Brook, which is outside of the respondent's school district. The Board filed a counterclaim seeking tuition for the period of M.K.'s ineligible attendance in the district.

The ALJ found, *inter alia*, that: the testimony of the respondent Board's residency investigator was credible and persuasive, while the testimony of the petitioners and their witnesses was inconsistent and lacked credibility; the Board completed a residency investigation in this matter during the 2015-2016 school year, the results of which indicated that although the petitioners claim to reside in Bridgewater, M.K. – the mother of minor child, M.K. – resides in South Bound Brook in order to care for her ailing mother; M.K. – the father of minor child, M.K. – had substance abuse issues, and was not able to care for his child during the period in question; and the minor child therefore was domiciled in South Bound Brook, with his mother, during the 2015-2016 school year. Accordingly, the ALJ concluded that M.K. was not entitled to a free public education under *N.J.S.A.* 18A:38-1, and that the Board is therefore entitled to be reimbursed for tuition by the petitioner in the amount of $38,329.20 for the period of M.K.'s ineligible attendance.

The Commissioner adopted the Initial Decision as the final decision in this matter, for the reasons expressed therein. The petitioner was ordered to pay tuition in the amount of $38,329.20 for M.K.'s ineligible enrollment in the District for the 2015-2016 school year.

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

Issued 6/05/17

OAL DKT. NO. EDU 172-16
AGENCY DKT. NO. 363-12/15

M.K. and M.K., on behalf of minor child, M.K., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

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

RESPONDENT. :

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

Upon such review, the Commissioner adopts the Initial Decision as the final decision for the reasons set forth therein. Accordingly, the petitioner shall pay the Board $38,329.20 in tuition costs for M.K.'s ineligible enrollment in the District for the 2015-2016 school year.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/05/17
Date of Mailing: 6/06/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00172-16
AGENCY DKT. NO. 363-12/15

M.K. AND M.K. ON BEHALF OF
MINOR CHILD, M.K.,
Petitioners,
v.
BOARD OF EDUCATION OF THE
BRIDGEWATER-RARITAN REGIONAL
SCHOOL DISTRICT, SOMERSET COUNTY,
Respondent.

Pasquale Marago, Esq., for petitioner (Law Offices of Pasquale Marago, attorneys)

Stephen M. Bacigalupo II, Esq., for respondent (Schwartz, Simon, Edelstein & Celso, L.L.C., attorneys)

Record Closed: March 8, 2017 Decided: April 20, 2017

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

Petitioners M.K. and M.K., are the mother and father of the minor child, M.K., who are challenging the determination made by the Board of Education (Board) of the Bridgewater-Raritan Regional School District (District) that he did not reside in the District. The District filed a counterclaim seeking payment of tuition for the number of days that the minor child, M.K., attended school in the District.

PROCEDURAL HISTORY

On October 16, 2015, the District notified the petitioners that their son, M.K., was ineligible to attend the schools of the District due to non-residency. A hearing was held on November 2, 2015, and the committee recommended that the minor child, M.K., be removed from enrollment in the District. Petitioners appealed the decision. On December 23, 2015, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Throughout 2016, the parties made several attempts to exchange discovery. The difficulties in exchanging discovery required multiple conference calls with the court in an effort to resolve the conflicts. A hearing was held on January 4, 2017, but the record remained open for the parties to submit written closing summations. The record closed on March 8, 2017.

FACTUAL DISCUSSION

M.K. and M.K. are the parents of minor child, M.K. M.K. and M.K. married in 2005 and resided in his parents' basement in Bridgewater, Somerset County. D.K. is the maternal grandmother of the minor child, M.K., and resides in South Bound Brook, which is outside the District. For the 2015-2016 school year, M.K. was enrolled in second grade in the District. The Board completed a residency investigation and conducted a residency hearing on November 2, 2015. Respondent filed its notice of final determination of ineligibility on November 16, 2015, determining that M.K. does not reside in the District. As a consequence, the parents of minor child ,M.K., appealed the determination. The tuition

rate of reimbursement as filed with the State for the 2015-2016 school year was $212.94 per day.

The preceding statements are not in dispute as they are from the records and testimony of the parties and are hereby **FOUND** as **FACT**.

TESTIMONY

For petitioner

M.K. is the mother of the minor child, M.K., who is an eight-year-old second grader at Milltown Primary School. She testified that she and her husband have lived on P. Street in Bridgewater, New Jersey since they started dating in 1995. The home is owned by her In-laws. In 2005, they were married and M.K. was born in 2008. They live in the basement which consists of one room, with a kitchen and bathroom. The basement was built and refinished in 2005.

The residence at South Bound Brook is owned by her mother. She testified that she stays at the South Bound Brook address to care for her mother because she has pulmonary edema. She alleges that in the middle of the night, at 3:00 a.m. or 4:00 a.m., the minor child, M.K., wakes up screaming, wanting his mother. She claims that it is a result of separation anxiety. As a result, M.K. is required to go to the Bridgewater address, pick him up and drive to the South Bound Brook address where they would leave to go to school. This happens four to five times a week. The child begins each night with dad and the in-laws in Bridgewater, and then after transport, spends only approximately two hours in South Bound Brook.

On cross-examination, she acknowledged that the answer to interrogatory number twenty-seven, indicates that the separation anxiety happens ten times in two months, not the four-five times per week as she testified. Also, a handwritten correspondence from her, dated October 5, 2015, never mentions the child being transported back-and-forth between residences. (R-5). Additionally, there is a storage

rental agreement, dated March 23, 2016, that has mother's address in South Bound Brook not Bridgewater. Finally, her Jeep SUV and a Black Mazda SUV are registered at the South Bound Brook address.

M.K. is the father of the minor child, M.K., and the husband of M.K. He testified that he has lived on P. Street in Bridgewater for forty-three years (his entire life.) He lives in the basement with his wife and child. His uncle finished the entire basement in 2005, so that the family would have a place to live.

He noted that he did not live in the house from June 17, 2015, through December 8, 2015, because of addiction and that he was involved in a court-ordered rehab. Before June 17, 2015, he had addiction "issues" and would not necessarily be home. However, he or his wife brought minor child, M.K., to school. On some occasions, his son would "freak out" at approximately 3:00 a.m. through 6:00 a.m. and his wife would be required to pick him up and transport him to the South Bound Brook address.

On cross-examination he was ordered by Drug Court to attend Integrity House, which is an aftercare drug treatment facility. He explained that he was not home before June 17, 2015, because of the drug addiction. He "was not there mentally or physically."

D.K. is the grandmother of the minor child, M.K. She has lived at the same address in Bridgewater for forty-five years with her husband. She explained that her son and daughter-in-law have lived in the basement since 1996. Sometimes the minor child, M.K., would leave to go to the South Bound Brook address in the middle of the night because he has anxiety for his mother. He would wake-up screaming "I need mommy."

On cross-examination, she testified that the minor child was never at the South Bound Brook residence and the anxiety incidents would occur fourteen to fifteen times a month.

J.K., Jr. is the grandfather of the minor child, M.K., and the husband of D.K. They reside in Bridgewater with their son, daughter-in-law and grandson. He explained that the minor child, M.K., is picked up from school in the afternoon by him, five days a week. Then he does homework and eats dinner and goes to bed in Bridgewater. "His mother would come to get him if there was a problem," but M.K. never goes to school from the South Bound Brook address.

For respondent

Walter Kalicki (Kalicki) has been with the District for eighteen years as the Attendance Officer. In September 2015, he received an anonymous email regarding the minor child, M.K., and his mother living in South Bound Brook. (R-1). As a result, he started a residency investigation on them for the South Bound Brook address. (R-2).

The investigation consisted of sixty occasions of surveillance. On thirty-five occasions, the mother and minor child were observed at the South Bound Brook address. On each of those occasions, the child was taken directly to the school in Bridgewater. Twelve occasions were during the summer (no school), seven occasions the child was absent from school and on three occasions he was late to school. On two occasions he was able to view a dismissal. On May 9, 2016 and May 10, 2016, the minor child, M.K., was picked-up by his mother and was observed being dropped off at South Bound Brook address. Two family vehicles, a Jeep SUV and a Black Mazda SUV are registered at the South Bound Brook address, not Bridgewater. It is his opinion that the student, M.K., was not domiciled in Bridgewater but at the residence in South Bound Brook.

He recalled an incident when he spoke to the mother of the minor child, M.K., on the phone and she said that she lived in Bridgewater with the family but then received the letter (R-5) which was contrary to her story. He also recalled another incident with the mother of the minor child, M.K., where he was seen during surveillance. He stated that the mother speedily changed lanes and got behind his vehicle and tailgated him for

a distance then honked and waved at him. She then proceeded to the Milltown School and dropped him off. It was obvious to him that she recognized him.

Finally, he indicated that the minor child, M.K., attended the entire school year (180 days) and the tuition rate for the 2015-2016 school year was $212.94 per day.

On cross-examination, he conceded that residency is the domicile where the child puts his head down at night. In this case, he does not know where the child puts his head down at night. It is possible that the child slept at Bridgewater because his surveillance started at 7:00 a.m., so he does not know what happened before 7:00 a.m. Also, it was explained that vehicles are registered to M.K.'s mother and leased, so insurance required that the vehicles be registered at the South Bound Brook address.

FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J.Super. 1 (App. Div.1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone

Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

After hearing the testimony and reviewing the evidence, I make the following findings of fact:

For the 2015-2016 school year, the minor child, M.K., was enrolled in second grade in the District. After receiving an anonymous complaint, the Board completed a residency investigation and conducted a residency hearing on November 2, 2015. The results of which were that the parents of the minor child, M.K., claimed to reside in Bridgewater, Somerset County. M.K., the mother of the minor child, M.K., resides in South Bound Brook which is outside the District. She resides at that location so that she may take care of her ailing mother. The father of the minor child had substance abuse issues and "was not there mentally or physically." As a result, the minor child, M.K., resided with his mother in the South Bound Brook residence because he had separation anxiety and the residence in South Bound Brook provided a more stable environment for the child. The tuition rate of reimbursement as filed with the State for the 2015-2016 school year was $212.94 per day.

The testimony of respondent's witness was especially credible and persuasive. He did not embellish his investigative findings and in fact, conceded the point that it was possible that the child slept at Bridgewater because his surveillance started at 7:00 a.m., so he does not know what happened before 7:00 a.m.

Conversely, the petitioners' witnesses' testimony was not credible in the manner in which it was given. Their own testimony assisted the respondent in proving the facts of the case by a preponderance of the evidence. The witnesses failed to give a concise number of days in which the minor child would experience episodes of "separation anxiety". In fact they all testified to a different frequency and the inconsistency made the testimony by each, suspect.

A logical assembly of piecemeal facts, as testified to by the petitioners,

was that due to the father, M.K.'s substance abuse, the mother would keep the minor child with her at the South Bound Brook residence. The undersigned believes that the petitioners brought together the respondent's case quite well in establishing the real facts.

It was obvious that the petitioners attempted to "sell" their version of the facts to the undersigned. On several occasions, the individuals that had already testified were cautioned by the court to not "coach" a witness that was testifying on the witness stand. This detracted from any modicum of credibility.

Therefore, I **FIND** that the minor child, M.K., was domiciled outside the District in South Bound Brook. Accordingly, I **FIND** that M.K. became ineligible to attend school in the District for the 2015-2016 school year. I **FURTHER FIND**, by a preponderance of the credible evidence, that respondent filed a counterclaim seeking tuition for the days M.K. attended the District ineligible for the 2015-2016 school year. As such, the District must establish the cost of tuition and the number of days M.K. attended the District's schools when he was ineligible to do so. Testimony was uncontroverted and therefore, I **FIND** that the per-pupil cost for a student to attend school in the district for the 2015-2016 school year was $212.94 per day equaling $38,329.20 per annum.

CONCLUSIONS OF LAW

At issue is whether minor child, M.K., was entitled to a free education under N.J.S.A. 18A:38-1, which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom. Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education).

A person who meets age requirements and is domiciled within a school district may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). A person may have

many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). A child's domicile is normally that of his or her parents. Ibid. The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999).

The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

The record reflects that the minor child, M.K., attended school within the district for the 2015-2016 school year while domiciled outside of the District. Accordingly, I **CONCLUDE** that the minor child, M.K., was not entitled to a free public education in the district. N.J.S.A. 18A:38-1(b)(1) provides that when the evidence does not support the claim of the resident, the resident shall be assessed tuition "for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per-pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced." The uncontested record reflects that the actual cost of M.K.'s attendance in-district was $212.94 per day equaling $38,329.20 per annum. Accordingly, I **CONCLUDE** that the District is entitled to be reimbursed for tuition by the petitioner in the amount of $38,329.20. I further **CONCLUDE** that petitioner's appeal should be dismissed.

ORDER

It is, therefore, **ORDERED** that petitioners, pay respondent, Board of Education of the Bridgewater-Raritan Regional School District, Somerset County, tuition in the total

amount of $38,329.20 for unauthorized attendance in the District schools for the periods stated above. It is further **ORDERED** that the District's determination that the minor child, M.K., was ineligible to attend school while domiciled outside the District is hereby **AFFIRMED**. Petitioner's appeal is **DISMISSED**.

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

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

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

April 20, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 4/20/17

Date Mailed to Parties: 4/20/17

/vj

APPENDIX

WITNESSES

For petitioner:

M.K.

M.K.

D.K.

J.K., Jr.

For respondent:

Walter Kalicki, Attendance Officer

EXHIBITS

For petitioner:

Exhibit X – Drivers License, Food Stamps and dogs rabies certificate

For respondent:

R-1 Email, dated September 16, 2015

R-2 Report of Walter Kalicki

R-3 Letter from Victor Hayek, dated September 25, 2015

R-4 Letter from Victor Hayek, dated September 25, 2015

R-5 Handwritten Statement of Petitioners

R-6 Letter from Victor Hayek, dated October 16, 2015

R-7 Letter from Victor Hayek, dated November 16, 2015

R-8 Notes of Committee recommended removal

R-9 Board of Education of the Bridgewater-Raritan Regional meeting minutes

R-10 IEP for M.K.

R-11 Correspondence to MVC from Walter Kalicki

R-12 Correspondence to MVC from Walter Kalicki

R-13 Correspondence from Concerned Taxpayer

153-17

AGENCY DKT. NO. 86-5/17

IN THE MATTER OF PATRICIA FABRIZIO,	:	
UNION COUNTY EDUCATIONAL SERVICES,	:	COMMISSIONER OF EDUCATION
COMMISSION, UNION COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely file her Personal/Relative and Financial Disclosure statements in accordance with *N.J.S.A.* 18A:12-25 and 26. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately filed disclosure statements after the issuance of its February 28, 2017 Order to Show Cause, but prior to the Commission's March 28, 2017 meeting, and it therefore recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal – pursuant to *N.J.A.C.* 6A:4 – of the Commission's underlying finding of violation.

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

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

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/05/17

Date of Mailing: 6/06/17

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

IN THE MATTER OF PATRICIA FABRIZIO	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***UNION COUNTY EDUCATIONAL SERVICES COMMISSION,* UNION COUNTY**	:	**DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS**
	:	**DOCKET NO.: D05-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on February 28, 2017, and mailed on March 1, 2017 through regular and certified mail, return receipt requested, directing Respondent, a "school official" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

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

ANALYSIS

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

Respondent is a school official who was elected or appointed after April 30, 2016 and, therefore, required to file Disclosure Statements within thirty (30) days of election or appointment. Respondent failed to file her Disclosure Statements within the statutorily required timeframe.

Consequently, by letter dated January 10, 2017, the Commission informed Respondent that failure to file her Disclosure Statements by January 25, 2017 would result in the

Commission voting to issue an OTSC. The Commission further advised that, if an OTSC issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file her Disclosure Statements required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by January 25, 2017, an OTSC was issued by the Commission at its meeting on February 28, 2017. After having been served with the OTSC, Respondent filed her completed Disclosure Statements on March 7, 2017. Respondent also filed a response to the OTSC, but did not dispute that her Disclosure Statements were not timely filed.

DECISION/PENALTY RECOMMENDATION

Based on the record as set forth above, at its meeting on March 28, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1. Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. The Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

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

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

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

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: April 26, 2017

IN THE MATTER OF PATRICIA FABRIZIO	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS**
***UNION COUNTY EDUCATIONAL SERVICES COMMISSION,* UNION COUNTY**	:	
	:	**DOCKET NO.: D05-16**

WHEREAS, Respondent is a "school official," as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), at Union County Educational Services Commission; and

WHEREAS, as a school official who was elected or appointed after April 30, 2016, Respondent was required to file her Personal/Relative and Financial Disclosure Statements (Disclosure Statements) within thirty (30) days thereof;

WHEREAS, Respondent failed to file her Disclosure Statements within the statutorily required timeframe;

WHEREAS, at its meeting on February 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file her Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1; and

WHEREAS, Respondent filed her Disclosure Statements on March 7, 2017, which were required to be filed no later than thirty (30) days of election or appointment pursuant to N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1; and

WHEREAS, Respondent also filed a response to the OTSC, but did not dispute that her Disclosure Statements were not timely filed; and

WHEREAS, at its meeting on March 28, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by failing to timely file her Disclosure Statements; and

WHEREAS, at its meeting on March 28, 2017, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on April 25, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on April 25, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

154-17

AGENCY DKT. NO. 87-5/17

IN THE MATTER OF TINA REEVES,	:	
PAUL ROBESON CHARTER SCHOOL FOR	:	COMMISSIONER OF EDUCATION
THE HUMANITIES, MERCER COUNTY.	:	DECISION

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission) – finding that respondent violated the School Ethics Act for failure to timely file her Personal/Relative and Financial Disclosure Statements in accordance with *N.J.S.A.* 18A:12-25 and -26, and *N.J.A.C.* 6A:28-3.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that the respondent failed to file her disclosure statements despite the issuance of its February 28, 2017 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

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

Accordingly, respondent is hereby suspended for 30 days as a school official found to have violated the School Ethics Act, effective from the date of this decision. If respondent fails to file her disclosure statements during the 30-day suspension period, she will be removed from office on the 31st day.

IT IS SO ORDERED.[1]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/06/17
Date of Mailing: 6/06/17

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

IN THE MATTER OF TINA REEVES	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***PAUL ROBESON CHARTER SCHOOL FOR THE HUMANITIES*, MERCER COUNTY**	:	**DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS**
	:	**DOCKET NO.: D04-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on February 28, 2017, and mailed on March 1, 2017 through regular and certified mail, return receipt requested, directing Respondent, a "school official" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

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

ANALYSIS

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

Respondent is a school official who was elected or appointed after April 30, 2016 and, therefore, required to file Disclosure Statements within thirty (30) days of election or appointment. Respondent failed to file her Disclosure Statements within the statutorily required timeframe.

Consequently, by letter dated January 10, 2017, the Commission informed Respondent that failure to file her Disclosure Statements by January 25, 2017 would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file her Disclosure Statements required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by January 25, 2017, an OTSC was issued by the Commission at its meeting on February 28, 2017. After having been served with the OTSC, Respondent still failed to file her completed Disclosure Statements.

DECISION/PENALTY RECOMMENDATION

Based on the record as set forth above, at its meeting on March 28, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1. Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. The Commission recommends that the Commissioner of Education impose a penalty of **suspension for thirty (30) days**, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education. If Respondent fails to file her Disclosure Statements within the period of her thirty (30) day suspension, the Commission recommends that Respondent be **removed from office on the thirty-first (31st) day**.

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

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

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

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: April 26, 2017

IN THE MATTER OF TINA REEVES	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS**
***PAUL ROBESON CHARTER SCHOOL FOR THE HUMANITIES*, MERCER COUNTY**	:	
	:	**DOCKET NO.: D04-16**

WHEREAS, Respondent is a "school official," as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), at the Paul Robeson Charter School for the Humanities; and

WHEREAS, as a school official who was elected or appointed after April 30, 2016, Respondent was required to file her Personal/Relative and Financial Disclosure Statements (Disclosure Statements) within thirty (30) days thereof; and

WHEREAS, Respondent failed to file her Disclosure Statements within the statutorily required timeframe; and

WHEREAS, at its meeting on February 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file her Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1; and

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

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

WHEREAS, at its meeting on March 28, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by failing to file her Disclosure Statements; and

WHEREAS, at its meeting on March 28, 2017, the Commission recommended that the Commissioner of Education impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education; and

WHEREAS, if at the conclusion of the thirty (30) day suspension, Respondent still has not filed her Disclosure Statements, the Commission recommends that she be removed from office on the thirty-first (31st) day; and

WHEREAS, at its meeting on April 25, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on April 25, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

156-17

S.R., ON BEHALF OF MINOR CHILD, Z.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In December 2016, petitioner S.R. filed a *pro-se* residency appeal contesting the respondent Board's determination that Z.K. was not entitled to a free public education in South Orange-Maplewood Schools. A hearing date was scheduled for April 25, 2017.

The ALJ reported that prior to the hearing, respondent's attorney advised that Z. K. was withdrawn from the school district on April 6, 2017, and the Board was withdrawing its counterclaim for back tuition. After confirming with petitioner that Z.K. was no longer in the district, the ALJ concluded that this matter was no longer a contested case before the Office of Administrative Law. Accordingly, the ALJ ordered the petition dismissed.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter for the reasons stated therein. The petition was dismissed.

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

June 6, 2017

156-17

OAL DKT. NO. EDU 02179-17
AGENCY DKT. NO. 6-1/17

S.R., ON BEHALF OF MINOR CHILD, Z.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner is in accord with the ALJ's conclusion – for the reasons set forth in the Initial Decision – that this matter is no longer a contested case before the Commissioner. Petitioner has withdrawn Z.K. from the District and the Board has withdrawn its counterclaim for back tuition.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/06/17
Date of Mailing: 6/06/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 02179-17
AGENCY DKT. NO. 6-1/17

S.R. ON BEHALF OF MINOR CHILD Z.K.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,

Respondent.

S.R., pro se

Jospeh L. Roselle, Esq. on behalf of respondent (Schenck, Price, Smith & King, LLP)

Record Closed: April 14, 2017 Decided: April 24, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

On February 14, 2017 this matter was transmitted to the Office of Administrative Law (OAL) for a hearing. A hearing date was scheduled for April 25, 2017. Prior to the hearing respondent's attorney advised that on April 6, 2017 minor child Z.K. withdrew

from the District. Respondent's attorney also advised that the District will withdraw its concurrent counterclaim for any back tuition. Under my direction, my secretary reached out to petitioner who confirmed that her child is no longer in the district. Petitioner faxed over a letter advising same. Said letters are attached hereto for reference.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is therefore **ORDERED** that this matter be and is hereby **DISMISSED**.

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

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

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

April 27, 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

4-24-2017

Date Mailed to Parties:

APR 24 2017

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DOCUMENTS RELIED ON

- Letter from S.R. regarding Z.K.'s withdrawal from District
- Letter from Joseph Roselle, Esq. re: counterclaim for back tuition

fax

To:
Judge Caneldo

Fax number:
973-648-2358

From:
Rankins, Shenise

Fax number:

Date:
4/14/2017

Regarding:
Zamir Knox/Docket #EDU02179-2017

Phone number for follow up:
9733366993

Comments:
Good Morning,

This letter is to inform you that my son Zamir Knox has decided to withdraw from Columbia High School. He felt the district wasn't providing the help he needed. Currently, he's enrolled in a new school, that's more equipped to handle his disability.

Thank you,

Shenise Rankins

SCHENCK PRICE SMITH & KING, LLP
ATTORNEYS AT LAW
~ Founded 1912 ~

Serving Our Clients and Community For Over 100 Years

JOSEPH L. ROSELLE
Direct Line: 973-540-7349
Email: jlr@spsk.com

220 Park Avenue
PO Box 991
Florham Park, NJ 07932
Telephone: 973-539-1000
Fax: 973-540-7300

www.spsk.com

April 10, 2017

Via Fax and Regular Mail
Hon. Joann LaSala Candido, ALJ
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: S.R. o/b/o Z.K. v. South Orange – Maplewood Board of Education
OAL Dkt. No. EDU 2179-17N
Agency Ref. No. 6-1/17

Dear Judge Candido:

This firm represents the Board of Education of the School District of South Orange and Maplewood in the above-referenced matter. The case is currently scheduled for hearing before Your Honor on April 25, 2017. By way of brief background, S.R., the parent of adult student Z.K., attempted to enroll the student in the District as an affidavit pupil. The enrollment request was denied by the District due to the student's failure to meet the standard for enrollment as an affidavit pupil. This appeal followed.

On April 6, 2017, the student withdrew from the District. He is not currently enrolled in the District nor is he attending the District's schools during the pendency of this appeal. Therefore, it is respectfully requested that Petitioner officially withdraw her Petition of Appeal, and/or Your Honor mark this matter as "withdrawn" or "dismissed," as appropriate, since Petitioner's challenge to the Board's determination is now moot. There is also no need to hold a hearing in this case.

Additionally, in light of the student's withdrawal from the District and, provided that the matter is withdrawn or dismissed, the Board will withdraw its concurrent counterclaim for any back tuition. Note that should the student return to the District or reenroll using a District address, the District reserves its right to investigate Petitioner's residency status in the future, if necessary.

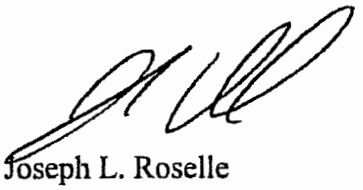
4/13 - M. Rankins was call
she confirmed that her son is
no longer in the District. I
asked that she send over a
ltr of W.D. She agreed to fax
to 973-648-2358.

SCHENCK PRICE SMITH & KING, LLP
ATTORNEYS AT LAW
- Founded 1912 -

Thank you for your courtesies. Should you have any questions or require additional information, or wish to schedule a conference call, please do not hesitate to contact me

Respectfully submitted,

SCHENCK, PRICE, SMITH & KING, LLP



Joseph L. Roselle

c: Shenise Rankins, *Pro Se* Petitioner (via mail)

fax

To:
Judge Caneldo

Fax number:
973-648-2358

From:
Rankins, Shenise

Fax number:

Date:
4/14/2017

Regarding:
Zamir Knox/Docket #EDU02179-2017

Phone number for follow up:
9733366993

Comments:
Good Morning,

This letter is to inform you that my son Zamir Knox has decided to withdraw from Columbia High School. He felt the district wasn't providing the help he needed. Currently, he's enrolled in a new school, that's more equipped to handle his disability.

Thank you,

Shenise Rankins

4/21/17

Good Morning—
I would also like to
cancel our court date as well.
Thank you
Stempa

157-17

CORY PISKIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In May 2016, petitioner appealed the determination of the respondent – the State Board of Examiners (SBE) – that he had not met the requirements for issuance of a Teacher of Elementary School Certificate of Eligibility (CE). Specifically, petitioner did not achieve a cumulative grade point average of 2.75 in his baccalaureate program, which is required to receive the CE. The SBE filed a motion to dismiss with the Commissioner of Education, and the matter was transmitted to the Office of Administrative Law as a contested case in June 2016.

The ALJ reported that petitioner failed to respond to a previously scheduled telephone conference in this matter on March 16, 2017. Subsequently, notice was mailed to petitioner, advising that he had missed the telephone conference, and instructing that he had until April 7, 2017 to provide a written explanation of his failure to appear; otherwise, petitioner's appeal would be dismissed. As of the date of the ALJ's Initial Decision, no response had been received. Accordingly, the ALJ concluded that the petitioner no longer wishes to proceed and ordered the petition dismissed.

Upon review, the Commissioner concurred with the ALJ that this matter is appropriately dismissed for failure to attend the scheduled telephone conference without explanation. Accordingly, the Initial Decision was adopted as the final decision in this matter and the petition was dismissed.

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

Issued 6/06/17

OAL DKT. NO. EDU 9468-16
AGENCY DKT. NO. 140-5/16

CORY PISKIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

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

Upon review of the record, the Commissioner finds that the Administrative Law Judge (ALJ) appropriately dismissed the matter – in accordance with *N.J.A.C.* 1:1-14.14 – because petitioner failed to attend a prescheduled telephone conference on March 16, 2017, notwithstanding the fact that he received advanced notice of same. Furthermore, petitioner failed to provide any explanation for his failure to participate in the conference call despite being provided the opportunity to do so, and being advised that the petition of appeal would be dismissed pursuant to *N.J.A.C.* 1:1-14.14 should he fail to respond to the ALJ's correspondence.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/06/17
Date of Mailing: 6/07/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 9468-16

AGENCY DKT. NO. 140-5/16

CORY PISKIN,

Petitioner,

v.

NEW JERSEY STATE BOARD OF EXAMINERS,

Respondent.

Cory Piskin, petitioner, pro se

Kathryn Duran, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: April 8, 2017 Decided: April 25, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter arises out of petitioner Cory Piskin's challenge to the decision by respondent New Jersey State Board of Examiners (Board) to deny his application for a Teacher of Elementary School Certificate of Eligibility (CE) due to his not meeting all of the certification requirements. On December 10, 2015, the Board considered petitioner's appeal. On January 21, 2016, the Board adopted a written decision

unanimously denying petitioner's request and determining that petitioner did not satisfy the minimum GPA requirement. On May 4, 2016, petitioner appealed. The Board filed a motion to dismiss on June 22, 2016 with the Commissioner of Education. On June 27, 2016, the Commissioner transmitted the matter as a contested case to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Petitioner filed a responsive letter dated August 16, 2016 in opposition to the Board's motion. On October 31, 2016, the Court denied the Board's motion to dismiss and proposed hearing dates to the parties. On November 9, 2016, Heidi Piskin, petitioner's mother, wrote the Court asking that petitioner be permitted to rely on the written documentation already submitted in lieu of a hearing. In a letter to Ms. Piskin dated November 22, 2016, the Court agreed to do so. On November 29, 2016, the Court received a letter from DAG Duran asking if petitioner would be submitting additional evidence and asking permission for the Board to refile its motion. A telephone conference was held on January 13, 2017. The Court scheduled a follow-up conference call for March 16, 2017. Petitioner was provided notice by regular mail at the address provided. On the scheduled date, petitioner could not be reached. The Court sent a letter to petitioner on March 17, 2017 advising that he missed the telephone call and that he had until April 7, 2017 to provide a written explanation for his failure to appear or his appeal may be dismissed. To date, the Court has not received a response.

Based on the foregoing, I **CONCLUDE** that petitioner no longer wishes to proceed and **ORDER** that this petition be **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

April 25, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: April 26, 2017

Date Mailed to Parties: April 26, 2017

cmo

159-17

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges Against Richard D. Allen:

HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

Petitioner,

- and -

RICHARD D. ALLEN

Respondent.

Agency Dkt No.
191-7/16

OPINION AND AWARD

Before
Joyce M. Klein
Arbitrator

Appearances:

For the Petitioner:
John B. Comegno, II, Esq.
Alicia D. Hoffmeyer, Esq.
Comegno Law Group, P.C.

For the Respondent:
Joseph R. Donahue, Esq.
Brickfield & Donahue, Esquires

Pursuant to *N.J.S.A.* 18A:6-16, as amended by *P.L. 2012*, c. 26 ("TEACHNJ"), the tenure charges brought by the Hunterdon Central Regional High School District Board of Education (the "Board" or "Petitioner") against Richard D. Allen ("Allen" or "Respondent") were referred to me by the Director of the Bureau of Controversies and Disputes, Department of Education, for a hearing and decision. I conducted hearings at the Board's offices in Flemington, New Jersey on September 26, November 7, November 21, December 1,

December 14, 2016, January 3, January 17, February 1, February 16, March 2, March 16, March 24 and March 30, 2017.

At the hearings, the parties argued orally, examined and cross-examined witnesses, and introduced documentary evidence into the record. Testimony was received from Christina Steffner, Superintendent of Livingston Board of Education, previously Superintendent of Hunterdon Central Regional High School District, John Fenimore, retired Director of Curriculum and Instruction, Michael Carr, Vice Principal, Karen Batista, retired Science Department Supervisor, Matthew Thompson, Vice Principal, C.L.,[1] Parent, Lori Blutfield, Member of the Board of Education, Sara Jane Mahan, Manager of Human Resources, Vincent Panico, a member of the Board of Education, Cynthia Fink, Chemistry Teacher, Sharon Cooper, Chemistry Teacher, Jay Kriesman, Chemistry Teacher, Leon Copeland, Chemistry Teacher, B.B., Parent, B.C., student, K.S., student, C.J., student, P.G., parent, Bonnie Berenger, Science Teacher, S.B., student, Eric Wasserman, Calculus Teacher, S.H., parent, Lars Wendt, Physics Teacher, Kenneth Macai, previously Science Supervisor, S.P., parent, Lisa Allen, Respondent's spouse, Sean Chappe, Physics Teacher and Association Representative and Dr. Richard (Dan) Allen.

Post-hearing briefs were received on May 15, 2017, whereupon the record was closed. An extension of time to issue an award until June 7, 2017 was granted by the Director of Controversies and Disputes, Department of Education.

RELEVANT REGULATIONS AND POLICIES

N.J.A.C. 6A:9-3.3: Professional Standards for Teachers

> Standard Eleven: Ethical Practice. The teacher acts in accordance with legal and ethical responsibilities and uses integrity and fairness to promote the success of all students.
>
> > i. Performances:
> >
> > ...
> >
> > (3) The teacher promotes aspects of students' well-being by exercising the highest level of professional judgment, and working cooperatively and productively with colleagues and parents to provide a safe, healthy, and emotionally protective learning environment;

[1] Parents and students are referenced by initials only to protect their privacy.

(4) The teacher maintains the confidentiality of information concerning students obtained in the proper course of the educational process and dispenses such information only when prescribed or directed by Federal and/or State statutes or accepted professional practice;

(5) The teacher maintains professional relationships with students and colleagues;

...

(7) The teacher fosters and maintains a school environment which protects students from sexually, physically, verbally, or emotionally harassing behavior by recognizing, understanding, and conducting themselves in a sound and professionally responsible manner.

ii. Essential Knowledge:

...

(2) The teacher understands laws related to learners' rights and teacher responsibilities (for example, for educational equity, appropriate education for learners with disabilities, confidentiality, privacy, appropriate treatment of learners, reporting in situations related to possible child abuse, and responding to harassment, intimidation, bullying, and suicide);

(3) The teacher understands his or her professional responsibilities as reflected in constitutional provisions, statutes, regulations, policies, and collective negotiations agreements;

Discipline Board / Policy 3150

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

National Education Association Code of Ethics / Board Policy 3211

The NEA Code of Ethics has been codified by the Board as Board Policy 3211-Code of Ethics. The policy provides:

COUNT ONE-UNBECOMING CONDUCT
(Retaliation)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

Dr. Allen's retaliatory conduct, as demonstrated in his May 6, 2016, email, wherein he threatened to lower K.P.'s grade due to her mother questioning his lesson planning, violates Standard Eleven[2] by creating an emotionally harassing environment for K.P. Threatening retaliation against students is at odds with his professional obligation to foster a safe and healthy learning environment. As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position to protect the students at HCRHS, and ensure they are free from retaliation.

COUNT TWO-UNBECOMING CONDUCT
(Disrespect for Supervisor)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

When Dr. Allen told Ms. Batista, his direct supervisor, "F*** you" in his May 6, 2016, email, he violated Standard Eleven by displaying open hostility and disrespect for a supervisor, in the virtual presence of other colleagues, and a parent, D.P. In doing so, he evidenced his refusal to work cooperatively and productively with his colleagues, and conducted himself in a professionally irresponsible manner by copying D.P. on his email tirade.

As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position, so that the Board can maintain a community of respect and integrity amongst the students, parents and staff at HCRHS.

COUNT THREE-UNBECOMING CONDUCT
(Violation of Student Confidentiality)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

Dr. Allen's disclosure of confidential information regarding K.P. and C.N. to his wife, in his May 6, 2016, email violates Standard Eleven. Dr. Allen failed to maintain student confidentiality, ultimately exposing C.N. to harassment by her peers.

In fact, Dr. Allen purposely and knowingly shared confidential student information to his wife on multiple occasions, knowing full well that the law requires him to keep this information confidential. His behavior in this regard

[2] The New Jersey Administrative Code sets forth "Professional standards for teachers" at N.J.A.C. 6A:9-3.3, enumerating eleven (11) standards that govern teacher behavior and practice in New Jersey public schools.

served no purpose other than to spread gossip for his own gratification. Dr. Allen's behavior makes it unreasonable for the Board to continue trusting him with confidential student information.

As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position, so that the Board can ensure the confidentiality of student information at HCRHS.

COUNT FOUR-UNBECOMING CONDUCT
(Disrespect for Students)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

Dr. Allen not only disclosed student information in his multiple email communications to his wife, he often spoke in a derisive and pejorative manner about his students, in violation of Standard Eleven. Dr. Allen referred to a student as "annoying" and deserving of a bad grade. He questioned C.L.'s parenting ability and C.N.'s character merely because C.L. questioned her child's progress in his class. Even more troubling is his email to M.W., apparently expressing concern for her son, which he then forwarded to his wife saying "haha" and later seemed to laugh about that student's bad grade.

Dr. Allen's unprofessional behavior in this regard makes it impossible to ask parents to trust Dr. Allen's judgment, and leave their own children's educational well-being in his hands. His behavior deteriorates the safe, healthy, and emotionally protective learning environment that he is obligated to foster, and which HCRHS strives to maintain.

As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position, so that the Board can ensure the confidentiality of student information, and continue providing a healthy and safe learning environment for all students at HCRHS.

COUNT FIVE-UNBECOMING CONDUCT
(Failure to Teach)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

Dr. Allen's conduct, as demonstrated by his failure to complete lesson plans for AP Chemistry, subsequent to the AP exam, violates Standard Eleven, which tasks him with understanding his professional responsibilities "as reflected in constitutional provisions, statutes, regulations, policies, and collective negotiations agreements." Dr. Allen is the only AP teacher who is refusing to

As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position, so that the Board can continue providing a healthy and safe learning environment for all students at HCRHS.

COUNT TEN-UNBECOMING CONDUCT
(Violation of Board Policy 3281 - Inappropriate Staff Conduct)

Dr. Allen's conduct, as demonstrated by his May 6, 2016, email, wherein he told Ms. Batista, his direct supervisor, "F*** you" violates Board Policy 3281-Inappropriate Staff Conduct, which provides "The Board strongly believes that school staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district" and further provides:

- Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district
- School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils

Dr. Allen's palpable disrespect for his supervisor, and his use of profanity multiple times, in the virtual presence of other colleagues, and a parent, D.P., and in response to a mundane parent inquiry demonstrate clearly inappropriate conduct, which should not be tolerated.

Dr. Allen's conduct was knowing and deliberate, as evidenced by his email to Sean Chappe, saying "See you in court" with a smile. Dr. Allen's email demonstrates that his tirade was not the result of a momentary loss of temper or professionalism, but rather a calculated and knowing exposure of his disdain for his colleagues. His behavior undermines the public's trust and confidence, and erodes the professional environment at HCRHS.

As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position, so that the Board can maintain a community of respect and integrity at HCRHS.

COUNT ELEVEN-UNBECOMING CONDUCT
(Violation of Board Policy 3150-Discipline)

Dr. Allen's conduct, as demonstrated in the foregoing paragraphs, violates Board Policy 3150- Discipline.

Dr. Allen's disclosure of confidential student information violates the Federal Educational Rights and Privacy Act ("FERPA"), New Jersey Statutes, New Jersey Administrative Code, as well as Board Policy. Dr. Allen's violation of the aforementioned laws has caused exposure and embarrassment to a student, and compromises the public's trust in the Board.

As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position.

COUNT TWELVE-UNBECOMING CONDUCT
(Violation of Board Policy 3360-Acceptable Use of District Technology)

Dr. Allen's disclosure of confidential student information via his HCRHS email, as well as his profane and disrespectful tirade toward his supervisor, violates Board Policy 3360- Acceptable Use of District Technology.

Dr. Allen's conduct violates both State and Federal confidentiality laws, as set forth herein. Further, Dr. Allen used his HCRHS email account to transmit vulgar, rude, inflammatory, threatening, and disrespectful content to Ms. Batista, and D.P., in his May 6th email tirade.

Dr. Allen's conduct in violating Board Policy 3360-Acceptable Use of Technology renders him guilty of unbecoming conduct, and requires his removal from his tenured position.

COUNT THIRTEEN-UNBECOMING CONDUCT
(Violation of Board Policy 3270-Professional Responsibilities)

Dr. Allen's refusal to teach AP chemistry after the AP exam, combined with his failure to have emergency lesson plans on file, failure to provide tests and lesson plans to his ICS teacher, and refusal to use common assessments violate Board Policy 3270-Professional Responsibilities.

Dr. Allen's conduct in failing to teach or have lesson plans subsequent to the AP Chemistry exam is an abdication of his professional responsibilities. Further, his emergency lesson plans were determined to be non-existent, and contained the name of his 2014-2015 students. Finally, by failing to provide lesson plans and tests to his ICS teacher, Dr. Allen has failed in his professional responsibility to 504 and IEP students, and compromised the Board's ability to fulfill its legal obligations to these students.

Accordingly, Dr. Allen's conduct in violation of Board Policy 3270 constitutes conduct unbecoming, requiring his removal from his tenured position.

BACKGROUND

Dr. Richard (Dan) Allen is a tenured member of the Science Department at Hunterdon Central Regional High School (HCRHS), teaching Advanced Placement Chemistry ("AP Chemistry") and CP (College Prep) Chemistry during the 2015-2016 school year. Dr. Allen began teaching for the school district at the beginning of the 2004-2005 school year. Dr. Allen gained tenure in his position as of October 5, 2007.

Dr. Allen has received a variety of training, including annual training via computer on the Federal Educational Rights and Privacy Act ("FERPA") for the past four (4) years. Dr. Allen has received satisfactory or better evaluations throughout his career at HCRHS. Dr. Allen received a written reprimand in 2012 after he suggested to parents at a Back to School Night that Superintendent Christina Steffner's motivation for increasing the number of students taking the AP exam was tied to her compensation.

During the 2014-2015 school year, HCRHS changed from a "semester block schedule" to an "A/B block schedule." This resulted in a significant change for AP teachers because they previously taught their courses over either a half year or three quarter year period. Before the 2014-2015 school year, the District's semester block schedule resulted in completion of the AP Chemistry class and curriculum a few weeks before the national AP exam that is given during the first week in May each year. Beginning in the 2014-2015 school year, the District adopted and implemented an A/B block scheduling model that resulted in students continuing in the same class through the entire school year. Under the new schedule, AP courses were taught over the course of the entire school year, including the portion of the school year after the national AP exam. As a result, teachers who taught AP classes were required to develop a curriculum for the classes after the AP exam in early May until the end of the school year. AP teachers were provided with support and training to prepare them for this change. Science Supervisor Karen Batista testified that in preparation for the schedule change, AP science teachers were given first priority at summer curriculum writing money, given access to a teacher forum through the College Board website, and offered the opportunity to observe AP teachers in other districts using the A/B block schedule. Preparing AP teachers for the schedule changes was discussed at faculty meetings in Professional Learning Communities ("PLCs"), as well as at department meetings.

For the 2014-2015 school year, Dr. Allen developed a series of research projects and associated assignments and presentations, but found that most students did not work up to their potential and did not produce good work. So, for the 2015-2016 school year, Dr. Allen planned to show a series of video

lectures on chemistry topics that related to those topics covered by the AP Chemistry curriculum. Initially, Dr. Allen had not planned to require graded assignments associated with the lectures, but after showing the first lecture had determined that he needed to do so in order to make sure the class paid attention. As of May 6, 2016, Dr. Allen had not advised the class that there would be graded assignments based upon the video lecture series.

The charges arise primarily out of the events that occurred on and around May 6, 2016 and shortly thereafter.

During the 2015-2016 school year, Students K.P. and C.N. were students in one of Dr. Allen's two AP Chemistry classes. Neither student excelled and both of their parents were in touch with Dr. Allen and Ms. Batista during the school year. C.L., a parent, met with Dr. Allen and her daughter, C.N. in January of 2016 to determine why C.N. did well on homework and labs, but not on tests. According to C.L., she did not find the results of the meeting to be satisfactory. In February, after C.N. continued to struggle in Dr. Allen's class, C.L. met with Ms. Batista and C.N.'s counselor, Casey Roupon.

Similarly, D.P. was in touch with Dr. Allen and Ms. Batista because her daughter, K.P., also struggled in Dr. Allen's AP Chemistry class. D.P. complained that Dr. Allen consistently told K.P. to do homework and attend tutorials but did not offer specific help. During the school year, K.P. consulted with counselors, but did not approach Dr. Allen. Dr. Allen speculated that K.P. went "behind [his] ... back" to counselors because she was looking to drop the course.

In 2016, the national AP Chemistry exam was given on Monday, May 2, 2016. Several students missed class during the remainder of the week as they sat for AP exams in other subjects. For the remainder of classes that week, Dr. Allen showed videos of chemistry lectures and did not give students an assignment regarding those lectures. According to Dr. Allen, K.P. and C.N. were not attentive during those videos and their behavior bordered on disruptive. Apparently, K.P. told her mother, D.P., that Dr. Allen told the class that he did not plan to teach for the rest of the school year since the AP Chemistry exam had now been administered. After K.P. described the classes to her mother, on Friday, May 6, 2016, D.P. sent the following email to Ms. Batista and school counselors, asking about Dr. Allen's lesson plans for the remainder of the school year:

> Good morning all on this very wet, yet again, dreary day! Hope this finds you all well. Question pertaining to K.P.'s Chem class. The students were informed this week by Dr. Allen that he has decided this year "due to lack of interest and effort" on the students part,

> that he will no longer be basically teaching them for the rest of the school year. That for the next six weeks, they will be watching videos and having study halls where they can complete their other work. This past Tuesday was free time and yesterday they watched a video. I am fully aware that at the AP level, their finals are over and so is the AP Exam but there is nothing else these kids can be doing? Mini-labs, anything? That does not sound right to me giving the amount of time left. This to me sounds like a perfect opportunity to give assignments to help boost their grades. I understand that these types of lessons don't have to be everyday but to just sit there in a block length course with nothing to do is ridiculous. Other AP classes are slowing down but still giving some type of assignment. I am not trying to ruffle anymore feathers at this point but I do find this academically sad and a waste of school time.
>
> Thanks for listening to me and hoping that maybe something can be resolved from this.

Upon receiving D.P.'s email during the afternoon of May 6, Ms. Batista responded to her and assured her that Dr. Allen was most likely trying to make a point and that she would speak to him. Ms. Batista forwarded D.P.'s email to Dr. Allen, seeking his response. Ms. Batista's email to Dr. Allen read as follows:

> Dan,
>
> Do you have a response to this? I'm assuming that you are trying to make a point. If not, understand that you are under contract (even if the new one hasn't been negotiated yet) until June 30th.
>
> Karen

Ms. Batista expected that she and Dr. Allen would have a discussion about D.P.'s email and she would learn what caused K.P.'s impression. Dr. Allen was angered by Ms. Batista's email and initially sent three brief emails to her during that evening.

> At 6:37 p.m., Dr. Allen sent an email providing:
>
> Wow. What the f*** is that? Maybe ask about it me first before you accuse me of violating my f****ing contract?
>
> A moment later, at 6:38 p.m., he wrote:
>
> I'm too angry to reply now. Later

Then, at 6:51 p.m., he followed up, again expressing his anger, and listing the Chemistry lectures he was showing in class:

> I am so angry right now. Here is the title of the Eric Smith video I showed on Thurs (Paste it into youtube) & the Robert Hazen one I am showing on Mon. Please watch them (1hr each) before I talk to you again, so you have some background. Just f****ing unbelievable.
>
> ...
> McCloskey Speaker Series – New Theories on the Origin of Life with Dr. Eric Smith
>
> ...
> ROBERT HAZEN - CHANCE, NECESSITY, AND THE ORIGINS OF LIFE

Dr. Allen testified that he was "upset" and very "angry" when he sent these three emails. Dr. Allen mentioned D.P.'s email to his wife and daughter and then took a walk and did some gardening. Dr. Allen, believing that he had calmed down, then composed, and sent, the following response to Ms. Batista, the two counselors, D.P. and his wife (agape). Dr. Allen's response, at 8:40 p.m. on May 6, 2016, reads as follows:

> Hi Karen.
>
> Well, first off, that is certainly an interesting version of what goes on in my class. Here is my version:
>
> There are about 16 class days for each section of AP Chemistry after the final exam & national AP Exam. Last year I gave the students a large list of possible research topics that tied into the course material & that they might find interesting. The assignment was for each student to pick three topics to research -- followed by the submission of a two page summary and a short presentation to the class. Each report/presentation was worth a lab grade. Unfortunately, a majority of the (very grade-savvy) kids realized that three lab grades would not statistically affect their overall course grade and thus did a barely acceptable, low-effort job on the reports. Frankly it was a waste of everybody's time. Just one girl did serious research on a topic she eventually went on to study in college, but the other 59 students basically gave me crap -- just good enough to no drop their overall grade. One obvious option on

my part would be to bump up the worth of these assignments so the kids would have a penalty for bad work. But I rejected that option because most would just bump up the quality slightly (still crap) to stay even. Some would do a great job to get a better grade but (from experience) these kids would be mostly kids who already had an A. And in my opinion, the "AP Chemistry" grade at HCRHS should be based solely on the "AP Chemistry" curriculum, which has now ended.

So this year I decided to do something different. I conceived a sort of mini-course of video lectures by college professors that would show the kids real-world & scientific research applications of the things we learned in class. I came up with seven "units" (origin of life, biogeochemistry, climate change, energy, limits to growth, etc.) for which I would devote two class periods each (an hour-long lecture in each block). I am developing this on the fly based on my feel for the material and the kids. At first I was thinking I would just show the videos and that was that. After showing the first video that way and gauging their reaction, I am reconsidering -- now planning a mini-discussion before & after, along with a two-paragraph summary and reflection (with course tie-ins) of the video. I'm feeling my way through this, my first foray into video lectures.

My first video was (search youtube) "McCloskey Speaker Series - New Theories on the Origin of Life with Dr. Eric Smith" I showed this to A-day on Thurs and B-day today. I encourage you to watch it in its entirety. On student applauded after the video ended. My second (and last) video of the first unit will be "Robert Hazen - Chance, Necessity and the Origins of Life". Again, highly recommended. This stuff is the real deal -- a good metric for them to see if science is really what they want to do, and which parts of real-world science do they find most interesting and necessary.

Unfortunately I did have some trouble with two students for most of the block: C------- N-------- and K----- P------ were talking loudly and laughing in the back of the room -- loudly enough that I had to interrupt the video and ask them to quiet down THREE different times during the block. I had to speak to nobody else in either block I showed this video. I suspect this may be partially why K---- P---- did not join in the applause at the end -- I don't think she actually saw the video, which I would consider one of the very best lectures I have ever seen in my life (-- a life where I have seen hundreds of them).

> One other note about K----- P------: after entering the final exam grades, she actually ended up with an F in AP Chemistry. I understand that she was exempted into the class -- an error of judgement for which I don't think she deserves blame. So I bumped up her final exam grade until she just barely had a D. I did not inform her of this because I didn't want to embarrass her. Nice guy, huh?
>
> So...here's the way it'll go: I'm bumping her grade back down to the original F (I will inform her). And from now on I'll collect and grade the class reflection on each video.
>
> Karen, I am deeply disappointed in your handling of this matter. "Understand that you are under contract"???!!! Frankly, f*** you. I work my f***ing ass off to be a great teacher and I expect the common courtesy of at least checking in more tactfully (or in person!) when receiving second hand (and erroneous) information you received from the parent. But a threat right off the get go? No thanks.
>
> Have a great weekend & thank you for ruining mine – Dan

Only moments after sending the 8:40 p.m. May 6th email, Dr. Allen forwarded that email to Sean Chappe, a science teacher who was also an HCEA representative with this note: "See you in court, my friend :-)." Shortly after he sent the email, both Dr. Allen and his wife, Lisa Allen, were concerned about the content of the email and called Mr. Chappe for advice.

Suzanne Cooley, then HCRHS Principal, received the email from one of the counselors and forwarded it to Superintendent Christina Steffner. Over the weekend, Ms. Steffner sought and received permission from the Board President to suspend Dr. Allen, and commence an investigation into his actions.

D.P. replied to Dr. Allen's May 6th email on May 7, 2016, copying Ms. Batista, and asking Dr. Allen to please reconsider lowering K.P.'s grade and promising to speak with K.P. regarding Dr. Allen's contention that she was talking while he was showing the class videos. Also over the weekend, C.L. learned that Dr. Allen named her child, C.N. in his May 6th email, and that he copied "agape" on the email. C.L. emailed Ms. Batista to express her concern. She questioned why C.N. had been brought into the discussion, and asked for the "name and title of the individual with the agape email."

On Monday, May 9, 2016, Superintendent Steffner interviewed Dr. Allen. Director of Curriculum John Fenimore, Manager of Human Resources, Sara Jane Mahan, Shari Calabrese, President of the Hunterdon Central Education Association and Sean Chappe, another HCEA representative were present.

At the May 9th meeting, Dr. Allen was asked about his AP Chemistry lesson plans for the remainder of the 2015-2016 school year. At that time, approximately twenty-six (26) school days, including approximately 15 AP Chemistry classes, remained in the 2015-2016 school year. Dr. Allen responded "[t]hat class is over." Dr. Allen explained that he was not able to give a full answer or explanation, but that he was "outrageously excited" about his planned lecture series for the remainder of the school year. Dr. Allen was also asked about his lesson plans for his CP Chemistry class. Dr. Allen advised that the class was preparing for a test later in the week. Dr. Allen acknowledged that the test had not yet been prepared, and that his ICS (in-class support) teaching partner had not been provided with the test.[3] Dr. Allen explained that his ICS partner did have a collection of unit worksheets and she was aware that the test would "closely mirror" the worksheets.

Dr. Allen's emergency lesson plan folder in Ms. Batista's office contained only class rosters from his classes for the 2014-2015 school year and an instruction to complete an assignment that was not provided. Dr. Allen testified that his emergency lesson plans for the 2015-2016 school year, along with current rosters, were in his mailbox and were easily accessible to any substitute teacher. Some science teachers testified that emergency lesson plans were typically filed with Ms. Batista and other science teachers typically provided necessary information to the substitute when one was needed at the last minute.

At the conclusion of the meeting, Dr. Allen was advised that he was being suspended with pay pending the outcome of an investigation into his conduct.

The administration sets aside time designated as "PLC (professional learning community) time" for all teachers within each department, to learn from and collaborate with one another. Mr. Fenimore testified that Dr. Allen did not meet regularly with his PLC. Chemistry Teacher Sharon Cooper recalled that Dr. Allen participated in Chemistry PLCs. Ms. Batista did not recall that there was any issue regarding Dr. Allen's attendance at PLCs.

As part of the investigation, Vice Principals Matthew Thompson, and Michael Carr, interviewed eight students from Dr. Allen's two AP Chemistry courses. Each student was asked the same set of questions: 1) Have you taken

[3] The ICS teacher's role is to support special education students and/or students with § 504 plans. This entails reviewing lesson plans and tests to ensure that students are provided with the accommodations set forth in their IEP and/or § 504 plans, as required by law.

any AP tests yet? How have they gone? How many AP classes are you currently taking?; 2) What do you think you'll be doing from now on since you've taken your AP test?; 3) How do you know that?, and 4) What did you do last week after your test?

The AP Chemistry students interviewed generally confirmed that they had watched videos on chemistry topics during the week that began with the AP exam. The students believed that they would continue to watch videos for the remainder of the school year and did not believe that they would be required to complete assignments or otherwise be graded based on the videos.

After the meeting with Dr. Allen, Ms. Steffner asked Mr. Fenimore to speak with the supervisors from each department that offers AP coursework, to ensure that other teachers of AP classes were continuing to teach for the remainder of the school year. In response to Mr. Fenimore's inquiry, the Social Studies, Math, Fine Art, World Language, Science and English Department Supervisors all confirmed that their AP teachers were still teaching, and had lesson plans in place for post AP coursework. Mr. Fenimore also conducted seventeen (17) "drop-ins" of AP courses, to observe that AP instruction was still occurring. The drop-ins confirmed other AP teachers were providing instruction and assessment.

Ms. Steffner was also concerned that Dr. Allen had copied his wife (agape) on the May 6, 2016 email so she reviewed all of Dr. Allen's emails to his wife from his HCRHS email from September 4, 2013 through his May 9, 2016 suspension. At Ms. Steffner's direction, the Board's IT manager, Michael Marron, searched Dr. Allen's email for any other emails between his school email and his wife's email address, agape7769@comcast.net. The search yielded ten (10) additional instances of Dr. Allen disclosing student information to his wife from his HCRHS email account. Eight of these emails were sent during the 2015-2016 school year. Dr. Allen's emails that included his wife are as follows:

On April 3, 2014, Dr. Allen forwarded an email to his wife, containing a string of emails between himself and M.K., the parent of a student, E.K., discussing E.K.'s progress in his class. M.K. expressed concern over E.K.'s stress levels. E.K. is a friend of Dr. Allen's daughter.

On April 23, 2014, Dr. Allen forwarded an email that came directly from a student, who inquired about her grade to his wife. Dr. Allen forwarded the email to his wife stating "Here's the email the student sent to me before her charade was revealed. ..."

Hi Dr. Allen,

I logged into Aspen yesterday and noticed that the report card for Marking period 3 was very different from quarters 1 and 2.

I saw that my averages were C+ and C but on the report cards from the beginning of the year, my averages showed as A- and A. I was wondering if we could resolve this problem as soon as possible.

Thank you.

Hey babe. Here's the email the student sent to me before her charade was revealed. Tsk tsk tsk. What was she thinking I would do—forger her grades for the whole class & give her a A?! luv u!

On October 8, 2015, Dr. Allen forwarded an email to his wife from D.P., mother of K.P. D.P. emailed Dr. Allen to introduce herself, apparently having missed the opportunity to do so at back to school night. In Dr. Allen's response, he notes that his wife says hello. D.P. returned the greeting, and Dr. Allen forwarded the email to his wife.

Good morning. Hope this finds you well. I unfortunately cannot attend this evening's Back to School night but wanted to touch base to say hi and introduce myself. I am K.P.'s mom, D. If at any time there are any questions or concerns, please feel free to contact me at your convenience. My information is listed below.

Dr. Allen replied as follows, also copying his wife:

Hi D. Lisa (my wife) says hi. :-) ... K's done better on the past 2 tests, so as long as she keeps up the effort she'll be fine. Make sure she's keeping up with the problem set on a daily basis -- since getting even a day behind is a bit deadly with the amount of content they get each day. Let me know if you have any questions! -- Dan :-)

On November 16, 2015, Dr. Allen forwarded another email containing student information to his wife. Dr. Allen initiated this email exchange with M.W., parent of W.W. Dr. Allen reached out to express concern for W.W.'s response to his latest grade. M.W., who responded, thanking Dr. Allen. Dr. Allen then forwarded the email to his wife with the subject line "haha from M------."

> Hi M. R. seemed bummed out about his last test (84 on Liquids & Solids), but I just wanted to say that he's doing a really great job -- working really hard to understand the material. It's nice to have kids who care about their work as much as R.!! Some units he'll find easier than others, so just tell him to keep up the good work & he'll be fine. -- Dan :-)
>
> --
>
> Thanks for the note.

Four days later, on November 20, 2015, Dr. Allen sent his wife an email that simply stated "there's gonna [sic] be hell to pay—[W.W.] got a 64% on test today :-)."

On December 1, 2015, in an email exchange with his wife, Dr. Allen responded to her inquiry about his day "...going ok...the annoying kid who kept pushing back his makeup test got his deserved bad grade (hee hee)..." The student was not named in the exchange.

> How's your day?
>
> Lis
>
> ---
>
> hey :-) going ok...the annoying kid who kept pushing back his makeup test got his deserved bad grade (hee hee)
>
> otherwise going well. low stress day :-)
>
> how about you?

On February 29, 2016, Dr. Allen forwarded emails to his wife from a student's parent, C.L., mother of C.N., and his response. C.L. emailed Ms. Batista to express concern over C.N.'s performance in Dr. Allen's class, and questioned Dr. Allen's teaching skills based on her assessment of C.N.'s efforts as compared to the grades she was receiving. Ms. Batista forwarded the email to Dr. Allen, who wrote a lengthy response. Dr. Allen then forwarded the email to his wife, who responded:

> Wow!! She's a jerk. So her kid is finally being challenged and she is attacking you? What will Karen respond?

Dr. Allen wrote back to her:

> I'm sure Karen will just try to defuse it. I mean, it's the first kid in 10 years of AP to say I don't do it right :-)

Mrs. Allen replied:

> Interesting fact-- lady is friends with D.P. I would hope that Karen has your back bc it's clearly not you with your exemplary track record.
>
> Lis

And Dr. Allen finished the conversation:

> Ha ha. Her and D. (or D.'s kid at least) really laying into me this year. :-) Maybe invite them over for tea so they can fill you in. :-)

Dr. Allen again included information about C.N. in an email to his wife on March 3, 2016. Apparently, Ms. Batista met with C.L. to discuss her email, later providing an email summary of the meeting to Dr. Allen. Dr. Allen responded referencing his opinion on C.L.'s parenting skills and C.N.'s character. He then forwarded Ms. Batista's email, along with his response, to his wife with the message "This is my response to Karen's email—she met with C.N.'s mom yesterday. Bold type is Karen & normal type is mine. :-)."

> This is my response to Karen's email--she met with C.'s mom yesterday. Bold type is Karen & normal type is mine. :-)
>
> Hi Karen. Lots of stuff, so I'll respond within your text:
>
> *The meeting was actually cordial. She asked me to look at your review sheets as compared to the tests to make sure there was alignment. *
>
> The review sheets are the problem sets. I'll let you look at them if you want, but it'd be hard to decipher without actually doing all the problems, which would take days. I can tell you that they are COMPLETELY in alignment. One thing I'm very good at is picking out the essence of each unit -- i.e. the key points/skills/ideas that they need to get. I make sure I stress them during class & I pick the key problems from the book (often spanning several chapters) that illustrate them. ...That said, C. has several times approached me after a test & said that the material on the test did not match the

problem set. This is a refrain I ONLY ever hear from kids who don't understand the material. Check in with kids who do and you'll hear the opposite of what C. says. It's a "let me blame someone else" tactic, and it's use at this stage is a sign of some really bad parenting. Although I don't say anything, it reflects VERY poorly on the kid's character.

I told her I'd look at C.'s four worst tests. She also asked for a grade distribution, which I did yesterday afternoon. (everything looks well within the norm, btw) She said that they already hired a tutor (Carolyn Wilheim from North Hunterdon). I told her I would contact her to see if there is anything that we could provide to help.

I can speak with (or email) the tutor too if you like.

*She liked the idea of you checking in (with formative assessments) for the remainder of the year with C. to gauge her understanding. *

Fire drill caused B3 test to be postponed until Monday (so observation would be Wed or Fri now).

To be honest, C. mostly just screws around during class. She has her work open, but she's constantly getting sidetracked by her phone or her friends (mostly K.P. who has a D. & is also blaming me for her trouble). I can give her assigned seat, but I think you didn't want me to single her out, right? She asks me token questions & makes token appearances at tutorial. She is just not a serious student in Chemistry for whatever reasons. I usually let the AP kids check in with me as needed, so it would feel weird to check in only for C.

I certainly can do it (& will if you want), but personally I think it's a disservice to the AP kids for me to babysit them at this age because they need to start transitioning to college. They need to start figuring out (1) the work and discipline it takes to master a difficult subject, (2) if they like it (3) if they're good at it.

*She did not get personal at all. (Which is good because I was prepared to nip that in the bud.) She was concerned about curves being applied unevenly, but I assured her that you and Leon speak often about lessons, labs, tests and grading. By the end of the meeting, she was looking to get an accurate assessment of C.'s abilities. At one point she said, "look, if she's not a chemistry type,

that's okay. It's just that no one has actually said that to me." I told her that I would speak to you, Cindy Fink (her hon chem teacher) and the tutor to try to get an accurate picture for her.*

Repeat after me: "My daughter is not the chemistry type" :-) C. doesn't seem like the material much, she doesn't try very hard at understanding it, and she doesn't seem quick to pick up even the simpler concepts that the "chemistry types" absorb immediately. What kind of parent is confused about something like that at this age? Her Dad (a horse breeder) came up to me at BTS and said very jovially, "I heard you like farming -- we'll need to talk about that sometime instead of this boring Chemistry stuff." ...Ummm...Mom...maybe your daughter is a bit more like her Dad?

That's it in a nutshell. I need to take a look at the 4 tests and would like to just speak to you about the latest one to see how you are going to handle the situation (10 failures and a D class average). I don't want to add fuel to the fire. Can you swing by after class, or would you like me to go to you during block 5?

Don't worry about this one. We'll answer some of the questions and let this blow over.

The best thing for C. at this point is to work very hard with her tutor at one of those AP Exam Chemistry review books -- e.g. Princeton Review, Barrons, or the one I lent the students. There is simply no time for her to go back and nitpick over some questions on a few bad tests when an epic twenty-unit test is staring her in the face in 8 weeks. AP Chem is like a firehose of material (that's still going full blast for the next 7 weeks), and her micro-examining a few bad tests is like stopping down to gather a few cupfuls of water that spilled. That said, I understand if the Mom is insistent on this. I fully understand that this is not a good model for education, but that's the requirements of this AP model we're implementing.

So ... let me know if you have any more questions -- Dan

Dr. Allen again forwarded his wife a lengthy email exchange between Ms. Batista and C.L. on March 18, 2016. This email contained C.N.'s test scores, as well as class averages and median grades for several tests.

Finally, on March 21, 2016, Dr. Allen forwarded his wife an email that he sent to HCRHS administrators earlier in the day. Dr. Allen's email to his wife said

"Ugh. One of the General Chemistry students, J.B., released a wildly inappropriate video last night. It's on youtube under "J BloG p*$$y destroyer."

> Ugh. One of my General Chemistry students, J.B., released a wildly inappropriate video last night. It's on youtube under "J BLoG p*$$y destroyer."
>
> Not sure what jurisdiction you have over off-campus-filmed youtube video, but he's waving a fake gun around.
>
> I really really really like J.B., but he worries me sometimes, and this video is a good example.
>
> PLESE DO NOT TELL HIM I 'RATTED HIM OUT'!!!!
>
> Thanks, Dan

When asked why he copied his wife on the May 6th email, Dr. Allen testified as follows:

> I didn't know they were FERPA violations at the time. This is not -- even in my -- even in my not quite complete understanding of FERPA at this stage, I would have to know that copying my wife where other people can see she's copied is completely inappropriate. But back to your question, the reason is, because she's my advisor in the sense that she's my better half. She's good under pressure, she's good in emergency situations, she cool-headed, and I'm emotional. And she's my sounding board for things, you know, as we'll get to. Not in the sense where I should pass on names and grades to her. But she's in a true sense, she is my -- she is my -- she is my partner in teaching, you know. So that's why.

Dr. Allen's testimony was similar to his wife's understanding of FERPA. She believed that an educator could not share student information with the public, but believed that there was an exception for one's spouse.

Dr. Allen's May 6, 2016 email had further repercussions within the school.

On May 12, 2016, C.N.'s mother, C.L., wrote to Ms. Steffner advising that other students were accusing C.N. of being responsible for Dr. Allen getting "fired." C.L. included a social media post by C.N. where she attempted to set the record straight in an effort to end the attacks on her.

On May 15, 2016, D.P. sent a letter to the Board raising concern that K.P. might be exposed to Dr. Allen in the future, as well as questioning his fitness to be in a teacher. D.P. pointed to the vindictive and threatening tone of his email, and noted his inclusion of her on an email wherein he used profanity toward his supervisor. D.P. directed that neither of her children be placed in Dr. Allen's classes in the future.

The Board met on May 16, 2016 to discuss his employment. The meeting was in an open session at Dr. Allen's request. The meeting room was filled mostly with Dr. Allen's supporters. At that meeting, Dr. Allen addressed the Board and apologized for his actions. Many parents and students spoke. The vast majority expressed their support for Dr. Allen. Both before and after the meeting, the Board received many letters of support for Dr. Allen's teaching.

For example, one current student wrote, "AP Chemistry was one of the classes that made coming to school worth it every day..." Another former student wrote, "Dr. Allen's passion for the subject is part of what gave me the drive to pursue a degree in biochemistry..." A parent wrote that Dr. Allen "cares about his students and teachers in an engaging and interesting manner." Another parent, S.P., testified that her daughter had Dr. Allen as a teacher for AP Chemistry and it "was an extremely challenging class ... it was the kind of class I would want for her." That parent described Dr. Allen as "very fair" and always available after school if the kids needed help..." Science teacher Sharon Cooper described Dr. Allen's teaching as "engaging" and using cartoon characters and music to illustrate points and reach students. Ms. Cooper also testified to Dr. Allen's positive interaction with Ms. Batista and Dr. Macai, the previous science supervisor.

In addition to those letters, several students and parents testified to Dr. Allen's skills as a teacher, motivating students to pursue higher education and careers in science. Parents also testified to his good character and his contributions to the community, including a community garden. Had time permitted, numerous additional students, parents, colleagues, former colleague and members of the community were eager to testify to Dr. Allen's skills as a teacher and his good character and reputation. The record reflects that these potential additional character witnesses would have provided testimony that is substantially similar and complementary to the supportive character testimony described above.

After the May 16th Board meeting, many members of the administrative staff, which includes the department supervisors, among others, expressed concern that Dr. Allen's behavior would be viewed as a minor infraction. The Board President received letters from Edward Brandt, President of the Hunterdon Central Administrator's Association, as well as Sandra Chronic, Supervisor of

Health and Physical Education, Sara Jane Mahan, Human Resources Manager, Don Thornton, Operations Manager, Sue Cooley, HCRHS Principal, and Gymlyn Corbin, School Business Administrator/Board Secretary. These letters urged the Board's to support appropriate consequences commensurate with Dr. Allen's actions.

Dr. Allen admits that there were "so many warning signals to [him] along the way," which should have prevented him from sending the emails. He acknowledged that his wife told him not to send the email until she read it, although he ignored that advice. He further acknowledges that the series of emails he sent only to Ms. Batista in the lead up to the May 6th email were the result of a "gross overreaction." He characterizes his tone in those emails to Ms. Batista as "scolding her like she's a kid" and "ordering" her to watch the videos he references. With respect to his email to Mr. Chappe, Dr. Allen testified that he was not intended to show disdain, but rather was letting Mr. Chappe know he had "screwed up." He further claimed that the ":)" was not intended to be a happy smiley face, but was instead a "rueful" smiley face.

Dr. Allen testified that he was upset because D.P.'s email "grossly misrepresented what was happening in his class." He explained that his anger toward Ms. Batista derived from his perception that she accepted D.P.'s statements as true. Dr. Allen took issue with D.P.'s statement that Dr. Allen told the class that "due to lack of interest and effort" he would not be teaching them for the rest of the year. Dr. Allen acknowledged that he had permitted students to do other work during an AP Chemistry the day after the AP Chemistry exam. Dr. Allen explained that he recognized students had additional AP exams that week and it was time to "pull back a little bit." Dr. Allen denied that he would not be teaching for the rest of the school year and cited his excitement about the lecture series he was developing. Dr. Allen knew that D.P. was "not privy" to his excitement for the lecture series he had planned, but nonetheless was very upset and hurt by D.P.'s email.

DISCUSSION

N.J.S.A. 18A:6-10 provides that no tenured employees of the public school system "shall be dismissed or reduced in compensation ... except for inefficiency, incapacity, unbecoming conduct, or other just cause." The District bears the burden to establish that it met this standard.

The New Jersey Supreme Court has defined "unbecoming conduct" as conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." In re Young, 202 N.J. 50, 66 (2010) (quoting Karins v. City of Atl. City, 152 N.J. 532, 554

(1998) (citation omitted). The New Jersey Supreme Court further defined "unbecoming conduct" as that which violates "the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Bound Brook Bd. Of Ed. v. Ciripompa, Dkt. No. A-57-15, __ N.J. __ (February 21, 2017) (quoting Karins v. City of Atlantic City).

With this standard in mind, I turn to Dr. Allen's conduct in sending the four emails on May 6, 2016, as well as the remaining charges that arose from the investigation. In evaluating these charges, I have reviewed and considered the testimony, documentary evidence and arguments submitted by both parties. That consideration is incorporated into the discussion of the charges.

COUNT ONE-UNBECOMING CONDUCT
(Retaliation)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

COUNT NINE-UNBECOMING CONDUCT
(Retaliation)
(Violation of National Education Association Code of Ethics/Board Policy 3211)

Most troubling is the charge that Dr. Allen expressed an intention to retaliate against K.P. by lowering her grade from a D to an F after her mother D.P., sent the original email to Ms. Batista suggesting that Dr. Allen did not intend to teach AP Chemistry for the remainder of the school year because the AP Chemistry exam had been completed.

That portion of the May 6 email provided as follows:

> One other note about K----- P------: after entering the final exam grades, she actually ended up with an F in AP Chemistry. I understand that she was exempted into the class -- an error of judgement for which I don't think she deserves blame. So I bumped up her final exam grade until she just barely had a D. I did not inform her of this because I didn't want to embarrass her. Nice guy, huh?
>
> So...here's the way it'll go: I'm bumping her grade back down to the original F (I will inform her). And from now on I'll collect and grade the class reflection on each video.

Ms. Steffner, Ms. Batista and D.P. all interpreted this portion of the email to threaten retribution. Ms. Steffner testified that she was "concerned that there was a tone of retribution, that because mother had sent an e-mail apparently asking about the practice of teaching after the AP exam, that we were going to drop a student's grade..." Ms. Steffner cited "the volatile manner in which he responded and his threat of lowering a student's grade because a parent asked a question was deeply concerning..." and created concerns about him returning to the classroom. Ms. Batista also read Dr. Allen's words as threatening retaliation:

> What did become very upsetting to me was the part about K's grade being changed in particular as a result of the e-mail sent by the mom.
>
> Q. So let's get to that. That's the next paragraph. The next paragraph, so, it reads, quote, So. . .here's the way it'll go. I'm bumping her grade back down to the original F (I will inform her). And from now on I'll collect and grade the class reflection on each video, close quote.
>
> Q. So what's your reaction to that?
>
> A. Clearly it's retaliation for something that a parent had written, a parent questioned what was going on in the class, and as a result, he was going to change a grade.

Ms. Batista further stated "As I read through the e-mail, it looked to me like after he gave the explanation of what he was going to do, he still was angry and mentioned that he was going to change a student's grade, which, of course, is the worst thing he could have possibly said."

That D.P. believed that Dr. Allen might retaliate against K.P. is expressed first in a May 7 email to Dr. Allen where she seeks to insulate K.P. from blame for her previous emails:

> ... As for the info I received, I heard not from K.P. or C.N. but another student in your class on Tuesday. I never spoke to K.P. about it until Thursday night. I was just hoping, call it greedy, that maybe she would have the opportunity, not just for her but for others too, to maybe bump up her grade slightly more. My apologies for being presumptuous. As for the talking and disturbing class, they said they were told they could talk. I will speak to her about her volume. She can be loud. Any further questions/ concerns you have please feel free to contact me. I seriously hope

you will consider my request and continue in with your plan as you feel necessary.

D.P.'s May 15, 2016 letter to the Board of Education crystalized her concerns that her daughter K.P. might be the victim of retribution by Dr. Allen:

> I recently sent an email questioning if during the last few weeks of school the students might have the opportunity to "lift" their grades slightly. In response, I received a very disturbing reply that I felt not only threatened my child, but myself. The email also contained vulgarities directed towards Dr. Allen's supervisor, which I know you have read. How Dr. Allen believes a response can be sent in that tone makes me even more concerned about his mental equanimity and classroom behaviors.

D.P. continued "I am appalled that he felt he could threaten me and my child in writing instead of reaching out to me to explain the situation."

Ms. Batista also spoke to this specific issue of the apparent threat and the ever present parents' concern that a teacher will retaliate against their child when a parent complains:

> I mean, as a supervisor, one of the things that happens, parents will call about a complaint about a particular teacher, and you'll say to the parent, well, you know, can I speak to the teacher about their complaint, and their first response is well, please don't use my student's name. And, in fact, you know it's not that you don't -- you wouldn't go to a teacher and give the student's name, but, of course that's the first thing the teacher asks when you go to the teacher and say, you know, I've gotten this complaint from a parent. You know, the first question the teacher will ask: Well, which parent? And the implication is that it's a kid that's a problem in class and therefore that's why there's a parent complaint. On the parent's side of that issue is that, you know, if you mention my kid's name, the teacher is going to retaliate against my kid. I mean, this is the exact thing that you don't want to get to a parent, and he's put it in writing now, and has notified people, and so now, you know, every other parent has now got something that they can use to say that a teacher is retaliating against their kid because in fact, here's a teacher that did it.

Ms. Steffner also emphasized the importance of being able to maintain parents' trust:

> ... the trust that has to be placed between parents and teachers was seriously compromised. In the 40 plus years that I've been doing this, I often hear from parents oh, I would never say anything because the teacher will take it out on my child. And I as an administrator have always said that doesn't happen. It won't happen. You know, you have a right, this is your child. You have a right to ask questions. You have a right to be a part of it. A teacher, a professional would never take it out on a child. This e-mail spoke to me about the serious interruption of that trust, the serious breakdown and it reinforced that constant comment that we hear from parents often that I'm afraid to say anything because my child will suffer.
>
> This e-mail from D. was almost apologetic, not almost, it was apologetic and it was almost pleading please don't take it out on my daughter. I found that very disconcerting, very upsetting and certainly is not the kind of relationship we want with our parents.

Dr. Allen acknowledged that his language was "ambiguous-ish." As such, regardless of his intention, Dr. Allen's words were perceived as threatening to lower K.P.'s grade in response to D.P.'s email. Dr. Allen claims that he did not intend to fail K.P. He testified that when he wrote "I'm bumping her grade back down to the original F (I will inform her). And from now on I'll collect and grade the class reflection on each video..." Rather, this language reflected "a change in strategy." He testified as follows: "This reflects a change in strategy, that I was saying, look, I'm not -- I am not going to be able to, I'm not going to be able to not give grades for the rest of the course and have kids pay attention at all."

Dr. Allen testified that he does not fail students, and that he would have bumped K.P.'s grade back up to a "D" at the end of the course. In other words, Dr. Allen planned to lower K.P.'s grade back to the "F" she had earned to allow her to improve her grade for the remainder of the school year, and if she did not improve her grade on her own, he would then bump K.P.'s grade back to a "D".

To Dr. Allen, if he left K.P.'s grade as a "D" and then allowed her to earn extra credit and perhaps raise her grade to a "C", that would be a "gift onto a gift." Dr. Allen believed that D.P. was trying to get her daughter's grade to improve to a "C", which, to his mind, K.P. had not earned.

Dr. Allen testified that he made it a practice not to fail students and he did not intend the email as retaliation against K.P. Rather, Dr. Allen explained that he had already bumped K.P.'s grade from an F to a "D" because he had not planned additional assignments. Once he determined to grade assignments

related to the videos, he no longer needed to bump up K.P.'s grade, because she would have an opportunity to bump her own grade up from an F to a D. Dr. Allen acknowledged that he was "borderline off the rails" when he wrote this but thought it would be a "logical solution to a problem" rather than a "vindictive grade change."

Dr. Allen testified both that he was concerned not to embarrass K.P. and his view of K.P.'s visits to her counselor concerning AP Chemistry:

> So, yeah, I don't want to embarrass K.P. even if she was -- I knew she was coming at me the whole year. I knew she was going to her counselor, I didn't know exactly what she was saying to her counselor, but I knew it probably wasn't true..."

Dr. Allen characterized K.P.'s actions in going to her counselor as "unprecedented" for him in that he had never "had a kid go behind [his] back."

Turning to the question of whether Dr. Allen threatened retaliation against K.P. and, if so, whether this conduct violated Standard Eleven of Professional Standards for Teachers, N.J.A.C. 6A:9-3.3 and/or the National Education Association Code of Ethics/Board Policy 3211, I must look beyond Dr. Allen's intent to his actual words. Dr. Allen did not explain that he intended to knock K.P.'s grade back to the grade she had actually earned, to allow her the opportunity to increase her grade through additional assignments or extra credit assignments as suggested by her mother. Rather, Dr. Allen wrote that K.P. "ended up with an F in AP Chemistry" and he bumped her final exam grade up "until she just barely had a D." He continued:

> So...here's the way it'll go: I'm bumping her grade back down to the original F (I will inform her). And from now on I'll collect and grade the class reflection on each video.

Returning to Dr. Allen's words in his email, he stated "I'm bumping her [K.P.'s] grade back down to the original F..." He then indicated that he would grade the class reflections from the video, but did not explain that K.P. would have the chance to improve her grade, and once the school year was completed he would bump her grade back to a passing grade if she did not do so on her own.

Dr. Allen also stated, "I will inform her," lending credence to the thought that he would inform K.P. that she would get an "F" for the class. When taken in context of the entire email, including the angry and disgruntled tone, and the inappropriate language directed at Ms. Batista, it is difficult to interpret his statement that he would lower K.P.'s grade as anything but retaliation for her

mother's email. When viewed in light of his testimony that he knew she was coming at him the whole year, the notion that Dr. Allen had a retaliatory motive is reinforced.

Regardless of whether Dr. Allen actually intended to fail K.P., he unquestionably created the impression that he would, and compromised the necessary trust between parents and the Board. In doing so, he has irreparably damaged his own credibility with both the Board and parents. Dr. Allen had made it almost impossible for the Board to ask parents to trust him.

Accordingly, I find that Dr. Allen's statement that he would bump K.P.'s grade back to an F, by itself, leads to the conclusion that Dr. Allen engaged in conduct unbecoming a public employee. This statement, on its own, by apparently threatening to lower K.P.'s grade in retaliation for her mother's email, cannot be tolerated from any teacher. Such a statement breaches the trust between teacher and student, teacher and parent, and teacher and Board of Education. That trust is necessary for the teacher to be a successful educator. The charge of retaliation, by itself, is sufficiently serious to sustain tenure charges against Dr. Allen, but must be viewed in light of all of the facts and circumstances, including those supporting Dr. Allen.

COUNT TWO-UNBECOMING CONDUCT
(Disrespect for Supervisor)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

COUNT TEN-UNBECOMING CONDUCT
(Violation of Board Policy 3281-Inappropriate Staff Conduct)

I now turn to the charges that Dr. Allen was knowingly and deliberately hostile and disrespectful to his supervisor, Ms. Batista by using profane language in his May 6, 2017 email, by copying both colleagues and D.P., a parent with this disrespectful electronic communication.

In response to Ms. Batista's email forwarding and asking about D.P.'s email, Dr. Allen initially sent three brief emails to her, two of them using some version of "f****" or "f***ing", but not necessarily directing the profanity at Ms. Batista. For example, in his first email at 6:37 p.m., Dr. Allen wrote, "[W]ow. What the f*** is that? Maybe ask ... before you accuse me of violating my f***ing contract?"

Then, in the lengthy email sent to Ms. Batista with copies to colleagues and D.P. at 8:40 p.m., Dr. Allen directed profanity at Ms. Batista as follows:

> Karen, I am deeply disappointed in your handling of this matter. "Understand that you are under contract"???!!! Frankly, f*** you. I work my f***ing ass off to be a great teacher and I expect the common courtesy of at least checking in more tactfully (or in person!) when receiving second hand (and erroneous) information you received from the parent. But a threat right off the get go? No thanks.
>
> Have a great weekend & thank you for ruining mine – Dan

Administration officials, parents, students and other teachers uniformly testified that Dr. Allen's use of profanity, even in its censored state was inappropriate. Ms. Steffner testified to her concern both "about the use of abject profanity" and the "continued escalation of Dr. Allen's anger." John Fenimore, then the Director of Curriculum, testified that use of such language was inappropriate in any professional setting. The profanity was directed at Ms. Batista who testified that she was "offended, shocked and disappointed." Dr. Fink, a science teacher, agreed that Dr. Allen's email was "disrespectful." Another chemistry teacher, Ms. Cooper, thought directing the phrase "fuck you" to a supervisor was "inappropriate." Numerous other colleagues, as well as parents and students supporting Dr. Allen found such language to be unprofessional and/or inappropriate. D.P. cited Dr. Allen's use of profanity in her May 15, 2016 letter to the Board of Education noting that Dr. Allen's response to her email included "vulgarities directed towards Dr. Allen's supervisor." In that letter, D.P. also stated her belief that Dr. Allen needed to "accept full responsibility for his behaviors, threats, outbursts and obscenity laced emails."

Dr. Allen agreed and has apologized both to Ms. Batista and to the Board of Education. There is no dispute that Dr. Allen's use of profanity in his May 6, 2016 emails directed at Ms. Batista was both inappropriate and disrespectful. Such conduct from a teacher meets the definition of conduct unbecoming in that it violates the "implicit standard of good behavior" expected of a teacher. See Karins v. Atl. City, 152 N.J. 532, 554-555 (1998). Dr. Allen's May 6, 2016 email also violates Board Policy 3281 which provides "[i]nappropriate conduct and conduct unbecoming a school staff member will not be tolerated ..."

Dr. Allen's use of profanity directed at Ms. Batista in an email that was also sent to colleagues and a parent is unbecoming conduct. The use of profanity directed at a supervisor in this situation is serious, but on its own might not be sufficient to warrant removal. Dr. Allen's use of profanity cannot be examined in a vacuum but must be considered in light of all of the facts and circumstances present in this case.

COUNT FIVE-UNBECOMING CONDUCT
(Failure to Teach)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

COUNT THIRTEEN-UNBECOMING CONDUCT
(Violation of Board Policy 3270-Professional Responsibilities)

The Board has charged Dr. Allen with a failure to teach by failing to complete lesson plans, failing to have current emergency lesson plans on file, refusing to teach AP Chemistry after the AP Chemistry exam, failing to provide tests and lesson plans to his ICS teacher, and refusing to use common assessments.

Citing Mr. Fennimore's testimony, the Board contends that Dr. Allen failed to complete lesson plans and failed to have current emergency lesson plans on file. Mr. Fennimore testified that he checked Dr. Allen's emergency lesson plan folder in his mailbox in the 11/12 building and found only a class roster from the prior school year and a direction to work on "problem set 912". Mr. Fennimore viewed this and similar instructions as an activity rather than a lesson plan. Mr. Fennimore also expressed concern that Dr. Allen had not supplied lesson plans for CP Chemistry and in particular, had not supplied lesson plans to his ICS teacher.

Dr. Allen's supervisor, Karen Batista recalled that if she asked for lesson plans, Dr. Allen would typically be one of the first teachers to turn them in. Ms. Batista did not recall an issue with Dr. Allen turning in either lesson plans or emergency lesson plans. Ms. Batista also acknowledged that she permitted tenured teachers to submit unit plans but required non-tenured teachers to submit weekly lesson plans. Dr. Allen had provided unit plans to his ICS teacher. Dr. Allen testified that his emergency lesson plans could be found in his mailbox.

Science teachers, including Dr. Leon Copeland and Sharon Cooper, testified that when a science teacher would be absent unexpectedly, the teacher would typically call another teacher and ask that colleague to make sure that the substitute had whatever was necessary for lessons.

The Board contends that Dr. Allen planned simply to show videos during the gap period between the AP Chemistry exam and the end of the school year. It is not disputed that Dr. Allen did show a video lecture "McCloskey Speaker Series – New Theories on the Origin of Life with Dr. Eric Smith" to his AP Chemistry classes between May 2, 2016, the date of the AP Chemistry exam and May 6, 2016, his last day in the classroom. Dr. Allen described his thoughts and plans for the video lecture series in his May 6, 2016 email as follows:

> So this year I decided to do something different. I conceived a sort of mini-course of video lectures by college professors that would show the kids real-world & scientific research applications of the things we learned in class. I came up with seven "units" (origin of life, biogeochemistry, climate change, energy, limits to growth, etc.) for which I would devote two class periods each (an hour-long lecture in each block). I am developing this on the fly based on my feel for the material and the kids. At first I was thinking I would just show the videos and that was that. After showing the first video that way and gauging their reaction, I am reconsidering -- now planning a mini-discussion before & after, along with a two-paragraph summary and reflection (with course tie-ins) of the video. I'm feeling my way through this, my first foray into video lectures.
>
> My first video was (search youtube) "McCloskey Speaker Series - New Theories on the Origin of Life with Dr. Eric Smith" I showed this to A-day on Thurs and B-day today. I encourage you to watch it in its entirety. One student applauded after the video ended. My second (and last) video of the first unit will be "Robert Hazen - Chance, Necessity and the Origins of Life". Again, highly recommended. This stuff is the real deal -- a good metric for them to see if science is really what they want to do, and which parts of real-world science do they find most interesting and necessary.

However, in his May 6, 2016 email, Dr. Allen, also expressed his opinion on the grading of AP Chemistry and the period between the AP Chemistry exam and the end of the school year:

> And in my opinion, the "AP Chemistry" grade at HCRHS should be based solely on the "AP Chemistry" curriculum, which has now ended.

During the meeting on May 9, Mr. Fenimore asked Dr. Allen about lesson plans for AP Chemistry for the remainder of the year. According to Mr. Fenimore, Dr. Allen reiterated the sentiment from his email and replied, "that class is over." But during his testimony, Dr. Allen testified that he realized after his classes on May 5th and May 6th that he was going to need some sort of "carrot stick" mechanism to keep his students engaged for the remainder of the year.

Mr. Fenimore also asked Dr. Allen about his plans for CP Chemistry and he indicated that students were working on a test review sheet but he had not yet written the test. Mr. Fenimore expressed concern because this meant that Dr.

Allen's ICS partner, who was relatively new, did not have a copy of the test and she was legally bound to work on accommodations. Dr. Allen had not provided a test to be administered at the end of the week to his ICS partner by the morning of May 9, but had provided the unit worksheets and his ICS partner was aware that the test would closely track the problem sets included with the worksheets.

Mr. Fenimore distinguished between Dr. Allen's idea to use a video lecture series and Dr. Allen's implementation of the lecture series. According to Mr. Fenimore, "the actual implementation wasn't occurring." Mr. Fenimore based this conclusion on Dr. Allen's statement at the May 9 meeting as well as the May 6 email.

The Board has not established that Dr. Allen failed to continue to teach AP Chemistry by May 9, 2016. Rather, the AP Chemistry exam was administered on May 2, the previous Monday. The AP Chemistry exam is among the first AP exams administered and many students in AP Chemistry were absent during that week as they took other AP exams. Many students who did attend the class were focused on other AP exams they would take later in the week. Dr. Allen testified that he knew when "to pull back a little bit" as he was after the AP Chemistry exam. So, for the remainder of that week, Dr. Allen had shown the first of the video lectures in the lecture series he had developed. As noted in his May 6 email, he had initially conceived of the lecture series to complement the topics covered in AP Chemistry, but without related assignments. Dr. Allen acknowledged that he was "feeling... [his] way through" his first series of video lectures, but had already determined to add assignments and grades to the lecture series.

There is no doubt that Dr. Allen believed that the AP Chemistry class should end after the AP Chemistry exam, and that he had not developed formal lesson plans for his lecture series. Nonetheless, Dr. Allen was aware that he was required to teach for the remainder of the school year. He had developed a lecture series and was showing the lectures to his students. Given the block scheduling, Dr. Allen had shown only the first video in the lecture series without a graded assignment while students were in the process of completing other AP exams. At this point, Dr. Allen was removed from the classroom and had no further opportunity to develop his anticipated lecture series. Based upon this evidence, I find that the Board has established only that Dr. Allen had a personal belief that AP Chemistry should end with the AP exam. The Board has not established that Dr. Allen failed to teach or intended to stop teaching after the AP exam.

Mr. Fenimore testified that Dr. Allen participated in PLCs (Professional Learning Communities) only occasionally and did not use common assessments that were developed in the PLCs. This testimony was not fully supported. Ms.

Batista did not recall that Dr. Allen failed to attend or participate in PLCs. Ms. Batista recalled only one PLC meeting where Mr. Fenimore attended and had found that Dr. Allen was inattentive. Mr. Fenimore offered no evidentiary support for his allegation that Dr. Allen did not use common assessments in either CP Chemistry or AP Chemistry. Dr. Copeland testified that he and Dr. Allen collaborated on the teaching of AP Chemistry and that he used Dr. Allen's handouts and worksheets with his students.

In sum, I find insufficient evidence that Dr. Allen failed or refused to teach AP Chemistry after the AP exam, failed to provide tests and lesson plans to his ICS teacher, and refused to use common assessments. Dr. Allen did have current lesson plans, though the emergency lesson plans in the folder in his mailbox were not current. Dr. Allen attended and participated in PLC meetings and collaborated with his colleagues. Dr. Allen had not provided a single test to his ICS partner one week before the test. Dr. Allen did not fail to meet his professional obligations. To the extent that these charges are supported, they are not sufficient to warrant tenure charges. Charges 5 and 13 are dismissed.

COUNT THREE-UNBECOMING CONDUCT
(Violation of Student Confidentiality)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

COUNT SIX-UNBECOMING CONDUCT
(Violation of Student Confidentiality)
(Violation of National Education Association Code of Ethics/Board Policy 3211)

COUNT EIGHT-UNBECOMING CONDUCT
(Violating Student Confidentiality)
(Violation of National Education Association Code of Ethics/Board Policy 3211)

COUNT ELEVEN-UNBECOMING CONDUCT
(Violation of Board Policy 3150-Discipline)

COUNT TWELVE-UNBECOMING CONDUCT
(Violation of Board Policy 3360-Acceptable Use of District Technology)

These charges allege that Dr. Allen breached student confidentiality, violated the Federal Educational Rights and Privacy Act (FERPA) and Board Policies involving Discipline (3150) and Acceptable Use of Technology (3360) by sharing confidential student information with his wife Lisa Allen for no valid educational purpose. The charges also allege that Dr. Allen breached the

confidentiality of student C.N. when she was discussed in the May 6, 2016 email sent to D.P. as well as to Lisa Allen.

The Board contends that Dr. Allen engaged in unbecoming conduct when he sent four (4) unprofessional, insubordinate and hostile emails to his supervisor, including the May 6th email, which included the counselors, D.P., and his wife; violated the confidentiality rights of C.N. and K.P. by virtue of copying his wife, and D.P. on the May 6th email; threatened to lower K.P.'s grade as a result of D.P.'s email; and habitually violated student confidentiality rights by emailing his wife confidential student information.

Dr. Allen copied his wife on a total of ten emails referencing students and/or confidential student information, such as grades in addition to the May 6, 2016 email. That email referenced K.P. and C.N., their conduct in AP Chemistry, and K.P.'s final grade. In addition to confidential information, Dr. Allen demeaned and mocked students in some of the emails to Lisa Allen, referring to a student's "charade" and labeling another student "annoying."

Turning to the May 6, 2016 email, Dr. Allen discussed his difficulties with K.P. and C.N., and then copied D.P., K.P.'s mother, as well as Mrs. Allen on the email. Specifically, Dr. Allen discussed C.N. and K.P.'s lack of focus on the video as follows:

> Unfortunately I did have some trouble with two students for most of the block: C------- N-------- and K----- P------ were talking loudly and laughing in the back of the room -- loudly enough that I had to interrupt the video and ask them to quiet down THREE different times during the block. I had to speak to nobody else in either block I showed this video. I suspect this may be partially why K---- P---- did not join in the applause at the end -- I don't think she actually saw the video, which I would consider one of the very best lectures I have ever seen in my life (-- a life where I have seen hundreds of them).
>
> One other note about K----- P------: after entering the final exam grades, she actually ended up with an F in AP Chemistry. I understand that she was exempted into the class -- an error of judgement for which I don't think she deserves blame. So I bumped up her final exam grade until she just barely had a D. I did not inform her of this because I didn't want to embarrass her. Nice guy, huh?

As a result of this email, C.N. believed her confidentiality and privacy was violated. C.N.'s mother, C.L., learned of the email on Saturday, May 7, 2016 and

promptly sent an email to Ms. Batista asking the identify of "agape" and expressing concern that her daughter "had been brought into this discussion."

Subsequently, C.L., C.N.'s mother, explained that C.N. was concerned about discussion on social media that "plastered" her name everywhere in connection with Dr. Allen's suspension. On May 12, 2016, C.N.'s mother sent an email to Ms. Steffner expressing her concern for her daughter stating:

> My daughter came home today and informed me that members of the senior and junior class have accused her of "getting Dr. Allen fired." She is very upset. She feels helpless and harassed.

The Board would tie C.N.'s concern to a social media post from Dr. Allen's stepdaughter asking students to attend the upcoming Board of Education meeting and to write letters in support of Dr. Allen. The Board bases its conclusion on its assumption that Dr. Allen's stepdaughter sought students' support at his behest. The record does not establish that Dr. or Mrs. Allen urged or directed Dr. Allen's stepdaughter to post this request to social media. Although there is insufficient support for the Board's contention that his stepdaughter's post was at Dr. Allen's behest, this post, which did not include C.N., along with other posts circulated by students seemed to result in C.N. being perceived by other students as the reason for Dr. Allen's suspension. Regardless of the factual basis that led to Dr. Allen's suspension and subsequent tenure charges, Dr. Allen's inclusion of C.N. in his email to D.P., a parent, but not C.N.'s parent, and to his wife, led to C.N.'s name being connected to his tenure charges. Thus, the result of Dr. Allen's violation of C.N.'s privacy and confidentiality under FERPA and Board Policy 3360 may have lead to negative publicity for C.N.

Dr. Allen also violated both K.P.'s and C.N.'s confidentiality as students when he copied his wife on the May 6, 2016 email. That email included specific information about K.P.'s grades and K.P.'s and C.N.'s conduct. While Dr. Allen regards his wife as his "sounding board," "advisor" and "partner in teaching," she is not employed by the District and plays no role in the education of Dr. Allen's students, including K.P., C.N. and the other students specifically referenced in Dr. Allen's emails. By sending emails to his wife that included confidential student information, Dr. Allen violated the privacy rights of these students pursuant to FERPA, and Board Policy 3360 (Acceptable Use of District Technology) which requires users of the Board's email system to comply with FERPA. That policy also provides:

> Except in instances as specifically provided by law, any student records which are made, maintained, or transmitted technologically must be kept confidential.

Both Dr. Allen and Mrs. Allen seemed to think their emails were permitted as some sort of spousal privilege or exception to the student privacy requirements included in Board Policy and in FERPA. Dr. Allen acknowledged receiving FERPA training each year for the past five years but did not pay sufficient attention and take the training seriously because it was computer-based training, and thus did not think it applied to communications with his wife.

Dr. Allen explained that the emails "were just between me and my wife and not to be shared further." Dr. Allen testified that he "didn't know they were FERPA violations at the time." Explaining why he copied his wife on emails, Dr. Allen characterized his wife as his "advisor" who is "cool-headed" and his sounding board and "partner in teaching." Yet Dr. Allen acknowledged his error stating that "I would have to know that copying my wife where other people can see she's copied is completely inappropriate."

It is not clear whether Dr. Allen acknowledged that copying his wife on emails is inappropriate or that allowing others to see that she received the email is his mistake. It is troubling that Dr. Allen seemed to focus on whether others were aware that he copied his wife rather than the fact that he did so, thus violating student privacy and confidentiality.

Dr. Allen relies upon what he believed to be spousal privilege to suggest that he had a right to share confidential student information with his wife. Spousal or marital privilege as codified in the New Jersey Rules of Evidence 509 permits spouses to refrain of disclosure of spousal "communications made in confidence" without the consent of the spouse. N.J.S.A. 2A:84A-22. Rule 509 does not address the situation where one spouse presumes that he or she is able to disclose confidential information about another individual, in this case a student, to the other spouse because the information will then be protected from disclosure. Regardless, the Board's policy directs that any student records which are made, maintained, or transmitted technologically must be kept confidential. Additionally, FERPA prohibits the disclosure of student records, which include, but are not limited to, grades and student disciplinary files.

By copying his wife on the May 6, 2016 email which included K.P.'s grade in AP Chemistry, as well as several other emails disclosing student grades, Dr. Allen violated both FERPA and Board Policy 3360. Dr. Allen also violated C.N.'s privacy by disclosing her conduct in his class to both his wife and to D.P. These violations of privacy and confidentiality constitutes unbecoming conduct which violates "the implicit standard of good behavior" expected of a teacher. The charges of violating student privacy and confidentiality on their own might warrant discipline short of removal. Dr. Allen's violation of student privacy and confidentiality, as with other charges, cannot be examined in a vacuum, but it must be considered in light of all of the facts and circumstances present in this case.

COUNT FOUR-UNBECOMING CONDUCT
(Disrespect for Students)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

COUNT SEVEN-UNBECOMING CONDUCT
(Disparaging Students)
(Violation of National Education Association Code of Ethics/Board Policy 3211)

Dr. Allen is charged with disparaging and disrespecting students by speaking in a derisive and pejorative manner about them. The Board relies upon the series of emails Dr. Allen either forwarded to his wife or copied to her that include unprofessional statements such as calling a student "annoying" or laughing at a bad grade.

The language and tone of Dr. Allen's emails to his wife were, on occasion, derisive. For example, Dr. Allen forwarded one email to his wife on April 23, 2014 where a student asked about her grades. Dr. Allen's comment was "[]here's the email the student sent to me before her charade was revealed. Tsk tsk tsk." In another email on December 1, 2015, Dr. Allen referred to a student as annoying, stating "... the annoying kid who kept pushing back his make up test got his deserved bad grade (hee hee)." Dr. Allen also seemed to mock C.L.'s parenting skills and C.N.'s interest in chemistry in a March 3, 2016 email exchange with Ms. Batista.

Standard Eleven of Ethical Practice requires teachers to maintain "professional relationships with students ..." and to "conduct themselves in a sound and professionally responsible manner."

The NEA Code of Ethics as incorporated into Board Policy 3211 provides that teachers "[s]hall not expose the student to embarrassment or disparagement."

While these email exchanges were not public and did not expose students to public disparagement, they were unprofessional and inappropriate in that they mocked, disparaged and laughed at students and suggested that Dr. Allen took pleasure or felt vindicated in his opinions when students who did not excel met his expectations with poor grades, conduct or performance. These exchanges were unprofessional and violate the implicit standard of good behavior expected of a teacher. These emails disparaging students constitute unbecoming conduct. As with each of the charges, the charge that Dr. Allen disparaged students must be considered in light of all of the facts and circumstances present in this case.

Based upon the foregoing, Dr. Allen engaged in conduct unbecoming a teacher when he threatened retaliation against student K.P.; directed profanity at his supervisor, Ms. Batista in an email sent to colleagues, a parent and his wife, as well as Ms. Batista; violated the confidentiality of students K.P. and C.N., as well as others by copying his wife on emails discussing their grades and classroom behaviors; and by disparaging or mocking students in email exchanges with his wife over the District's email server.

As the appropriate penalty for Dr. Allen's misconduct is evaluated, the question of progressive discipline and mitigating factors warrants consideration. The New Jersey Supreme Court explained:

> [T]he concept of progressive discipline has been utilized in two ways: (1) to 'ratchet-up' or 'support imposition of a more severe penalty for a public employee who engages in habitual misconduct'; and (2) 'to mitigate the penalty' for an employee who has a record largely unblemished by significant disciplinary infractions.' On the other hand, progressive discipline is not 'a fixed and immutable rule to be followed without question' because 'some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record.'

In re Stallworth, 208 N.J. 182, 196 (2011) (citations and internal punctuation omitted). The Court explained the analytic framework to be considered in evaluating the issue of progressive discipline:

> To assure proper progressive discipline, and a resulting penalty based on the totality of the work history, an employee's past record with emphasis on the reasonably recent past should be considered. This includes consideration of the totality of the employee's work performance, including all prior infractions.... Progressive discipline is a flexible concept, and its application depends on the totality and remoteness of the individual instances of misconduct that comprise the disciplinary record. The number and remoteness or timing of the offenses and their comparative seriousness, together with an analysis of the present conduct, must inform the evaluation of the appropriate penalty.

Id. at 199.

Virtually all of Dr. Allen's misconduct occurred in a series of emails on May 6, 2016 and approximately ten emails with his wife from September 2014 through May 6, 2016. The question of penalty and any circumstances which might

mitigate the penalty begins with Dr. Allen's repeated apologies to the Board and to Ms. Batista. Dr. Allen has recognized that he should not have sent the May 6, 2016 emails in anger and that he overreacted to Ms. Batista's inquiry. This acknowledgement of fault is one of the several factors that Dr. Allen cites in support of a penalty short of removal. Dr. Allen also cites Ms. Steffner's alleged grudge against him, disparate treatment when compared to other District teachers, that students did not witness the conduct, his personal circumstances, his relatively clean record and his reputation as a popular and exciting teacher.

Dr. Allen has asserted that Ms. Steffner held a grudge and was out to get him both for his inadvisable comments to parents about her compensation in 2012 and because his mother, a local political force, is asserted to have backed successful board of education candidates Lori Blutfield and Vincent Panico and is asserted to have worked to defeat current Board President Deb Labbadia's candidacy for board of education in another district. Dr. Allen suggests that this family grudge caused Ms. Steffner to recommend termination rather than a lesser penalty. While Dr. Allen's testimony supports his contentions, this testimony is comprised predominantly of suggestion and innuendo rather than direct evidence. Dr. Allen went to great lengths to explain the intricacies of local board of education politics and established that his mother and Ms. Steffner were in opposing political camps, but did not offer direct and credible evidence connecting any possible animosity between Ms. Steffner and Dr. Allen's mother to his removal. Given that the allegation was not proven, it cannot be treated as a mitigating factor when considering the appropriate penalty for Dr. Allen's misconduct.

Similarly, Dr. Allen sought to establish a connection between the present tenure charges and the basis for his 2012 reprimand. In 2012, Dr. Allen received a written reprimand after he opined to parents at a Back to School Night that the push to increase the number of students taking AP exams was tied to Ms. Steffner's compensation. In support of this theory, several teachers testified to their perceived concern or fear that Ms. Steffner might have harmed their careers or make their work life more difficult based upon real or perceived past infractions. There were no examples of Ms. Steffner either disciplining teachers or seeking to enhance negative consequences based upon this testimony. There is insufficient evidence that Ms. Steffner held a grudge against Dr. Allen for his conduct in 2012 or that this influenced her recommendation that the Board terminate Dr. Allen.

To the extent that the Board relies upon the reprimand Dr. Allen received in 2012 and suggests that this reprimand supports removal in this instance, Dr. Allen has been disciplined for his statements to parents in 2012 suggesting that Ms. Steffner's compensation may have been placed ahead of the best interests of students. For purposes of progressive discipline, the issues in dispute in this

instance also involve incautious statements. The import of Dr. Allen's 2012 reprimand, however, is limited to the fact that he received it.

Dr. Allen compares his conduct to that in In re Geiger, 2015 WL 721458 (N.J. Super. Ct. App. Div. Nov. 18, 2015) and In re Watson, 2014 WL 2480173 (N.J. Super. Ct. App. Div. June 4, 2014). Specifically, in In re Watson, a teacher called educationally disabled students who were predominantly African American "stupid" and said they were "acting like monkeys." This teacher also grabbed a student's shirt and hit him, cursed at students and snapped a rubber band against a student's wrist. Although profanity was used in both cases, In re Watson is not analogous to Dr. Allen's situation in that there, the totality of the circumstances resulting in dismissal included corporal punishment against middle school age students. Dr. Allen emphasizes that no students witnessed his misconduct. While that is true, a situation where a teacher used profanity, made racially insensitive remarks and hit a student is not analogous to retaliation by lowering a student's grade.

Similarly, Dr. Allen would compare his circumstances, where his inappropriate conduct was not in the presence of students to In re Geiger, where students overheard two teachers making racially insensitive and profane remarks. In that instance, teachers made comments including "[t]hese negros think they're fucking tough shit," and "yeah, that's what they are, they're fucking, negros, negros, negros, negros." The Appellate Division found removal to be too extreme a penalty for Appellants because the "punishment is so disproportionate to the offense, in light of all of the circumstances, as to be shocking to one's sense of fairness." In re Geiger at 7 quoting In the Matter of Polk, 90 N.J. 550, 578 (1982).

Dr. Allen notes that this case does not include racially charged statements, but does include profanity or an edited stand-in for profanity, i.e. f***. As noted above, Dr. Allen's situation is not analogous to Geiger, but Dr. Allen suggests that it raises factors that must be considered, including whether the statement at issue were directed at students, whether the statements were intended to be heard by students, his prior record, and disparate treatment of other teachers.

In support of a lesser penalty, Dr. Allen also asserts that removal would amount to disparate treatment. Dr. Allen points to another situation in the District where a tenured teacher allegedly swore at her class, then left the class and the school and abandoned her class. Dr. Allen knew about this incident from a former student who was in the class. Dr. Allen was not aware of any of the circumstances surrounding this incident. In that instance, the teacher received a letter of reprimand for a first infraction similar to the letter Dr. Allen received for his misconduct in 2012. Dr. Allen also points to instances where teachers at

HCRHS engaged in misconduct without investigation or charges. These allegations include two different DUIs.

It is difficult to compare the other disciplinary situations that have arisen at HCRHS in recent years because the facts and circumstances are different. It is important to distinguish between these other situations, none of which included retaliation against a student, and the instant case. Those circumstances did not include a teacher's plan to lower a student's grade after a parent sent an email critical of the teacher. I find the other instances of discipline at HCRHS are not comparable and do not support a claim of disparate treatment.

Dr. Allen asserts that his conduct, although regrettable, does not rise to the level of warranting termination in light of all of the circumstances at issue in this case. Dr. Allen cites his distinguished career as a teacher and relatively unblemished disciplinary record. Dr. Allen cites testimony by parents, students and colleagues revealed how Dr. Allen went above and beyond in order to encourage and inspire his students. Dr. Allen also cites the numerous letters of support, as well as the approximately 150 individuals, mostly character witnesses, who were willing and eager to testify on his behalf.

Dr. Allen also sought to put the May 6th email in context by explaining the "stress" he was under both as a result of K.P. and C.N. challenging his teaching and grading all year and stress related to the illness of his eleven year old daughter. Dr. Allen also cites his efforts over the school year to assist C.N., while C.L., her mother continued to complain about his teaching causing him great stress. Dr. Allen emphasizes that the May 6, 2016 email was out of character and an aberration. This helps to explain, but does not excuse, Dr. Allen's conduct on May 6, 2016.

Dr. Allen has offered substantial support for his popularity as a teacher. Indeed, almost 150 individuals, including parents, students and colleagues were prepared to testify to his inspiring teaching ability and good character. Dr. Allen's teaching skills and character are significant and notable, and provide some defense to the pending charges.

The record establishes that Dr. Allen is an exciting and inspiring chemistry teacher who is beloved by many students and parents. Dr. Allen influenced and encouraged many students to pursue a career in science, including many who had been previously discouraged or turned off by science classes. The importance of this teaching skill and character evidence cannot be over emphasized. This evidence might be sufficient to outweigh the angry and disrespectful tone and language of Dr. Allen's May 6, 2016 email as well as his failure to maintain strict confidentiality of student information. It does not

outweigh his apparent threat to retaliate against K.P. for her mother's email to Ms. Batista questioning Dr. Allen's teaching for the remainder of the school year.

Dr. Allen has raised many factors supporting the use of progressive discipline and/or forming a basis to mitigate his termination, most notably his reputation and skills as a science teacher. As noted in In re Stallworth,

> [P]rogressive discipline is not 'a fixed and immutable rule to be followed without question' because 'some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record.'

Threatening or planning to retaliate against a student as a response to criticism from that student's parent is one such infraction. Retaliation by lowering a student's grade or even suggesting that the grade might be lowered eviscerates the trust necessary for teaching and learning to occur. In this instance, Dr. Allen responded to a parent's email critical of his use of class time with a statement that he would lower the student's grade from a "D" to an "F". There can be no mitigation of such apparent retaliation. Although each of the remaining infractions might be mitigated by Dr. Allen's record of exciting and inspiring teaching, the retaliatory language in his May 6, 2016 email, which was copied to the parent of the student at issue cannot be revoked. Likewise, Dr. Allen's reputation and the ability of the Board, parents and students to trust Dr. Allen cannot be rehabilitated. Threatening retaliation against a student is not suitable for progressive discipline.

In sum, I find that Dr. Allen engaged in unbecoming conduct when he threatened retaliation against student K.P., directed profanity at Ms. Batista, his supervisor; violated the confidentiality and privacy of students K.P., C.N. and others, and by disparaging or mocking students in email exchanges with his wife over the District's email server. The significant mitigating circumstances of Dr. Allen's popularity as a teacher might serve to reduce the penalty for most of the proven charges, but cannot overcome the charge that Dr. Allen threatened to lower K.P.'s grade in retaliation for her mother's email to Ms. Batista which angered him. As a result of his threat, which was sent to K.P.'s parent, there is no basis for the Board, parents or students to trust him as a teacher in the future. Accordingly, I find that the Board has established that Dr. Allen has engaged in unbecoming conduct that supports his dismissal from his position as a tenured teacher at HCRHS.

Hunterdon Regional High School
District Board of Education
and Richard D. Allen
Agency Docket No. 191-7/16

AWARD

The Hunterdon Regional High School District Board of Education had just cause to dismiss Dr. Richard D. Allen from employment.

Dated: June 7, 2017
Ocean Grove, New Jersey

Joyce M. Klein

State of New Jersey }
County of Monmouth } ss:

On this 7th day of June, 2017, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

CAROLINE E. GLYNN
NOTARY PUBLIC OF NEW JERSEY
I.D. # 2291875
My Commission Expires 10/1/2017

160-17

160-17L

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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

KIMBERLEY HARRINGTON
Acting Commissioner

June 12, 2017

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[redacted]
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Re: *B.J., on behalf of minor child, T.J. v. State-Operated School District of the City of Newark, Essex County, OAL Dkt. No. EDU 8133-16, Agency Dkt. No. 134-5/16.*

Dear Counsel:

I have considered the papers filed in connection with the respondent's request for interlocutory review of ALJ Richard McGill's Order of May 23, 2017, denying the respondent's motion for summary decision on Count Two of the Amended Petition in the above-captioned matter. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

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

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: Honorable Richard McGill, ALJ
County Superintendent
State Law Library

KH/MKD/JKH
Via Facsimile and Regular Delivery

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division in accordance with the applicable Appellate Division Rules.

161-17M

161-17

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

June 12, 2017

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Re: *In the Matter of the Princeton Charter School's Application to Amend its Charter, ~~Appellate~~ Division Docket No. A-2765-16*

Dear Counsel:

I have reviewed the materials filed in connection with the Princeton Board of Education's (Board) Motion to Stay my February 28, 2017 decision granting Princeton Charter School's (PCS) request to amend its charter, pending appeal of the decision to the Superior Court, Appellate Division.

The February 28, 2017 decision approved an application submitted by PCS to amend its charter, permitting it to: (1) implement a weighted lottery to provide economically disadvantaged students a 2:1 enrollment preference, and; (2) expand enrollment. Thereafter, on March 10, 2017, the Board appealed the decision to the Appellate Division, and on March 17, 2017, the Board requested a stay to enjoin PCS from implementing the weighted lottery and expansion pending resolution of the appeal.

By way of background, PCS has been operating a charter school in Princeton, New Jersey since the 1997-1998 school year. Prior to the February 28, 2017 amendment, PCS had been serving 348 students in grades K through 8, with principal entry points in Kindergarten and 3rd grade. On November 28, 2016, PCS filed an application to amend its charter to implement a weighted lottery and expand enrollment by 76 students. The integrated plan, designed to achieve the goals of diversity and increased access for disadvantaged students, was proposed to phase in beginning in September of 2017.

According to documents submitted in connection with its application, PCS's Charter mission articulates a goal of bridging the gap in achievement that is based on low socio-economic status, yet it was concerned that it wasn't serving a proportionate share of economically disadvantaged students. PCS requested approval to implement a weighted lottery to directly increase the proportion of economically disadvantaged students at PCS, and encourage a larger pool of economically disadvantaged applicants through public awareness.

In addition, PCS sought to add a second section to its Kindergarten and first grade classes for the 2017-2018 academic year; an additional second grade class in 2018-2019. These changes were proposed to remedy a number of practical issues. PCS has a large number of applicants, and must waitlist many students due to an established sibling preference. By expanding enrollment, more families will be given an opportunity to attend, which may also help to diversify the student body.

After PCS submitted its application, the Board filed a complaint in Superior Court on December 27, 2016, citing violation of the Open Public Meetings Act (OPMA). PCS subsequently filed a counterclaim.

On January 30, 2017, the Board sent a letter to the Department contesting the amendment application. The same day, PCS filed a supplemental memorandum in further support of its application. Based on my review of all of the submissions by the parties, I approved PCS's application to amend its charter. According to PCS's brief opposing the stay, once the decision was issued, it began taking certain steps toward implementing the amendment. PCS asserts that it engaged in extensive, multi-lingual outreach, and conducted a lottery for admission for the 2017-2018 school year (including the additional newly approved 54 seats). The results of that lottery were shared with the parents of applicants that same day. PCS also represents in its brief that it entered into a contract with a modular building vendor to accommodate the additional students, and began activities to recruit additional personnel.

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that petitioner has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

Upon review of the parties' submissions, I find that the Board has failed to meet the standard required for a stay of the February 28, 2017 decision, for the reasons set forth more fully below. Accordingly, the Board's request for a stay is denied.

(1) The Board Has Not Demonstrated That It Is Likely to Prevail on the Merits of its Underlying Claim

The Board suggests that the February 28, 2017 approval decision is "insufficient" to withstand scrutiny on appeal, and thus, it is likely to prevail on the merits. The scope of judicial review of agency action is limited. *In the Matter of the Proposed Quest Academy Charter Sch. of Montclair Founders Group*, 216 *N.J.* 370, 386 (2013) (citation omitted). An agency's final decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable. *Id.* Three channels of inquiry inform the appellate review function: (1) whether the agency's action violates express or implied legislative policies; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. *Id.* In this case, as set forth in greater detail below, the record clearly supports the decision to approve PCS's application and so the Board is not likely to prevail on the merits of its appeal.

Many factors are considered in deciding whether to approve a charter school amendment request. Although the overall analysis is holistic, pursuant to *N.J.S.A.* 18A:36A-1 *et seq.*, I chiefly consider the charter school's potential to improve pupil learning and increase the educational options available to New Jersey families. My decision to approve PCS's application was specifically informed by a review of

student performance on statewide assessments, operational stability, fiscal viability, public comment, and fiscal impact on sending districts.

A. Performance on Statewide Assessments

Student performance at PCS is remarkable. In weighing the amendment request, we analyzed the performance of PCS students on statewide assessments over a four year period. In 2012-13 and 2013-14, PCS received the highest rank possible based on the standards outlined in the Office of Charter and Renaissance School's Performance Framework – a Tier Rank 1. In 2014-15 and 2015-16, based on PARCC results, the school outperformed both the state and home district of Princeton in English language arts (ELA) and mathematics in the elementary grades 3-5 and middle grades 6-8. For the 2015-16 school year, PCS students ranked in the 99th percentile statewide for ELA and the 100th percentile statewide for math on the PARCC. Even though PCS only serves students in grades K through 8, 95 percent met or exceeded expectations in Algebra 1, and 100 percent of them met or exceeded expectations in Geometry. The school-wide median growth scores in both subjects exceeded statewide averages. Student growth in 2015-16 was 67 in ELA and 66 in math, above the statewide median of 50 in both subjects.

B. Operational Stability

PCS's initial charter was granted in 1997 and the school is currently in its 20th year of operation. After the first initial four year charter term, PCS has undergone comprehensive reviews every five years. The most recent comprehensive review was performed in 2015-16, when the school was granted another charter term. There is no record of PCS ever receiving a warning of probation or being placed on probation during its twenty years of operation.

The record reflects a strong community demand for additional enrollment slots. Pursuant to *N.J.A.C.* 6A:11-2.2, all charter schools are required to submit an annual report including, among other things, enrollment data and the number of applicants who were placed on a waitlist in accordance with *N.J.A.C.* 6A:11-4.5. In considering PCS's amendment application, the Department analyzed the reports submitted by PCS between 2013 and 2015 and found that enrollment has remained at or near maximum each year. Further, the school has maintained a waitlist in each of those years of between 92 to 133 students, suggesting a strong demand for the charter school within the community. PCS has requested an increase of 54 students for the 2017-18 school year, and an additional 22 students for the 2018-19 school year for a total of 76 additional students. According to the most recent annual report (from 2015-16), 122 students were waitlisted that year. That is nearly twice the number of additional seats requested through 2019, indicating that PCS has the potential to easily fill the slots.

PCS's former (pre-amendment) admissions policy allowed for 19 new students in kindergarten, two in first grade, one in second grade, and 24 in third grade. According to the amendment request, and confirmed by the grade delineated waitlist numbers, parents are less inclined to move their children from the Princeton Public School elementary schools in third grade due to disruption in academics, social relationships, and in the case of disadvantaged students, services they may be receiving in the District's schools. The amended enrollment configuration allows for a greater number of students to be enrolled in kindergarten, reducing the number of students who would suffer a break in educational continuity during the elementary school years.

In its amendment request, PCS indicated that there would be no change to the current administrative structure. However, to accommodate the additional students, the school will add instructional and special education positions. PCS's history of successful comprehensive charter reviews, record of outstanding academic results, desirability in the community, and implementation of a weighted

lottery, all support the conclusion that the current administrative structure will not only support the expansion request, but also provide the community with a greater opportunity to serve its economically disadvantaged students.

C. Fiscal Viability

Since 2012, PCS has remained at or near maximum enrollment every year. Between 2012 and 2016, final enrollment counts were between 344 and 348. Such consistently high enrollment assists the school in maintaining a fund balance year after year. The school's financial stability is corroborated by a review of the independent audits submitted annually to the Department since 2012 (the review period), none of which resulted in any findings.

D. Public Comment

Pursuant to *N.J.A.C.* 6A:11-2.6(c), the Board exercised its right to submit comments regarding the amendment request. I also received correspondence from members of the public whose children attend Princeton Public School District. In assessing PCS's request, my staff and I reviewed the public comments that we received both in favor of the amendment request, and opposed to it. I took those opinions into account when making my determination, in conjunction with the other factors, as part of a holistic analysis.

E. Fiscal Impact on Sending Districts

Based on the October 15, 2016 count, there were approximately 348 students enrolled at PCS. The expansion request increased PCS enrollment to the requested 424 students. Assuming stable enrollment in the Princeton Public School district (which has a current resident enrollment of 3,672) this would result in a minor increase of the district's enrollment going to PCS through 2022. The impact on the sending district would be an approximate 2 percent enrollment reduction over the next four years.

Because the February 28, 2017 decision is supported by the record and is not arbitrary or capricious, PPS is unlikely to prevail on the merits of its appeal, and thus, the stay must be denied. Moreover, the February 28, 2017 decision is sufficient. *N.J.A.C.* 6A:11-2.6 governs amendments to charters, and provides that the Department shall determine whether amendments are eligible for approval, and evaluate the amendments based on the Charter School Program Act, *N.J.S.A.* 18A:36A-1 *et seq.*

> [T]he Commissioner may approve or deny amendment requests of charter schools and shall notify charter schools of decisions. If approved, the amendment becomes effective immediately unless a different effective date is established by the Commissioner.
>
> [*N.J.A.C.* 6A:11-2.6(d) (emphasis added)].

The Board's argument that the February 28 decision will be overturned as "insufficient" fails to acknowledge the distinction between the level of detail required in decisions approving amendment or renewal applications, versus decisions to deny initial charter school applications. Decisions approving amendment or renewal applications need not set forth detailed or formalized reasoning, because the school's performance record is available for evaluation. Therefore, the supposition and predictions that necessarily permeate the approval process for initial applications no longer exist. *See I/M/O Grant of Renewal Application of the Red Bank Charter Sch., Monmouth Cnty.*, 367 *N.J. Super.* 462, 474-75 (App. Div. 2004).

An extensive record was available to support the approval of PCS's request, including standardized test scores, a history of successful comprehensive reviews conducted pursuant to charter term renewals, annual waitlist figures, enrollment data, and audits.

(2) The Board Has Not Shown That It Will Suffer Immediate Irreparable Harm if a Stay Is Not Granted

The Board articulates three alleged harms that would occur if a stay is not granted. First, it asserts that a PCS expansion will require the Board to begin paying more tuition for charter school students, resulting in concomitant budget cuts requiring the elimination of programs and staff. The funding impact of charter school enrollment on public schools was contemplated by the Legislature as an appropriate allocation of resources to foster the policy goals of the Charter School Program Act, *N.J.S.A.* 18A:36A-1 *et seq.* *See N.J.S.A.* 18A:36A-12; *N.J.S.A.* 18A:36A-2. Financial impact is only a basis for denying a charter amendment application if the District can make a preliminary showing that the effect of funding a charter school would render the district unable to provide a thorough and efficient education to the pupils it serves. *See In Re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 *N.J.* 316 (2000). Here, the Board has made no such claim. The only issue the Board raises is a concern that a denial of the stay could result in layoffs, and the same teachers that may be laid off may not be available for rehire should the Board ultimately prevail in its appeal. The Board has not suggested that the amendment would impact its ability to provide a thorough and efficient education. Princeton Public Schools are the 5th highest spending district in the state for a district of its size, and one of the top rated school districts in the State. The district spends approximately $24,000 annually per pupil—around 25 percent more than the statewide average of $19,000. The PCS expansion will only result in a two percent reduction in the Board's budget through 2022.

In the absence of showing harm to itself, the Board asserts potential harm on behalf of students, and, remarkably, PCS as a basis for the stay. These alleged harms fail to meet the *Crowe* standard: whether the movant will suffer irreparable injury. The Board asserts that if a stay is not granted, the additional students enrolled in PCS would suffer from a break in educational continuity if the Board prevails and they must be returned to the District. However, as discussed at length above, the Board is unlikely to prevail on the merits of its appeal. In the unlikely event the Board does prevail, nothing prevents the Appellate Division from fashioning an Order that would prevent a mid-year disruption in affected students' education.

Finally, the Board's suggestion that PCS itself faces a risk of harm if the stay is not granted is meritless. PCS has full knowledge of the risk in implementing an expansion project while an appeal is pending, and chooses to move forward based on its assessment of that risk.

(3) The Board Has Not Established the Remaining *Crowe* Factors

Balancing the equities, PCS has taken steps in reliance on the decision, and a stay would disrupt the reasonable expectations of families that are planning to send their children to PCS in the upcoming school year. The Board has also failed to demonstrate that the legal right underlying its claims is well-settled. As demonstrated above, the record supports the approval of a weighted lottery in favor of economically disadvantaged students, and expanded enrollment to further goals of diversity.

Accordingly, as the Board has not demonstrated that it is likely to prevail on the merits of its underlying claim, and has not satisfied any of the other *Crowe* factors, its request for a stay of the February 28, 2017 decision is hereby DENIED.*

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

KH/MKD/BON

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

164-17

OAL DKT. NO. 07078-16
(EDU 9446-12 ON REMAND)
AGENCY DKT. NO. 148-5/12

TRENTON EDUCATION ASSOCIATION, NAOMI JOHNSON-LAFLEUR, TWANDA TAYLOR AND BENJAMIN JENKINS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's May 9, 2016 determination that the prior Settlement Agreement did not comply with *N.J.A.C.* 6A:3-1.13, as it was signed by Naomi Johnson-Lafleur on behalf of the petitioners, without evidence that petitioners had authorized Naomi Johnson-Lafleur to sign the Agreement on their behalf; neither did the Settlement Agreement contain a signature of petitioners' attorney, who is their duly authorized representative in this litigation. Since the Agreement now contains the signatures of all the petitioners in this matter, the Commissioner can approve the within Agreement in its present form.

Accordingly, the Commissioner approves the settlement terms, and adopts the Initial Decision as the final decision in this matter. The matter in hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/15/17
Date of Mailing: 6/16/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07078-16

(ON REMAND OAL DKT. NO. EDU 09446-12)

AGENCY DKT. NO. 148-5/12

TRENTON EDUCATION ASSOCIATION, NAOMI JOHNSON-LAFLEUR, TWANDA TAYLOR AND BENJAMIN JENKINS,

Petitioners,

v.

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

Respondent.

Aileen O'Driscoll, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Perry L. Lattiboudere, Esq., for respondent (Adams Gutierrez and Lattiboudere, LLC, attorneys)

Record Closed: April 17, 2017 Decided: May 1, 2017

BEFORE **PATRICIA M. KERINS**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on May 10, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

May 1, 2017
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: 5/2/17

Date Mailed to Parties: 5/2/17

/mel

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 623-1822
Attorneys for Petitioners

TRENTON EDUCATION ASSOCIATION, NAOMI JOHNSON-LAFLEUR, President of the Trenton Education Association, TWANDA TAYLOR, Resident Taxpayer, and BENJAMIN JENKINS, a Resident and Parent Petitioners, v. BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION AGENCY DOCKET NO.: 148-5/12 OAL Docket No.: EDU 09446-2012 S EDU 07078-16 SETTLEMENT AGREEMENT

As the result of a Petition of Appeal filed by the Petitioners against the Respondent, the Trenton Board of Education, before the Commissioner of Education, alleging violations of N.J.A.C. 6A:13-3.1, and an Answer having been filed by Respondent, and the matter having been transmitted to the Office of Administrative Law, and the parties having resolved their differences in connection with the Petition of Appeal, and in full and final settlement of the above captioned matter, but without prejudice in asserting any future claims that may occur, the parties hereby agree to resolve the dispute as follows:

1. The Trenton Board of Education shall abide by and comply with the class sizes set forth in N.J.A.C. 6A: 13-3.1;

2. The Trenton Board of Education, in conjunction with representatives from the Trenton Education Association will establish schedule and conduct meetings on a monthly basis during which the issue of class size shall be reviewed and discussed.
3. At each meeting (or if a meeting for some reason does not occur on a given month), a report shall be generated through the PowerSchool or comparable portal system and distributed to the Trenton Education Representatives.
4. The report shall include a school by school and teacher by teacher breakdown of class sizes; and notice of registrations/transfers, and shall be generated for grades k-12.
5. The Enrollment committee shall be comprised of the following representatives:
    a. State Fiscal Monitor, or one of his/her representatives with decision-making authority;
    b. The Superintendent of Schools, or his/her designee;
    c. A representative from the Data and System Management office responsible for or with knowledge of enrollment data;
    d. A member of the Board of Education;
    e. A member of the Trenton Administrator's Supervisors Assn.;
    f. A member(s) of the Trenton Education Association;
    g. Representative(s)s from the Paraprofessional Assn.;
    h. System, Data Management and Accounting representative
6. If a report indicates that action is warranted, the District shall remedy any violation of the law within seven (7) business days of the notice of the violation, and if no such action is taken in a timely manner, the Petitioners may, upon an Affidavit submitted by Petitioners, seeking to enforce this Agreement, before the Superior Court, and seek a judgment accordingly;
7. An agenda and minutes shall be kept and made available to the members of the committee or its designee(s) on a regular and monthly basis.

8. Upon the execution and final approval of this settlement agreement, it shall be read to and incorporated as a part of the minutes of the then scheduled enrollment committee meeting.
9. The PowerSchool (or alternate portal system that may be used in the future) shall set caps that are consistent with any and all laws and regulations which address class size, including, but not limited to N.J.A.C. 6A:13-3.1.

On behalf of the Petitioners Dated

Naomi Johnson-Lafleur 3-22-17

Printed Name

Naomi Johnson-Lafleur

_____

On behalf of the Respondent Dated

_____ _____

Printed Name

_____

9. The PowerSchool (or alternate portal system that may be used in the future) shall set caps that are consistent with any and all laws and regulations which address class size, including, but not limited to N.J.A.C. 6A:13-3.1.

Twanda Taylor — 3-22-17

On behalf of the Petitioners — Dated

Twanda Taylor — 3-22-17

Printed Name — Dated

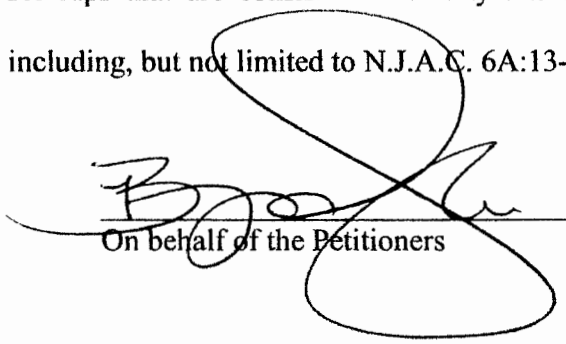
_____ — _____

On behalf of the Respondent — Dated

_____ — _____

Printed Name — Dated

9. The PowerSchool (or alternate portal system that may be used in the future) shall set caps that are consistent with any and all laws and regulations which address class size, including, but not limited to N.J.A.C. 6A:13-3.1.



On behalf of the Petitioners — Dated 3.22.17

Benjamin Jenkins — Dated 3.22.17
Printed Name

On behalf of the Respondent — Dated

Printed Name — Dated

165-17

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

GLENN CIRIPOMPA,
SCHOOL DISTRICT OF THE BOROUGH
OF BOUND BROOK, SOMERSET COUNTY

Agency Docket #177-7/14

Walt De Treux, Esq., Arbitrator

Exhibits and Briefs Received: 5/15/17
Decision Date: 6/16/17

Appearances: For the School District – Robert J. Merryman, Esq., APRUZZESE McDERMOTT
For the Respondent – Arnold M. Mellk, Esq.; Edward A. Cridge, Esq. and Gidian R. Mellk, Esq. (on brief), *MELLK O'NEILL*

Procedural History

On July 14, 2014, the Bound Brook Board of Education considered tenure charges against Bound Brook High School math teacher Glen Ciripompa. The charges alleged conduct unbecoming a teacher related to Respondent's inappropriate use of the District's computer network and his District-provided computer and IPad (Count I) and inappropriate interactions with female staff members (Count II). The Board of Education found merit to the charges and certified the charges to the New Jersey Commissioner of Education. An arbitrator was assigned to hear the charges, and hearings were conducted in September 2014. On October 20, 2014, the Arbitrator issued an Award finding that the District proved the allegations in Count I, but failed to prove the allegations in Count II because Respondent's interactions with the female staff members did not "meet the generally recognized definition of *hostile environment sexual harassment." (emphasis in original)* As to Count I, the Arbitrator found that the District had not

shown that the charges "justify the removal of Respondent from his tenured teaching position." His finding was based, in part, on the testimony of a psychiatrist, who testified that Respondent "understood his lapse in judgment and was extremely unlikely to engage in the behavior again." He reduced the disciplinary penalty to a suspension without pay of 120 days.

The District filed an action in the Superior Court of New Jersey to vacate the Award. On January 8, 2015, the Court responded affirmatively, vacating the Award because the Arbitrator erroneously considered the conduct under New Jersey's sexual harassment laws, improperly excluded evidence related to a Twitter posting that prompted the District's investigation into Respondent's computer use, and allowed and relied on testimony from the psychiatrist. The Court remanded the case to be heard by a different arbitrator.

The Superior Court was reversed by the Appellate Division on October 29, 2015, and the Award was reinstated. On February 21, 2017, the New Jersey Supreme Court reversed the Appellate Division. The Award was once again vacated and remanded to a different arbitrator.

After the initial remand, the undersigned Arbitrator was appointed to hear the case, but the matter was held in abeyance pending the appeal process. After the Supreme Court decision, the arbitration process resumed. The parties agreed to forego further hearings. Instead, they submitted the transcripts and exhibits from the earlier hearings, excluding the testimony of the psychiatrist and admitting the previously-excluded Twitter post. The parties filed briefs in support of their respective positions, and the matter was submitted to the Arbitrator for a decision.

Statement of Relevant Facts

During the 2013-14 school year, a teacher/coach in the School District reported to then-Assistant Superintendent Daniel Gallagher that a student/athlete had told him about a Twitter posting that indicated Bound Brook teacher "Mr. C" (as Respondent is often called) was "sending out nudes." Dr. Gallagher instructed the Director of Technology to retrieve Respondent's laptop computer. The laptop was turned over to Dr. Gallagher, who conducted a search and found "probably a hundred or more emails with photos attached." The photos included pictures of "[n]aked women, body parts. Sexual body parts."

Dr. Gallagher reported his findings to the Superintendent, who instructed him to contact the Bound Brook Police Department. The police and the local prosecutor's office arrived at the school and took possession of Respondent's laptop and IPad. Dr. Gallagher retrieved copies of the emails and photos from the District's server. The District submitted into evidence 183 pages of emails and photos that were of a sexual nature. Only a few were sent during the school day, but all were sent or received on the District's computer network through Respondent's laptop or IPad.

During the same school year, the District investigated several complaints from female staff members regarding interactions with Respondent that they deemed inappropriate and made them feel uncomfortable.

ESL teacher Kristin Brucia testified that Respondent would "come up behind me and whisper that I looked nice that day or it was a nice dress or something close to my ear quietly." On Valentine's Day two years earlier, he had bought carnations from students for a fundraiser and had them delivered to her by students with anonymous notes. Later in the day, he sent her

an email revealing that he had purchased the carnations and wishing her a nice Valentine's Day. She thanked him for the flowers, but told him she had a boyfriend. Before Mother's Day one year, he told her he was sending his wife to a spa for the day and asked if she wanted to bring her sons to a play date with his son. She declined.

Special Education teacher and softball coach Alexandra Shafi reported to the Athletic Director that Respondent, in the presence of two students, asked her if she "wanted to go out with him after the softball game." She refused, and he asked again. She replied no again. Later that day, he attended the softball game for a short period of time, which gave her "an eerie feeling."

Music teacher Marian Stewart testified that Respondent made her "uncomfortable" when he made a joking comment, in the presence of a student, implying that her pants were too tight.

Art teacher Elizabeth Levering testified that Respondent overheard her conversation with a co-worker about her boyfriend's work travel. Respondent approached her and offered his assistance "if I needed anything while the boyfriend was away." Another time, while she was hanging art projects, Respondent "was in my personal space a little bit" and told her "how good I looked in a pair of jeans."

The discovery of sexually related emails on his computer and IPad and the reports from female staff members of inappropriate interactions led the District to file the tenure charges for conduct unbecoming a teacher.

Issue

Has the School District of Bound Brook Borough established the allegations of conduct unbecoming against Respondent Glenn Ciripompa as set forth in the tenure charges? If so, do those charges warrant dismissal? To what remedies are the parties entitled?

Relevant Board of Education Policies

3321 – ACCEPTABLE USE OF COMPUTER NETWORKS/COMPUTERS AND RESOURCES BY TEACHING STAFF MEMBERS

***

Standards for Use of Computer Network(s)

Any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s) /computers shall be subject to discipline or legal action;

A. Using the computer network(s)/computers for illegal, inappropriate or obscene purposes, on in support of such activities. Illegal activities are defined as activities which violate federal, state, local laws and regulations. Inappropriate activities are defined as those that violate the intended use of the network(s). Obscene activities shall be defined as a violation of generally accepted social standards for use of publicly owned and operated communication vehicles.

***

Violations

Individuals violating this policy shall be subject to appropriate disciplinary actions as defined by Policy No. 1350, Discipline which includes but are not limited to:

1. Use of the network(s)/computers only under direct supervision;
2. Suspension of network privileges;
3. Revocation of network privileges;
4. Suspension of computer privileges;
5. Revocation of computer privileges;
6. Suspension;
7. Dismissal;
8. Legal action and prosecution by the authorities; and/or
9. Any appropriate action that may be deemed necessary as determined by the Superintendent and approved by the Board of Education.

3362 – SEXUAL HARASSMENT (M)

...Offensive speech and conduct are wholly inappropriate to the harmonious employment relationship necessary to the operation of the school district and intolerable in a workplace to which the children of this district are exposed.

Sexual harassment includes all nonwelcome sexual advances, requests for sexual favors, and verbal or physical contacts of a sexual nature that would not have happened except for the employee's gender...

The sexual harassment of any employee of this district is strictly forbidden. Any employee or agent of this Board who is found to have sexually harassed an employee of this district will be subject to discipline which may include termination of employment...

4281 – INAPPROPRIATE STAFF CONDUCT

***

School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils...

***

The Commissioner of Education had determined inappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Therefore, school staff members are advised to be concerned with such conduct which may include, but are not limited to, communications and/or publications using e-mails, text-messaging, social networking sites, or any other medium that is directed and/or available to pupils or for public display.

A school staff member is always expected to maintain a professional relationship with pupils and school staff members shall protect the health, safety and welfare of school pupils...

Analysis and Decision

Respondent did not testify at the arbitration hearing. Accordingly, the evidence and testimony offered by the School District is uncontroverted. The issue, therefore, is whether the proven conduct constitutes conduct unbecoming a teacher; and if so, does it warrant dismissal? In the appeal of the first arbitration award in the present case, the New Jersey Supreme Court addressed the standard for unbecoming conduct as follows,

> "A charge of unbecoming conduct requires only evidence of inappropriate conduct by teaching professionals. It focuses on the morale, efficiency, and public perception of an entity, and how those concerns are harmed by allowing teachers to behave inappropriately while holding public employment." *Bound Brook Board of Education v. Ciripompa,* 288 N.J. 4, 14 (2017)

Count I – Network/Computer Use

There is no real dispute that Respondent's use of the School District computer and IPad and the District's computer network to send and receive emails of a sexual nature, including naked photos, is inappropriate conduct by a teaching professional and constitutes conduct unbecoming. Although Respondent argues that his conduct does not warrant dismissal, he does not challenge the conclusion that he engaged in unbecoming conduct. Even though he does not contest the charge of conduct unbecoming, it is necessary to highlight the number and nature of those emails to appreciate the severity of Respondent's infractions.

The District submitted 183 pages of inappropriate emails and emailed photos. Respondent notes that only 4 emails were sent during the school day (another 13 were received during the school day), and none were sent when Respondent had students in the classroom. But whether they were sent during or outside the school day, the fact remains that

all the emails were sent or received on a District computer and IPad and on the District's network in clear violation of the Acceptable Use Policy.

The emails were directed at contacting and engaging sex partners through craigslist or other websites and included Respondent and the potential sex partners exchanging naked or near naked photos. I see no reason to repeat in this Award, which will become public, the exact quotes from the emails. But in many instances, Respondent contacted the potential sex partners, and they asked him to verify his age and identity through certain websites. In at least one case, a woman quoted prices for her services; and in others, the potential sex partners and/or Respondent described the sexual activities in which they wanted to engage. Many of the emails included naked pictures of the potential sex partners and pictures of Respondent.

The District Policy on Acceptable Use of Computer Network(s)/Computers clearly prohibits any use for illegal, inappropriate, or obscene purposes. Although, as noted, at least one potential sex partner quoted prices for her services, the District cannot show that Respondent's computer activities were illegal in any way. The police and prosecutor were called into the case, and the record does not indicate that Respondent was ever charged with criminal activity. The emails, however, are clearly inappropriate and obscene as defined by the Policy.

"Inappropriate activities" indicate any activities "that violate the intended use of the network(s)." The Policy states, "The Board provides access to computer network(s)/computers for administrative and educational purposes only." Solicitation of sex serves no administrative or educational purpose for the benefit of the District or its students.

"Obscene activities" are defined as "a violation of generally accepted social standards for use of *publicly owned and operated* communication vehicles." *(emphasis added)* If Respondent engaged in these activities through his own computer, the District would arguably have no basis for discipline absent some greater nexus to the workplace. But Respondent sent these emails and photos on District computers and on the District network for his own purposes. It seems obvious to state that the use of the District computers and network to engage in personal behavior of a sexual nature is in violation of generally accepted social standards, and therefore, constitutes "obscene activities" under the Policy.

Respondent's use of the District's computer network and computers for these purposes is inappropriate conduct for a teaching professional and in violation of the Acceptable Use policy. For these reasons, I find that the District has established the allegation of conduct unbecoming in Count I of the tenure charges.

Count II – Interaction with Female Staff

Respondent challenges the assertion that his interactions with female staff members Brucia, Shafi, Stewart, and Levering were inappropriate and constituted conduct unbecoming.

The Inappropriate Staff Conduct Policy requires staff to "be appropriate at all times" when completing their professional responsibilities. It focuses mainly on interaction with students, but cautions that staff "shall not engage in inappropriate language or expression in the presence of pupils." The Sexual Harassment Policy recognizes "[o]ffensive speech and conduct" as "wholly inappropriate;" and it defines sexual harassment to include "unwelcome sexual advances" and "verbal or physical contacts of a sexual nature."

Respondent violated those policies in his interactions with female staff. Respondent would come up behind Brucia and whisper comments about her physical appearance or dress. If he was simply complimenting her, his behavior may be viewed innocently. But the fact that he came up to her from behind and whispered "close to my ear quietly" is more indicative of contact of a sexual nature. He also sent her carnations with his identity unknown to her but known to the students who sold the carnations and had to deliver them to Brucia – an inappropriate expression in the presence of the students in violation of the Inappropriate Conduct Policy. Finally, he suggested a play date between their sons because he had send his wife away for the day – a suggestion that could reasonably be taken as an unwelcome sexual advance when considered in light of his other inappropriate behavior toward Brucia.

Despite Shafi's "eerie feeling," Respondent's attendance at her softball game does not violate any policy, particularly since he did not engage in any inappropriate activity at the game. But he asked her out on a date in the presence of students – another clear violation of the Inappropriate Staff Conduct Policy. It may be acceptable to ask her out, but it was wholly inappropriate to do so in front of students.

Similarly, he made a joking reference to Stewart's tight pants, which should not have been done in front of a student. The student questioned Stewart as to the meaning of Respondent's comment, which drives home the point that the behavior was inappropriate in front of the student and was in violation of the Inappropriate Staff Conduct Policy.

Respondent's offer of assistance to Levering while her boyfriend was away is subject to interpretation. It may be a kind offer of help, or it may be an unwelcome sexual advance, depending on how it was said and intended. There is not enough evidence to label it a violation

of policy. But his comment about how good she looked in jeans while standing "in [her] personal space" is similar to his quiet whisper into Brucia's ear. The context and substance of the comment suggest an unwelcome sexual advance or contact of a sexual nature in violation of the Sexual Harassment policy.

The policies define and regulate appropriate conduct among and between staff. Violations of the policies, by definition, constitute inappropriate conduct by a teaching professional. Accordingly, I find that the District has established the allegation of conduct unbecoming in Count II of the tenure charges.

Appropriate Disciplinary Penalty

The egregiousness of Respondent's behavior should be evident. Entrusted with the education of high school students and expected to further the mission of the School District, he used District resources and equipment for his own personal use and in a manner that would be offensive to students, parents, and the public. He engaged in personal and private matters on the District's time and over the District's computer network. The exchange of naked pictures and the search for sex partners have no place in an educational setting. He blatantly disregarded and repeatedly violated District policies. His interactions with female co-workers were unwelcome, made them feel uncomfortable, and caused them to try and avoid him during the school day. Because of the number of times he used the computer for inappropriate reasons and the number of times he conducted himself inappropriately with female staff, his behavior cannot be attributed to a lapse in judgment. Rather, his conduct demonstrated a

pattern of willful violations of policy and an astounding lack of any sense of boundaries for a teaching professional who is well-trained in the appropriate conduct expected of him.

Respondent cites *In re Fulcomer,* 93 N.J. Super. 401 (App. Div. 1967) for its holding that a determination of penalty requires consideration of the nature and gravity of the offense under all the circumstances involved; any extenuating or aggravating circumstances; and the harm or injurious effect the conduct may have had on the maintenance of discipline and the proper administration of the school system. (at 422) The paragraph above adequately captures the serious nature and gravity of the Respondent's infractions. He has offered no mitigating circumstances or other justification or explanation for his behavior. And as the District argues, he has shown no remorse for his actions. The repetitive nature of the violations serve as aggravating circumstances. And his actions had an injurious effect on the maintenance of discipline and the proper administration of the school. Respondent's actions led the District to conduct an investigation that led to an embarrassing and shocking discovery, compelled the District to contact local police and prosecutor, would tend to negatively affect the public's view of the District and its administration and staff if it learned of the conduct, and revealed the uncomfortable and humiliating situations in which he placed female staff in the presence of students.

Courts have held that focus in determining the penalty should be on the employee's fitness to discharge the duties and functions of his position. *In re Grossman,* 127 N.J. Super. 13, 29 (App. Div. 1974); *In re Young,* 202 N.J. 50 (2010). Respondent's computer activities, repeated numerous times in willful disregard of the Acceptable Use Policy, call into serious question his fitness as a teacher. His lack of any sense of boundaries and his abdication of his

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

GLENN CIRIPOMPA,
SCHOOL DISTRICT OF THE BOROUGH
OF BOUND BROOK, SOMERSET COUNTY

Agency Docket #177-7/14

Walt De Treux, Esq., Arbitrator

Exhibits and Briefs Received: 5/15/17
Decision Date: 6/16/17

Affirmation

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

Walt De Treux

WALT De TREUX

166-17

OAL DKT. NO. EDU 17188-16
AGENCY DKT. NO. 257-9/16

R.B. and J.B., on behalf of minor child, K.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/19/17

Date of Mailing: 6/20/17

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 17188-16

AGENCY DKT. NO. 257-9/16

R.B. AND J.B. ON BEHALF OF MINOR CHILD, K.G.,

Petitioners,

v.

TOWNSHIP OF MAHWAH BOARD OF EDUCATION, BERGEN COUNTY,

Respondent.

Linda George, Esq. for petitioners (Law Office of Linda George, attorney)

Marc. H. Zitomer, Esq. for respondent (Schenck, Price, Smith and King, attorneys)

Record Closed: May 3, 2017 Decided: May 3, 2017

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 14, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

May 3, 2017
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: 5-4-17

Mailed to Parties: MAY 4 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

2017 MAY -3 P 12:34

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for Respondent
Mahwah Board of Education

R.B. and J.B. o/b/o K.G., Petitioner, v. MAHWAH BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OAL Dkt. No. EDU 17188-16 Agency Ref. No. 257-9/16 SETTLEMENT AGREEMENT

This Agreement is made and entered into by and between Petitioners, R.B. and J.B., individually and on behalf of K.G., a minor child, and the Respondent, Mahwah Board of Education ("Board").

RECITALS

WHEREAS, in or about September of 2016, Respondent Mahwah Board of Education determined that minor student K.G. was not domiciled in the Mahwah School District ("District") and thus not entitled to a free, public education in the District, and therefore denied enrollment for K.G.; and

WHEREAS, Petitioner thereafter commenced an administrative action to challenge the Board's residency determination with regard to K.G.; and

WHEREAS, this administrative action is captioned R.B. and J.B. o/b/o K.G. v. Mahwah Board of Education, and is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 17188-16, Agency

Dkt. No. 257-9/16 ("the Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, having carefully reviewed and considered the information provided by Petitioners in connection with the Litigation, and taking all facts presented therein as true, the Board has determined that K.G.'s mother is domiciled in the District as will K.G. once this agreement is approved, and is therefore eligible to receive a free, public education in the District; and

WHEREAS, by this Agreement, Petitioner will voluntarily dismiss the Litigation with prejudice, without costs to any party as against the other;

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. The Parties mutually agree that K.G. shall be eligible for a free, public education in the District only if K.G.'s parent(s) and K.G. continue to be domiciled in the District.
2. The Board reserves all rights, as provided by statute, to commence disenrollment procedures against K.G. if it is found that K.G. and K.G.'s parent(s) are not domiciled in the district, pursuant to N.J.S.A. 18A:38-1(a).
3. Petitioners acknowledge and agree that K.G., like all District students, is subject to residency verification to determine whether K.G. and her parent(s) remain domiciled in the District.
4. The Parties further acknowledge and agree that if K.G. is enrolled in the District, but K.G. and her parent(s) are not domiciled in the District, the Board reserves its right to

assess tuition for any period of ineligible attendance consistent with the provisions of N.J.A.C. 6A:22-6.1.

5. Petitioners, in consideration of this Stipulation of Settlement, and in full, final, and complete settlement of the matter, hereby agree to a withdrawal and/or dismissal, with prejudice, of their Petition of Appeal in this matter.

6. This Agreement is subject to approval by the Mahwah Board of Education. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

7. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

8. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

9. Petitioners warrant that they have the authority to enter into this Agreement individually as well as on behalf of K.G. and her parents.

10. This Settlement may be subject to the approval of the Office of Administrative Law and the Commissioner of Education. In the event that such approval is necessary, the terms of this Agreement shall not be binding until said approvals are received.

11. This Agreement shall be binding upon all parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors, predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, *shareholders, members, employees, agents and assigns.*

12. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements,

understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioners and Respondent.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, consisting of four pages, effective on the day and year first above written.

PETITIONERS

Date: 3/21/17

R.B., Petitioner

Date: 3/21/17

J.B., Petitioner

FOR RESPONDENT,
MAHWAH BOARD OF EDUCATION

Date: 4/26/17

Kim Barron, Board President

EXTRACT FROM THE MINUTES OF A MEETING OF THE
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH,
BERGEN COUNTY, N.J. AS RECORDED IN THE
OFFICIAL MINUTE BOOK

The Board of Education of the Township of Mahwah in the County of Bergen, New Jersey, convened in public session Monday, April 26, 2017, at 7:00 p.m. in the Administrative Offices, 60 Ridge Road, Mahwah, New Jersey.

The following members of the Mahwah Board of Education were present:

Mesdames Konikow, Mavretish, Moorthy and Barron
Messrs. DeSilva Dinice, Kezmarsky and Wendrychowicz

The following member of the Mahwah Board of Education was absent:

Mr. Galow

The following resolution was moved by Mr. Wendrychowicz, seconded by Ms. Mavretish.

SETTLEMENT AGREEMENT – (04-055-16/17)
RESOLVED: that the Board of Education hereby approves the Settlement Agreement in the matter captioned R.B. and J.B. o/b/o K.G. v. Mahwah Board of Education, OAL Docket No. EDU17188-16, in accordance with the terms and conditions therein; and

Be it further resolved that the Board President is hereby authorized to execute the Agreement on behalf of the Board.

ROLL CALL VOTE on the above resolution. Motion carried 8-0.

STATE OF NEW JERSEY)
COUNTY OF BERGEN)

I, Kyle J. Bleeker, Secretary of the Board of Education of the Township of Mahwah, in the County of Bergen, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Mahwah Board of Education duly called and held on Wednesday, April 26, 2017, has been compared by me with the original minutes as officially recorded in my office in the minute book of said Mahwah Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract. In witness I have hereunto set my hand and affixed the corporate seal of the Mahwah Board of Education this 3rd day of May 2017.

SEAL

Kyle J. Bleeker
Business Administrator/Board Secretary

OAL DKT. NO. EDU 06241-17
AGENCY DKT. NO. 85-5/17

DREW PACKARD,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

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

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/19/17
Date of Mailing: 6/20/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 06241-17
AGENCY DKT. NO. 85-5/17

DREW PACKARD,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,
Respondent.

Carol R. Smeltzer, Esq., for petitioner (Foundation for Education Administration, attorneys)

Arlene Quinones Perez, Esq., for respondent (Decotis, Fitz, Patrick and Cole, L.L.P., attorneys)

BEFORE **PATRICIA M. KERINS**, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF FACTS

This emergent matter arises from a dispute between petitioner Drew Packard (Packard) and the Board of Education of the Borough of Carteret (Board) in which Packard challenges the Board's decision to suspend him from his position as a Supervisor of Buildings and Grounds and seeks immediate reinstatement to his position. Packard, who has worked for the Board since 1974, is currently employed as Supervisor of Buildings and Grounds. He is a tenured employee.

At a meeting on April 26, 2017, the Board voted to suspend Packard indefinitely and without pay, beginning on April 27, 2017, "for theft of services from the District as well as creating a hostile work environment for the employees in Building and Grounds."[1] Certification of Martin Murray, Board President, ¶ 3. The Board's Superintendent, Kevin Ahern, was present at the meeting, but he neither affirmatively recommended nor opposed Packard's suspension. Id. at ¶¶ 5, 7; Certification of Kevin Ahern, ¶¶ 2-3. After the meeting, Superintendent Ahern notified another Board employee, Jon Toth, that he would assume Packard's duties "until further notice." April 26, 2017, Email from Ahern to Jon Toth, P-1.

On May 3, 2017, Packard filed with the Commissioner of Education a petition of appeal and a request for emergent relief seeking his immediate reinstatement to his position, with pay, retroactive to April 27, 2017. In the petition, Packard argues that he is entitled to reinstatement for two reasons. First, "N.J.S.A. 18A:6-8.3 expressly provides that no school district employee may be suspended without pay other than by reason of indictment or certified tenure charges," but that, at the time of his suspension, Packard had neither been indicted on criminal charges nor subject to tenure charges. Petition of Appeal, ¶¶ 6-8. Second, Packard argues that "N.J.S.A. 18A:27-4.1 expressly provides that a board of education cannot remove a school district employee in the absence of the recommendation of the chief school administrator," but that Superintendent Ahern never recommended Packard's suspension to the Board. Id. at ¶¶ 9, 13.

In its answer, the Board asserts that "[a]s of May 9, 2017, the District has authorized payment to [Packard], inclusive of all back pay due and owed at this time" and that Packard "will receive his salary moving forward while he remains on suspended status." Answer, ¶ 3. The Board denies that its action to suspend Packard violated N.J.S.A. 18A:6-8.3 or N.J.S.A. 18A:27-4.1.

On May 4, 2017, the Commissioner transmitted Packard's request for emergent relief to the OAL for an immediate hearing. At the hearing, which was held on May 10,

[1] The Board notified Packard of the meeting beforehand. Murray Cert., ¶ 2.

2017, Packard argued that he is entitled to emergent relief in the form of immediate reinstatement to his position, with pay, because, otherwise, his reputation in the community will be irrevocably damaged; because the Board violated N.J.S.A. 18A:27-4.1 by suspending him without Superintendent Ahern's recommendation;[2] and, because he will suffer more than the Board will suffer if emergent relief is not granted.[3]

LEGAL DISCUSSION

The regulations governing controversies and disputes before the Commissioner of Education provide that "[w]here the subject matter of the controversy is a particular course of action by a district board of education. . . the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case." N.J.A.C. 6A:3-1.6(a). The regulations further provide that the Commissioner may "[t]ransmit the motion to the OAL for immediate hearing on the motion." N.J.A.C. 6A:3-1.6(c)(3). At such a hearing, the petitioner must show by clear and convincing evidence that he satisfies each of the following four standards:

---

[2] In light of the fact that he is now suspended with pay and will receive back pay for the period in which he was suspended without pay, Packard no longer maintains that his suspension violates N.J.S.A. 18A:6-8.3, under which,

> [a]ny employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary[.]
>
> [Ibid.]

However, the Board is reminded that N.J.S.A. 18A:6-8.3 does not authorize Packard's indefinite suspension with pay for an unreasonable amount of time. See Migliaccio v. Bd. of Educ. of the City of Paterson, 1990 S.L.D. 294 (concluding that a suspension with pay "levied against a tenured employee may not be continued indefinitely in derogation of the employee's tenure rights" and that "as suggested by N.J.S.A. 18A:6-8.3, the intendment of any paid suspension is to conduct an investigation, hearing or trial, absent the filing of tenure charges or, perhaps, to await disposition of an indictment").

[3] At the hearing, the Board stated that it has referred the matter involving Packard to the county prosecutor's office.

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> 2. The legal right underlying petitioner's claim is settled;
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
> [N.J.A.C. 6A:3-1.6(b) (citing Crowe v. DeGioia, 90 N.J. 126 (1982)); Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (citation omitted).]

Importantly, the purpose of emergent relief is "to 'prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.'" Crowe, supra, 90 N.J. at 132 (citing Thompson ex rel. Bd. of Chosen Freeholders v. Paterson, 9 N.J. Eq. 624, 625 (Sup. Ct. 1854)).

Irreparable Harm

First, Packard has failed to show that he will suffer irreparable harm if the requested relief is not granted. Under this standard, "harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages," Crowe, supra, 90 N.J. at 132-33. Here, Packard is now suspended with pay, and will receive back pay for the period in which he was suspended without pay. Thus, in this regard, Packard's continued suspension will not cause him irreparable harm.

Moreover, Packard has failed to show how any damage to his reputation due to his suspension constitutes irreparable harm. In support of this argument, Packard relies on Sanchez, v. Bd. of Educ. of the City of Camden, Commissioner's Decision 107-03 (March 6, 2003), affirmed, State Bd. of Educ. (June 4, 2003) <http://www.nj.gov/education/legal/commissioner/>, in which the Commissioner found that a tenured principal who was transferred to an acting vice principal position without any loss of salary would, nonetheless, suffer irreparable harm to her reputation if not returned to a principal position to which she was legally entitled, because "the illegal transfer and the consequent de facto demotion to the separate and subordinate position of Acting Vice Principal can never be adequately addressed over time, nor can

monetary damages ameliorate the blemish on her professional standing among her peers and her reputation in the school district and in the community."

Here, however, the situation is more akin to Lewis v. Bd. of Educ. of the City of Asbury Park, EDU 8425-09, Comm'r (September 16, 2009), in which the Commissioner determined that the petitioner, a tenured principal whom the school board declined to appoint to a principal position after his superintendent contract had expired, failed to provide any support for his claim that he would suffer irreparable harm to his reputation if was not immediately placed in a principal position. Like in Lewis, Packard has failed to clearly and convincingly show that his reputation will be damaged irreparably if he is not immediately reinstated, but has instead offered vague descriptions of community gossip and rumors about him due to his suspension. And, unlike in Sanchez and as discussed more fully below, it is not apparent that Packard's suspension is illegal.

Settled Legal Right

Second, Packard has failed to show that the legal right underlying his claim is settled. In this regard, emergent relief "should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe, supra, 90 N.J. at 133 (citing Citizens Coach Co. v. Camden H. R. Co., 29 N.J.Eq. 299, 304-305 (E & A 1878)). Here, it is not settled that, as Packard argues, a school board must act in accordance with N.J.S.A. 18A:27-4.1 if it seeks to suspend a tenured employee for suspected misconduct, such that a school board cannot suspend a tenured employee without a prior recommendation from its chief school administrator.

Under N.J.S.A. 18A:27-4.1(a), "[a] board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board." Ibid. The parties do not dispute that the Board, by a majority vote, suspended Packard from his position, but do dispute whether the Board could do so without Superintendent Ahern's recommendation. While N.J.S.A. 18A:27-4.1 prohibits a school board from appointing, transferring, or *removing* an employee without the chief school administrator's recommendation, that provision does

not explicitly address a school board's authority to *suspend* a tenured employee such as Packard without the chief school administrator's recommendation.[4] Here, Packard was suspended, and not removed, from his position.

Packard's legal right to reinstatement under N.J.S.A. 18A:27-4.1 simply is not apparent from a reading of that statutory provision. Nonetheless it is important to note that, while Superintendent Ahern did not affirmatively recommend Packard's suspension, he was not oblivious to, or blindsided by, the Board's action. Instead, Superintendent Ahern was present at the meeting in which the Board voted to suspend Packard and he took action to ensure that someone carried out Packard's duties during his suspension.[5]

Likelihood of Success on the Merits

Under the third emergent relief standard, "a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits." Crowe, supra, 90 N.J. at 133 (citing Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115-16 (E. & A. 1930)), but Packard also fails to meet this standard because he has not shown that the Board did not have the authority to suspend Packard without Superintendent Ahern's affirmative recommendation.

Balancing of the Equities

[4] N.J.S.A. 18A:25-6 specifically addresses the procedure for suspending assistant superintendents, principals, and teachers, but not employees such as Packard. Under that provision, "[t]he superintendent of schools may, with the approval of the president or presidents of the board or boards employing him, suspend any assistant superintendent, principal or teaching staff member, and shall report such a suspension to the board or boards forthwith" and "[t]he board or boards, each by a recorded roll call majority vote of its membership, shall take such action for the restoration or removal of such person as it shall deem proper[.]" Ibid.

Certainly, the chief school administrator plays an important, and in many instances, legal, role in personnel decisions. However, again, Packard has not shown that the Board acted in violation of N.J.S.A. 18A:27-4.1 or otherwise did not have the authority to suspend Packard without Superintendent Ahern's prior recommendation.

[5] The Board also suggested, albeit vaguely, at oral argument on Packard's motion for emergent relief that Superintendent Ahern's ability to recommend Packard's suspension may have been compromised as his conduct is under current review as well.

Lastly, Packard fails to meet the fourth emergent relief standard, which involves "the relative hardship to the parties in granting or denying relief." Crowe, supra, 90 N.J. at 134 (citing Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J.Eq. 506, 515 (Ch.1941), mod. on other grounds, 132 N.J.Eq. 613 (E. & A. 1942)). If emergent relief is denied, Packard will continue to serve a suspension *with pay*. However, if emergent relief is granted, the Board will be forced to reinstate an employee who has been accused of serious misconduct, including "theft of services" resulting in a referral to the county prosecutor's office as well as creating a hostile work environment. Thus, the equities favor the Board.

CONCLUSION

Emergent relief in favor of Packard is inappropriate because he has failed to show by clear and convincing evidence that he meets any of the four standards for emergent relief.

ORDER

Petitioner's request for emergent relief is **DENIED**.

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

Patricia M. Kerins

May 11, 2017
DATE

PATRICIA M. KERINS, ALJ

/mel

168-17

J.T., ON BEHALF OF MINOR CHILDREN, J.T., A.T., AND B.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

In November 2016, *pro se* petitioner appealed the determination of the respondent Board that his children are ineligible for a free public education in respondent's school district. Petitioner contended that he resides at an address in Monmouth Junction, which is within the South Brunswick school district. The Board contended that a residency investigation revealed that petitioner and his children actually reside in Franklin Township. The Board filed a motion to dismiss, asserting that the petition was late filed. An Initial Decision was issued in this matter on March 8, 2017, wherein the ALJ concluded that the petition was late filed pursuant to *N.J.S.A.* 18A:38-1(b). The ALJ denied the petitioner's appeal and ordered tuition reimbursement for the period of ineligible attendance. The Commissioner subsequently remanded the case to the OAL, finding that the ALJ had failed to include a factual discussion or make any factual findings in his decision, as is required under *N.J.A.C.* 1:1-18.3.

On remand: the ALJ laid out findings of fact related to the timeliness of the petition, and found that the facts of this matter were set forth in respondent's brief in support of its motion to dismiss and in a certification from the Superintendent of Schools, both of which were incorporated in the decision as attachments; and the tuition cost per pupil for grades 6-8 was $11,873 for the 2015-2016 school year, or $66.00 per day. The ALJ concluded that: petitioner failed to timely file a residency appeal in accordance with *N.J.S.A.* 18A:38-1(b); neither petitioner nor his children resided in respondent's school district, and petitioner failed to sustain his burden of proof to establish that J.T., A.T., and B.T. were entitled to attend school in the South Brunswick school district; and the Board is owed tuition in the amount of $66.00 per day, per child, for the period of ineligible attendance.

The Commissioner noted that the ALJ erred in determining that the petition should be dismissed as untimely; further, the ALJ again failed to make factual findings or include the factual discussion that is required under *N.J.A.C.* 1:1-18.3. Accordingly, the Commissioner summarized the facts of the matter in the final decision in order to provide support for the legal conclusion that petitioner was not domiciled in the school district, and therefore his children were not entitled to a free public education in South Brunswick schools. In addition, the Commissioner corrected the amount of tuition due, and ordered that petitioner owes the respondent Board tuition reimbursement in the total amount of $35,462. The petition was dismissed.

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

Issued 6/19/17

OAL DKT. NO. 05426-17
(EDU 19075-16 ON REMAND)
AGENCY DKT. NO. 298-11/16

J.T., ON BEHALF OF MINOR CHILDREN, J.T., A.T., AND B.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed – mindful of the Commissioner's April 20, 2017 decision remanding this matter for inclusion of a factual discussion. The parties did not file exceptions.

While the Initial Decision contains some findings of fact, such findings relate solely to the timeliness of the petition. The remaining factual findings appear to have been incorporated through a 60 page attachment – including the Board's entire brief in support of its motion to dismiss, the exhibits attached to the brief, and the certification of Gary McCartney and the exhibits attached thereto. As the ALJ did not make specific factual findings regarding the merits of whether petitioner resides in South Brunswick, the facts of this matter are summarized as follows.[1]

Petitioner enrolled his three children in the District's schools for the 2016-2017 school year, and provided a copy of a lease indicating that he lived at a South Brunswick rental

[1] The Certification of Interim Superintendent Gary McCartney is undisputed as the petitioner did not file opposition to the Board's motion to dismiss, nor exceptions to the Initial Decision.

property. (Certification of Gary McCartney, ¶ 3-4) Upon discovering that petitioner did not live at the South Brunswick rental property, the Board initiated a residency investigation. (*Id.* at ¶ 5-6) The Board's investigator conducted surveillance between September 1 and October 24, 2016, at the South Brunswick rental property, as well as at petitioner's Franklin Township home. (*Id.* at ¶ 7-8) The investigator observed the South Brunswick rental property on 27 occasions and never saw petitioner or any activity at the home. (*Id.* at ¶ 10) By contrast, the investigator observed the Franklin Township home on 31 occasions and saw petitioner's cars parked outside and in the garage on 28 occasions, and the same cars were also seen dropping off the minor children at the bus stop near the South Brunswick property several times. (*Id.* at ¶ 11-12)

On October 13, 2016, the Board informed petitioner of a residency hearing before the Board to be held on October 24, 2016. (*Id.* at ¶ 13) By letter dated October 25, 2016, the Board informed petitioner of its determination that petitioner resides in Franklin Township and, therefore, the minor children are ineligible to attend the District's schools. (*Id.* at ¶ 14)

The Commissioner finds as a preliminary matter that the instant petition should not be dismissed as out of time. As the Commissioner previously noted in her April 20, 2017 decision, pursuant to *N.J.S.A.* 18A:38-1, when an appeal is filed within 21 days of the date of the district's decision, no child shall be removed from the school during the pendency of the proceedings before the Commissioner. Nevertheless, appeals may be filed after expiration of the 21-day period, but the student's right to attend school during the pendency of the appeal is not guaranteed by operation of statute. See *Attendance at School Based on Domicile or Residency in the School District: Sample Forms, Notices, and Informational Documents*, http://www.state.nj.us/education/code/current/title6a/chap22sample.pdf, p. 15.

Upon a comprehensive review of the record, the Commissioner notes that the Initial Decision did not contain any support for its legal conclusion except "See Certification of Gary McCartney and the investigator's report attached thereto as Exhibit A." (Initial Decision at 8). There is no explanation as to the facts on which the ALJ is relying for these conclusions of law, and indicating that the Commissioner should refer to a certification is not a substitute for written legal analysis. *N.J.A.C.* 1:1-18.3(c). Nevertheless, the Commissioner agrees with the ALJ that petitioner failed to sustain his burden of establishing that he was a domiciliary of South Brunswick for the 2016-2017 school year. The Board's investigation showed that – over nearly a two month period – on no occasion was petitioner present at his South Brunswick rental property, while on nearly every occasion, petitioner's cars – the same cars that were observed dropping the minor children off at the bus stop in South Brunswick – were at the Franklin Township location. As such, the Board's determination that petitioner did not reside in South Brunswick was not arbitrary, capricious, or unreasonable. The Commissioner further concurs with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in the District's schools during the 2016-2017 school year.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor children were ineligible to attend school in South Brunswick. Therefore, the Board is entitled to tuition reimbursement in the amount of $35,462.00[2] ($11,873.00 each for A.T. and B.T. to attend middle school, and $11,716.00 for J.T.

[2] It appears that the ALJ used the tuition rate for grades 6-8 ($11,873.00) for all three students. The Certification of Gary McCartney indicates that A.T. and B.T. attended middle school and J.T attended high school. (¶ 16-17). The per pupil tuition costs issued by the Department of Education on February 17, 2017 indicates that the annual tuition cost for grades 6-8 is $11,873.00 and the annual tuition cost for grades 9-12 is $11,716.00.

to attend high school – based on the tuition rates for the entire 2016-2017 school year, during which petitioner's minor children were ineligible to attend).[3]

Accordingly, the recommended decision of the ALJ is modified as stated above and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/19/17

Date of Mailing: 6/20/17

[3] The Initial Decision does not indicate the number of days in which the children were ineligible for school during the 2016-2017 school year and does not calculate the total amount of tuition reimbursement owed. It appears from the record that the minor children are still attending school in South Brunswick, and have for the entire school year. As the school year will be concluded by the time the parties receive this decision, the Commissioner assumes that the children attended school in the district for the full 180 days; accordingly, her assessment of tuition owed is based on attendance for the full 180 day school year.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO.: EDU 05426-17
AGENCY REF. NO.: 298-11/16

J.T. O/B/O MINOR CHILDREN J.T., A.T. AND B.T.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, COUNTY OF MIDLLESEX,

Respondent.

ON REMAND
OAL DKT. NO.: EDU 19075-16

J.T., Petitioner, pro se

Adam S. Herman, Esq., for Respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: April 20, 2017

Decided: May 3, 2017

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The matter is before the undersigned on remand pursuant to the Decision of the Acting Commissioner of Education, dated April 20, 2017, requiring the undersigned to set forth a recitation of facts. (J-1)

Petitioner challenges Respondent Board of Education's residency determination.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on December 20, 2016, as a contested case. N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to –13, bearing OAL Docket No. EDU 19075-16.

A prehearing conference was held on January 6, 2017. A prehearing order, dated January 6, 2017, was entered by the undersigned.

Respondent filed a motion to dismiss the petitioner's appeal with the Bureau of Controversies and Disputes on December 16, 2016, prior to the matter being transferred to the OAL, and before a decision on said motion was made. Respondent simultaneously filed its Answer and Cross Petition with the Bureau of Controversies and Disputes.

Pursuant to the pretrial Order entered on January 6, 2017, Petitioner was permitted ten days from the receipt of said motion to respond. No response was submitted.

On February 24, 2017, Respondent filed a certification of Gary McCartney, Superintendent of the South Brunswick Board of Education.

On March 3, 2017, Respondent's counsel provided a letter from the New Jersey Department of Education setting forth Tuition Costs per Pupil for the 2015-2016 school year.

ISSUES

1. Did Respondent err in its determination that Petitioner's three children did not reside in South Brunswick and were ineligible to attend school in the South Brunswick School District; and, is petitioners claim time barred?
2. Are Respondent's entitled tuition reimbursement?

FACTUAL DISCUSSION

The Preliminary Statement and the Factual Background set forth in Respondent's brief in support of its motion to dismiss, which are attached hereto and made a part hereof, are adopted herein as if set forth at length. (R-3)

The facts set forth in the Certification of Gary McCartney, which are attached hereto and made a part hereof, are adopted herein as if set forth at length. (R-4)

FINDINGS OF FACT

1. The residency decision of Respondent was adopted on October 24, 2016, which determined that petitioner's children did not reside with the District, and a letter setting forth the same was mailed to the petitioner on October 25, 2016. (R-4, pg. 3, paragraphs 13 and 14)

2. Petitioner was advised in said October 25, 2016 letter that should he disagree with the District's decision he had the right to appeal within 21 days of the notice. (Exhibit C of R-3)

3. Petitioner did not file an appeal until November 22, 2016.[1] (P-1)

4. Petitioner's appeal was filed more than twenty-one days after notice of the District's decision.

[1] There are two identical residency appeals, one dated November 22, 2016 and one dated November 25, 2016. For purposes of this decision the November 22, 2016 filing date shall be used.

5. The tuition cost per pupil for grades 6-8 is $11,873 for the 2015-16 school year, or $66.00 per day. (R-5)

6. Petitioner's children did not reside with the District, and have not so resided from the 2015-2016 school year to the present. (R-2, page 2, paragraph 4; R-3; and, R-4)

7. On February 9, 2016, the District determined that neither petitioner or his children resided within the District. (R-2, pg. 2, paragraph 4)

8. The District and petitioner had previously entered into a settlement agreement on August 31, 2016, wherein petitioner represented that he was in the process of renting an apartment in the District. (R-2, pg. 2, paragraph 5)

9. The District became aware that petitioner and his children were not residing in the District and commenced a residency investigation which determined that petitioner and his children did not reside in the District. (R-2, pg. 2, paragraph 6; R-4)

LEGAL ANALYSIS AND CONCLUSION

Standard of Review

N.J.A.C. 6A:3-1.5(g) states, "Nothing in this section precludes the filing of a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. Briefing on such motions shall be in the manner and within the time fixed by the Commissioner, or by the ALJ if the motion is to be briefed following transmittal to the OAL."

In ruling on a motion to dismiss:

> The judge considers whether all of the evidence together with all legitimate inferences could sustain a judgment in favor of the party opposing the motion. The judge is not concerned with the weight, worth, nature or extent of the evidence. The judge must accept all evidence supporting the party defending against the motion and accord that party

> the benefit of all inferences that can and legitimately be deducted therefrom...

Myles Hart v. New Jersey State Board of Examiners, 2014 WL 3708621 (citing New Jersey Practice, Administrative Law and Practice, §5, 19, at 259-60).

Petitioner did not file a response to Respondent's motion to dismiss. N.J.S.A. 18A:38-1 provides that public schools shall be free to the following persons over five and under 20 years of age:

a. Any person who is domiciled within the school district;

b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in

> this subsection. The board of education shall, at the time of its decision, notify the resident in writing of his right to contest the board's decision to the commissioner within 21 days. No child shall be denied admission during the pendency of the proceedings before the commissioner. In the event the child is currently enrolled in the district, the student shall not be removed from school during the 21-day period in which the resident may contest the board's decision nor during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the resident, parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner.

In the instant matter, Respondent notified Petitioner of the residency hearing by letter dated October 13, 2016. The residency hearing was held on October 24, 2016. By letter dated October 26, 2016, Petitioner was advised of Respondent's determination that his children were not eligible to attend school in the Respondent School District. Petitioner was advised in said letter of his right to contest Respondent School District's decision within twenty-one days. Petitioner did not file the pro se residency appeal until November 22, 2016. Said appeal was dated November 20, 2016. The twenty-one day period in which to file expired on November 15, 2016.

Right to a Free Public Education

N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a) sets forth the right of a student to a free public education, which in pertinent parts states:

> Public schools shall be free to the following persons over five and under twenty years of age:
>
> a. Any person who is domiciled within the school district[.]

Consideration in proving residency for purposes of establishing eligibility for school district placement is found at N.J.A.C. 6A:22-3.4(a),

> (a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:
>
> 1. Property tax bills, deeds, contracts of sale, leases, mortgages, signed letters from landlords and other evidence of property ownership, tenancy or residency;
>
> 2. Voter registrations, licenses, permits, financial account information, utility bills, delivery receipts, and other evidence of personal attachment to a particular location;
>
> . . .
>
> 3. Court orders; State agency agreements; and other evidence of court or agency placements or directives;
>
> 4. Receipts; bills; cancelled checks; insurance claims or payments; and other evidence of expenditures demonstrating personal attachment to a particular location or to support the student;
>
> . . .
>
> 6. Affidavits, certifications and sworn attestations pertaining to statutory criteria for school attendance, from the parent, guardian, person keeping an "affidavit student," adult student, person(s) with whom a family is living, or others as appropriate;
>
> . . .
>
> 8. Any other business record or document issued by a governmental entity.

> (b) A district board of education may accept forms of documentation not listed in (a) above, and shall not exclude from consideration any documentation or information presented by a person seeking to enroll a student.
>
> (c) A district board of education shall consider the totality of information and documentation offered by an applicant, and shall not deny enrollment based on failure to provide a particular form of documentation, or a particular subset of documents, without regard to other evidence presented.

In S.S. ex rel. A.S. and A.S. v. Bd. of Education of the Township of Marlboro, Monmouth County, EDU 192-12, Initial Decision (August 26, 2013), http://njlaw.rutgers.edu/collections/oal, evidence submitted by an investigator hired by the Marlboro New Jersey School District to determine whether certain minor children who were enrolled in the school district in fact were domiciled therein within the meaning of N.J.A.C. 6A:22-3.1(a) was sufficient to establish that the children in fact were not domiciled in the district during the period in question and, instead, supported a conclusion that the minors resided at their grandmother's home in Edison New Jersey. Even though their mother had submitted documentation of the type described in N.J.A.C. 6A:22-3.4(a) that supported her claim that the minors were domiciled in Marlboro, the circumstances of the mother's employment, which included late hours, was such that the minors were properly found to be residing with their grandmother. On that basis, the administrative law judge recommended that the Department of Education find the mother liable for tuition for the minors.

In the instant matter, it is clear that neither Petitioner, nor his children, resided within Respondent's school district. (See Certification of Gary McCartney and the investigator's report attached thereto as Exhibit A)

N.J.A.C. 6A:22-6.2 states:

> (a) If an appeal to the Commissioner is filed by the parent, guardian, adult student, or school district resident

> keeping an "affidavit" student and the petitioner does not sustain the burden of demonstrating the student's right to attend the school district, or the petitioner withdraws the appeal, fails to prosecute, or abandons the appeal by any means other than settlement agreeing to waive or reduce tuition, the Commissioner may assess tuition for the period during which the hearing and decision on appeal were pending, and for up to one year of a student's ineligible attendance in a school district prior to the appeal's filing and including the 21-day period to file an appeal.
>
> 1. Upon the Commissioner's finding that an appeal has been abandoned, the district board of education may remove the student from school and seek tuition for up to one year of ineligible attendance pursuant to N.J.A.C. 6A:22-6.1(a) plus the period of ineligible attendance after the appeal was filed. If the record of the appeal includes a calculation reflecting the tuition rate(s) for the year(s) at issue, the per diem tuition rate for the current year and the date on which the student's ineligible attendance began, the Commissioner may order payment of tuition as part of his or her decision. In doing so, the Commissioner shall consider whether the ineligible attendance was due to a school district's error. If the record does not include such a calculation and the district board of education has filed a counterclaim for tuition, the counterclaim shall proceed to a hearing notwithstanding that the petition has been abandoned.
>
> 2. An order of the Commissioner assessing tuition is enforceable through recording, upon request of the district board of education pursuant to N.J.A.C. 6A:3-12, on the judgment docket of the Superior Court, Law Division, in accordance with N.J.S.A. 2A:58-10.

Cleary, Petitioner has failed to sustain the burden of proof to demonstrate J.T., A.T. and B.T. have the right to attend the Respondent school, and Respondent is entitled to tuition reimbursement.

N.J.A.C. 6A:22-6.3 states in pertinent part: a) Tuition assessed pursuant to this section shall be calculated on a per-student basis for the period of a student's ineligible enrollment, up to one year, by applicable grade/program category and consistent with

APPENDIX

List of Exhibits

For Petitioner:

P-1 Pro se Residency Appeal dated November 20, 2016, and filed with the Bureau of Controversies and Disputes on November 22, 2016.

For Respondent:

R-1 Notice of Motion to Dismiss dated December 15, 2016, and filed with the Bureau of Controversies and Disputes on December 16, 2016.

R-2 Answer and Cross Petition dated December 15, 2016 and filed with the Bureau of Controversies and Disputes on December 16, 2016.

R-3 Brief in support of motion to dismiss the residency appeal December 15, 2016 and filed with the Bureau of Controversies and Disputes with Directions for Appealing Local Board's Residency Determination to on December 16, 2016, together with Exhibits A through D.

R-4 Certification of Gary McCartney, Superintendent of Respondent school district, with Exhibits A though D.

R-5 Letter from the New Jersey Department of Education, dated February 17, 2017, with tuition costs per pupil for the 2015-2016 school year.

169-17

SHANE BERGER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
GLADYS RIVERA AND BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner – a former member of the Bloomfield Board of Education (Board) – challenged the eligibility of respondent, Gladys Rivera – currently a member of the Board – to serve in that capacity, based on a residency requirement. Petitioner asserted that Rivera had not been a resident of Bloomfield for one year immediately preceding the board election as is required by *N.J.S.A.* 18A:12-1. Petitioner filed an application for emergency relief in this matter, which was denied. A plenary hearing was held in the matter on February 7, 2017, after which the record was closed.

The ALJ found, *inter alia*, that: the question posed in this matter is when did respondent Rivera become a bona fide resident of Bloomfield; Rivera was elected to the Board in November 2016; petitioner ran for re-election to a third term in the same race, but failed to earn enough votes to continue his service on the Board; soon after the election, questions were raised about the residency of respondent, and whether she had lived in town for the requisite one year prior to running for the Board; petitioner retained the services of a detective agency to conduct a residency investigation on respondent; the resulting detective's report concluded that respondent lived in Elizabeth rather than Bloomfield; on the other hand, respondent provided testimony from herself and others that contradicted the facts and assumptions of the detective's report, and indicated that respondent had relocated to Bloomfield after beginning a romantic relationship with her now-fiancé in April 2015; and the pivotal issue here is whether petitioner has satisfied his burden of proving by a preponderance of the credible evidence that respondent did not reside in Bloomfield for the requisite period of time. The ALJ concluded that the competent, credible evidence in this matter does not establish that respondent was not a resident of Bloomfield for the requisite one year prior to her election to the Bloomfield Board of Education. Accordingly, the petition was dismissed.

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

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

June 20, 2017

169-17

OAL DKT. NO. EDU 19266-16
AGENCY DKT. NO. 319-12/16

SHANE BERGER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
GLADYS RIVERA AND BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Shane Berger. This matter involves a claim by the petitioner that respondent, Gladys Rivera – a current member of the Bloomfield Board of Education (Board) – was not a resident of Bloomfield for one year immediately preceding the school board election as required by *N.J.S.A.* 18A:12-1.[1] In this case, the relevant school board election was held on November 8, 2016. Following a hearing at the OAL, the Administrative Law Judge (ALJ) found that the petitioner did not present sufficient evidence to establish that the respondent was not a resident of Bloomfield for the requisite one year prior to her election to a seat on the Board. Therefore, the ALJ dismissed the petition.

In his exceptions, the petitioner maintains that the ALJ erred when she concluded that the competent, credible evidence in this matter does not establish that the respondent was not a resident in Bloomfield for the requisite one year period prior to the school board election. In

[1] Pursuant to *N.J.S.A.* 18A:12-1, "[e]ach member of any board of education shall be a citizen and a resident of the district ... and shall have been such for one year immediately preceding his appointment or election."

successfully challenged. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [*N.J.S.A.* 52:14B-10(c)].

The respondent maintains that she moved into her fiancé's residence in Bloomfield before November 8, 2015. The ALJ found that the respondent testified plausibly and her fiancé testified credibly in connection with concerns raised by the petitioner regarding where the respondent resided during the relevant period. It is clear that the ALJ's ultimate determination in this matter was dictated by which party had the burden of proof. Notwithstanding the petitioner's contentions to the contrary, the Commissioner finds no basis in the record to reject either the ALJ's determinations of witness credibility or her application of the petitioner's burden of proof to find that the petitioner did not present enough evidence to prove that the respondent was not a resident of Bloomfield as of November 8, 2015.

Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/20/17

Date of Mailing: 6/20/17

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 19266-16
AGENCY DKT. NO. 319-12/16

SHANE BERGER,

Petitioner,

v.

GLADYS RIVERA, AND BOARD OF EDUCATION OF BLOOMFIELD, ESSEX COUNTY,

Respondents.

Ciro Spina, Esq., for petitioner (Law Offices of Jef Henninger, attorneys)

James A. Key, Jr., Esq., for respondent Gladys Rivera (Key Law Firm, attorneys)

Jonathan M. Busch, Esq., for respondent Bloomfield Board of Education (Busch Law Group, LLC, attorneys)

Record Closed: February 7, 2017 Decided: May 8, 2017

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, Shane Berger, asserts that Gladys Rivera, currently a member of the Board of Education of Bloomfield, Essex County, New Jersey, had not been a resident of Bloomfield for one year immediately preceding the election as is required by N.J.S.A. 18A:12-1.

Petitioner filed an application for emergency relief seeking an Order voiding the candidacy of Rivera for a seat on the Board and enjoining Rivera from continuing to occupy a seat and/or removing her from her elected position.

Oral argument was heard on January 5, 2017, and on January 6, 2017, an Order was issued denying the emergent relief sought.

The matter was scheduled for plenary hearing on February 7, 2017, and was heard on that date, at the conclusion of which the record closed.

TESTIMONY

Edward Koster

Edward Koster has been the director of the Spartan Detective Agency for three and a half years. He previously served as a police officer for twenty-five years in the Township of Union. He was asked by petitioner to conduct an investigation of Gladys E. Rivera. He generated two reports, one that was later determined to be related to a different Gladys Rivera, and a second that investigated the correct person. (P-2.) The report, dated January 13, 2017, revealed that as of that date Ms. Rivera's address was 542 South Broad Street, in Elizabeth, N.J. Koster used several databases in his research, and checked telephone numbers and cell-phone numbers, and cross-referenced everything, and nothing came up to suggest that Ms. Rivera resided in Bloomfield, N.J., as of January 13, 2017. Her cell-phone bill does not go to the Bloomfield address, nor do any utility bills.

Jill Fischman

Jill Fischman is in her second term on the Bloomfield Board of Education and served as president from June 2016 until December 2016. She was notified in December 2016 that questions had arisen regarding respondent's residency, and whether she had lived in town for the requisite one year prior to running for the Board of Education. Ms. Fischman testified that she sent respondent a text message indicating that there were concerns about her residency, and asked for proof of residency. In turn, respondent sent Ms. Fischman her New Jersey Motor Vehicle Commission (MVC) change-of-address form dated March 24, 2016.[1] Respondent indicated that she would provide additional proofs, or a letter from her landlord; however, none of those things were forthcoming, and Ms. Fischman heard nothing further from respondent regarding the request for additional proofs of residency.

As a result, Ms. Fischman asked Nicholas Dotoli, Esq., Board attorney, to seek the assistance of the police department in determining respondent's residency. She does not know what they did and did not receive any reports. She asked for the inquiry because respondent had said that her campaign manager would provide additional proofs of residency, and did not, and so she asked that a police check be undertaken.

Leonardo Marin III

Leonardo Marin has resided at 329 Ampere Park in Bloomfield for four years with his mother and younger brother. He indicated that he has been the building supervisor for those four years, for which he receives no salary, but does receive additional property privileges, including use of the patio and additional parking. The residence is a three-family house and he lives on the second floor. The third-floor tenant is Richard Mendez, who has lived there approximately nine years, and now Gladys Rivera, respondent, who moved in with Mr. Mendez in April 2016. Marin testified that he had just finished a course of physical therapy for a sports injury at the time, and noted her moving boxes in gradually.

[1] This is only eight months before the election.

Vincent Kearney

Lieutenant Kearney has been employed by the Bloomfield Police Department for sixteen years and is the lieutenant in charge of the Internal Affairs Division. He has been a lieutenant since 2014, and prior to that was a sergeant for five years. He was asked by the police director to do an investigation of respondent, and was provided with the Spartan report and the letter from Mr. Marin. He determined that respondent moved to Bloomfield in the spring of 2016, sometime between the dates of March 9 and April 19, 2016, and that prior to that she resided at 542 South Broad Street in Elizabeth, N.J. An MVC search revealed that on March 9, 2016, the address on her driver's license had been changed to 329 Ampere Parkway in Bloomfield. He checked the voter-registration system, which revealed that respondent changed her voter registration to the Bloomfield address on April 19, 2016. He also found prior voter registrations at 542 South Broad Street in Elizabeth (until September 2016) and a prior voting address of 527 Morris Avenue, also in Elizabeth, N.J.

Lieutenant Kearney then conducted witness interviews, including of Mr. Marin, who indicated that respondent moved into his building in April, and that at some point, "several months ago," Richard Mendez had asked permission for respondent to move in with him. Marin did not recall exactly when Mendez had sought permission, but indicated that it was several months before Lieutenant Kearney spoke to him in January 2017.

Lieutenant Kearney testified that he did not speak to respondent's prior landlord. He also testified that NJ MVC laws require individuals who move to change their address within fourteen days or they can receive a summons.

Shane Berger

Mr. Berger is self-employed and owns a chain of laundromats. He was elected to the Bloomfield Board of Education in 2010 and reelected in 2013, and has served as chairman of every committee. He has also served as the liaison for every school; however, he was not reelected in the last cycle in 2016, and came in fourth place. He

has also previously served on the county school board association, and was the State chairman of the Standards and Assessments Standing Committee.

Mr. Berger testified that many people reached out to him indicating that "someone needs to do something" about the fact that a nonresident had been elected to the Board. He recognized that he would not get the seat if respondent were unseated; however, he felt that residency issues are important matters that the Board has to address, and that if a Board member does not even comply, how can they determine residency compliance by others?

Berger testified that he went to the county superintendent of elections and was advised that the onus is on the district to determine respondent's residency. He then met with the Board attorney, Mr. Dotoli, and the superintendent, Mr. Gonzalez. Soon thereafter, he received a call from the county superintendent's office instructing him how to challenge the election results.

Berger testified that he wants credibility for the Board of Education, and that the residency of Board members cannot be in question. He says he is doing his civic duty. He believes respondent did not live in town for the requisite one year prior to the election, and that she has provided no proof otherwise, despite requests from the then-president of the Board, Ms. Fischman.

Nicholas J. Dotoli

Mr. Dotoli is employed by the Bloomfield Township Board of Education as director of human resources and general counsel. He oversees all employment acts and certification issues and also oversees special education. He advises the Board members and reports to the superintendent.

Residency issues related to respondent came to his attention from members of the community who were concerned whether there had been compliance with N.J.S.A. 18A:12-1, et seq., and whether respondent actually lived in town. He sent an email to the police director (R-1) at the request of the Board president, Ms. Fischman, to investigate

the residency issue. He also spoke to Lieutenant Kearney regarding his report, and was concerned that respondent had moved to Bloomfield in April 2016.

He testified that he has never had to do an investigation of a Board member. He agreed that investigations are conducted of student residency issues, but he does not feel the same standards apply under N.J.S.A. 18A:12-1. A student may not attend school if not a resident of the district, but he does not believe it is within his jurisdiction to make sure the Board members are qualified to sit, and feels that is the responsibility of the County Board of Elections, which has jurisdiction to determine if Board members have met the requirements.[2]

Amarilis Martinez

Ms. Martinez testified that she lives at 511 Fulton Street in Elizabeth, which is a two-family home that she has owned for thirty-six years. She stated that respondent rented a room from her from early 2015 until June 30, 2015, pursuant to her rent receipts. At the end of June 2015, respondent moved out and moved in with her boyfriend, Richard

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[2] Under the school laws governing the qualifications of school-board members, N.J.S.A. 18A:12-1 to -2.2, "[e]ach member of any board of education shall be a citizen and resident of the district . . . and shall have been such for at least one year immediately preceding his appointment or election." N.J.S.A. 18A:12-1. Moreover, "[w]henever a member of a local or regional board of education shall cease to be a bona fide resident of the district . . . his membership in the board shall immediately cease." N.J.S.A. 18A:12-3. And, in the event a school-board member is removed because he is not a resident of the district, the county superintendent of schools shall fill the vacancy. N.J.S.A. 18A:12-15(a).

The Commissioner of Education has "jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9. However, in 1995 the Legislature "transfer[red] responsibility for the conduct of school elections from boards of education to the officials responsible for conducting other elections under New Jersey's election code (Title 19 of the Revised Statutes)," and "jurisdiction over school election-related disputes [was] removed from the Commissioner of Education and State Board of Education, so that such disputes will be handled in the same manner as those arising with respect to other elections." P.L. 1995, c. 278; Statement to Senate Amendments to A1705 (adopted June 12, 1995). As a result of that change, "controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws." N.J.S.A. 18A:6-9.

Thus, while the Commissioner does not have jurisdiction over the conduct of school elections, the Commissioner still has jurisdiction over post-election challenges to a board member's qualifications, including the residency requirement under N.J.S.A. 18A:12-1. See, e.g., Bd. of Educ. of Sea Isle v. Kennedy, EDU 2028-05, Comm'r (June 30, 2005) (confirming that the Commissioner is the one "to whom adjudication of board member qualification is reserved in the event of a dispute, N.J.S.A. 18A:6-9"), aff'd, State Bd. of Educ. (January 4, 2006), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, 393 N.J. Super. 93 (App. Div. 2007) (stating that "[c]laims regarding an individual's qualifications to serve on a local board fall under the Commissioner.s jurisdiction"), aff'd, modified for other reasons, 196 N.J. 1 (2008).

Mendez, in Bloomfield. She believes that they became engaged on July 5, 2015, and moved in together around that time. Her daughter is married to respondent's son, and both her sons now live in the building as of June 2015, when respondent moved out. She testified that respondent paid $300 a month for the room. She stated that respondent still receives mail at her address, and that she comes there every weekend, because "she is family," as they are both grandmothers to the same children.

Aida Ortiz

Ms. Ortiz testified that she lives at 12 Turnbridge Place in Bloomfield, N.J., where she has lived for seventeen years. She has known respondent since Mother's Day 2015, when her son introduced Rivera as his fiancée. Her son resides at 329 Ampere Parkway, Bloomfield, and Ms. Ortiz testified that she was there when respondent moved in with her son at that address. She testified that she helped bring some things upstairs. Respondent was unsure of the security of the mail at the Bloomfield address because she did not trust the residents there, and so she still sends mail to Ms. Ortiz's home in Bloomfield. Respondent asked her almost a year ago if she could use her address to send mail to. She also stated that respondent took a "small bedroom set" into the apartment, and that she unpacked clothes and dishes for about two hours, helping to empty out a small truck they rented.

Richard Mendez

Mr. Mendez testified that he has lived at 329 Ampere Parkway in Bloomfield for three and a half or four years, and that respondent is his fiancée. He testified that they met online on April 10, 2015; started dating about a week later; and became engaged on July 5, 2015. He testified that he introduced her to his mother, Ms. Ortiz, on Mother's Day of 2015, and that she moved into his apartment at the end of June or in early July 2015. Mr. Mendez provided a receipt for the engagement ring dated June 8, 2015. (R-2.) He agrees that respondent asked his mother if her mail could go to his mom's house because they felt there was mail tampering since she moved in with him.

Mendez stated that when his mother met respondent in May 2015 she was not yet his fiancée, and so his mother was incorrect when she said that respondent was introduced to her as his fiancée.

He also stated that his mail was tampered with in July 2015, so they began to send their mail to his mother's address, and that his mother's address is on all his bills and checks.[3] The mailboxes at 329 Ampere Parkway in Bloomfield do not have locks on them; however, the mailbox at his mother's house does, so all the mail goes here. Mendez confirmed that he asked permission of the landlord for respondent to move in around June of 2015. He also stated that respondent does not pay any of the bills.

Finally, Mendez testified that a joint account with respondent was opened on August 3, 2015. (R-3.)

Gladys Rivera

Ms. Rivera testified that from January 2015 until the end of June 2015 she lived at 511 Fulton Street in Elizabeth. She then said she had moved there at the end of August 2014. At the end of June 2015 she moved into 329 Ampere Parkway in Bloomfield, with Richard Mendez. She arranged at the time for her mail to remain coming to the Fulton Street address until she was comfortable with mail going to Bloomfield. She believed that Leo Marin's younger brother would go through the mailbox, and so arranged for bank statements and certain other mail to go to her mother's address, and other mail to continue to go to Martinez's address.

Rivera testified that she "started off fine" with other tenants at the Bloomfield address; however, relationships changed when the Marins had her daughter's car towed from the driveway one day. It was parked in Mr. Mendez's spot at the time, yet it was towed. The Marin boys continued to visit, as they were friendly with Mendez's son; however, their mother, Teresa, no longer spoke to her.

[3] None were produced and there was no indication they had been requested to be produced.

Ms. Rivera testified that her fiancé's mother, Aida Ortiz, helped a bit with the move. They had an SUV that they used, but did not bring any furniture; they had a futon delivered a few weeks later. She stated that she moved in with Mendez in July 2015 after Ms. Martinez needed the room she had been renting for another son, who moved in when she moved out, and remains living there today. She had nowhere to go back to, and so moved in with Mr. Mendez.

Rivera agreed that she had been asked for proof of residency, and only provided an MVC address-change form from March 2016, and that other address changes slipped her mind because a lot was going on. She stated that her cell-phone bill goes to her son because it is in his name, and that the bank statement for her personal account goes to Ms. Martinez's home at 511 Fulton Street in Elizabeth. The statements for the joint account with Mr. Mendez go to 12 Turnbridge Place in Bloomfield, Ms. Ortiz's home. She testified that she changed her voter registration in March or April 2016, and agreed that there are no bills or other utilities in her name, and that she is not on the lease. Rivera again stated that she lived at 542 South Broad Street in Elizabeth from December 2010 until August 2014,[4] and then moved to 511 Fulton Street in Elizabeth, but she did not change her address because she "didn't see a need."

FACTUAL DISCUSSION

Based upon consideration of the testimonial and documentary evidence presented at the hearing and having had the opportunity to observe the demeanor of the witnesses and to assess their credibility, I **FIND** the following **FACTS** by a preponderance of the credible evidence:

Gladys Rivera is a member of the Board of Education of the Township of Bloomfield in Essex County. An election was held in November 2016 for four seats on the Board. Three seats were for three-year terms and one seat was for a one-year term. Respondent earned 4,258 votes for one of the three-year seats, and thus was seated.

[4] This varies from Ms. Martinez's testimony and the rent receipts she referenced, which she indicated reflected that Rivera rented the room from January 2015 through June 2015.

Petitioner ran in the same election, also seeking a three-year term, and placed fourth, with 2,670 votes.

Soon after the election, questions were raised about the residency of Ms. Rivera and whether she had lived in town for the requisite one year prior to running for the Board. The president of the Board at the time, Jill Fischman, advised respondent of the concerns that had been raised as to her residency and asked for proof that Ms. Rivera did indeed reside in Bloomfield. In response to this inquiry, respondent sent Ms. Fischman the New Jersey Motor Vehicle Commission address form dated March 24, 2016. Rivera indicated she would provide additional proofs and a letter from her landlord; however, no additional proofs were received by Ms. Fischman.

Ms. Fischman then requested that the Board attorney, Nicholas Dotoli, Esq., ask the police department for help in determining respondent's residency. That was her last involvement with the issue.

Believing that Rivera had not resided in Bloomfield for the one year immediately prior to the election as is required by statute, petitioner retained the services of the Spartan Detective Agency to conduct a search on Rivera. The investigator reported that as of the date of his report, January 13, 2017, all information came back indicating Ms. Rivera's address to be 542 South Broad Street in Elizabeth, New Jersey. He concluded that she resided at the address following voter-registration searches, motor-vehicle searches, and cell-phone searches, as more fully detailed in a twenty-five-page report he provided to petitioner. He also determined that Rivera was registered to vote in Elizabeth, New Jersey, and therefore also did not meet the requirement of the statute that she be registered to vote in the district. After receiving the report, petitioner filed his application to have her removed from her position on the Board.

Respondent previously resided at 542 South Broad Street, Elizabeth, New Jersey. She then moved to 511 Fulton Street in Elizabeth, New Jersey, and lived there from either August 2014 or January 2015 until the end of June 2015, when she moved out.

Respondent and Richard Mendez met online on April 10, 2015, and started dating about a week later, becoming engaged on July 5, 2015. Respondent moved in with Mendez at 329 Ampere Parkway in Bloomfield, New Jersey, sometime between July 1, 2015, and March 9, 2016. Respondent and Mendez opened a joint bank account on August 3, 2015.

On March 9, 2016, Rivera changed the address on her driver's license to 329 Ampere Parkway in Bloomfield, New Jersey. Respondent changed her voter registration to Bloomfield, New Jersey, on April 19, 2016.

Respondent has her mail delivered to her mother's address, to Ms. Ortiz's[5] address, and to Ms. Martinez's[6] address.

DISCUSSION AND CONCLUSIONS

The statute, at N.J.S.A. 18A:12-1, Qualifications, provides in salient part as follows:

> Each member of any board of education shall be a citizen and resident of the district, or of such constituent district of a consolidated or regional district as may be required by law, and shall have been such for at least one year immediately preceding his appointment or election, he shall be able to read and write, shall be registered to vote in the district, and, notwithstanding the provisions of N.J.S. 2C:51-1 or any other law to the contrary, he is not disqualified as a voter pursuant to R.S. 19:4-1 . . . .

N.J.S.A. 18A:12-2.1, Oaths, provides as follows:

> Each member of the board of education shall, before entering upon the duties of his office, take and subscribe:
>
> > (1) An oath that he possesses the qualifications of membership prescribed by law, including a specific declaration that he is not disqualified as a voter pursuant to R.S. 19:4-1 and a specific declaration that

[5] Aida Ortiz is Mr. Mendez's mother.
[6] Martinez's daughter is married to respondent's son.

> he is not disqualified due to conviction of a crime or offense listed in N.J.S. 18A:12-1, and that he will faithfully discharge the duties of his office, and also
>
> (2) The oath prescribed by R.S. 41:1-3.
>
> In the case of a Type I school district the oath shall be filed with the clerk of the municipality and in all other cases it shall be filed with the secretary of the board of education of the district.

The question then is, when did Rivera become a bona fide resident of Bloomfield, New Jersey? The petitioner in this matter asserts that respondent is not eligible for membership on the Board for having failed to meet the one-year residency requirement of the statute. Petitioner seeks to have respondent removed from the Board. Respondent contends that she was a resident of Bloomfield for more than one year preceding her election and that the burden is on the petitioner to prove she was not.

As a threshold matter, it must be presumed that respondent met the requirements of the County Board of Elections, because respondent's name was printed on the ballot. The Board of Elections must therefore, have been satisfied that the candidate was qualified by residence, among other things, to be elected to the Board.

It is well settled that a person can have more than one residence, but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). The domicile of a person is the place where he has his true, fixed permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 517 (1999). The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959).

Respondent testified that she registered to vote in Bloomfield in March or April of 2016; however, no testimony was offered as to whether respondent did in fact vote in

Bloomfield in the following election cycle. However, failure to vote is not proof of lack of residence; indeed, the notion that she was still a resident of Elizabeth would be disproven with the same argument.

The basis of the petition in this matter is primarily threefold: (1) respondent receives no bills or any other mail at the Bloomfield address; (2) respondent was registered to vote in Elizabeth, New Jersey, until March or April 2016; and (3) respondent changed the address on her driver's license in March 2016. When asked by the president of the Board of Education for proof as to her residency, respondent failed to provide any, other than the MVC address change processed less than eight months before the election. While at first blush it appears that respondent had not established domicile in Bloomfield within the requisite one year, she offered the plausible explanation that the mail was not secure at the Bloomfield address, and so all of her bills and bank statements continued to be sent to prior addresses or to her mother's home. The pivotal issue, therefore, in this matter is whether petitioner has satisfied his burden of proving, by a preponderance of the credible, competent evidence, that respondent did not reside in Bloomfield for the requisite period of time.

In connection with that determination, it is necessary for me to assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of facts gives to a witness' testimony. It requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible," and may also reject testimony when "it is inconsistent with other testimony or with common experience" or

"overborne" by the testimony or other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

It is also necessary to consider the nature of the evidence presented. Hearsay evidence is admissible in administrative proceedings and "shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability." N.J.A.C. 1:1-15.5(a). Notwithstanding the admissibility of hearsay evidence, the "residuum rule" requires that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b). In the words of the New Jersey Supreme Court:

> [A] fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.
>
> [Weston v. State, 60 N.J. 36, 51 (1972).]

In this matter, the record includes contradictory testimony related almost solely to the failure to submit changes of address. The Spartan Detective Agency report reflects Elizabeth addresses for everything in respondent's name, through the date of the report in January 2017. The preliminary investigation by the police department reflects largely the same information, along with reports of interviews, including that of Mr. Marin, who

indicated that respondent had only moved in "several months ago."[7] The testimony of Ms. Martinez was of limited usefulness, and the date she alleges respondent began renting a room from her differs from the testimony of respondent. Additionally, the testimony of Ms. Ortiz conflicted with that of respondent in terms of the furniture purportedly moved into the Bloomfield address. Mr. Mendez testified credibly regarding the issues with the mail that respondent experienced at his address. Respondent's testimony regarding those issues with the mail was plausible.

Notwithstanding the efforts of petitioner to attempt to shift the burden of proof to respondent, ultimately the allegations and testimony of respondent have not been successfully challenged, and the burden of proof rests squarely with petitioner. It is the sworn testimony of respondent that she resided in Bloomfield for more than one year preceding the school-board election in November 2016. Her prior residence in Elizabeth has been occupied by the owner's son since respondent moved out, and she cannot return there. The MVC address change in March 2016 and the voter-registration address change in April 2016 are not, by themselves, sufficient to discredit respondent's testimony that Bloomfield was her residence and domicile from and after July 2015. Petitioner's contention that the failure to file change-of-address forms, or to receive mail at the Bloomfield address, is proof of no change in domicile from Elizabeth, is insufficient to refute the limited testimony to the contrary.

Clearly, significant question remains as to whether respondent was domiciled in Bloomfield for the requisite one year prior to her election. However, absent competent, credible evidence of the contrary, no consideration can be given to granting the extraordinary relief sought of removal from the Board.

"The plaintiff's residence will be presumed to be where he alleges it to be, unless the contrary appear." 71 N.J.L. 115 (Sup. Ct. 1904).

[7] Mr. Marin testified on direct examination that he observed Rivera visit the home "on and off" on weekends, commencing in January 2015. This was three months before Rivera and Mendez met. On redirect, he indicated that he began to see her "dating back to July 2015," and that Rivera started moving boxes in around April 2015.

Based upon all of the foregoing, I am constrained to **CONCLUDE** that the competent, credible evidence in this matter does not establish that respondent was not a resident in Bloomfield for the requisite one year prior to her election to a seat on the Bloomfield Board of Education.

ORDER

The petition to declare that Gladys Rivera was not a bona fide resident of the Township of Bloomfield, Essex County, New Jersey, for one year prior to her election to the Board of Education is **DISMISSED**.

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

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

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

May 8, 2017
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: May 8, 2017

Date Mailed to Parties: May 8, 2017
dr

APPENDIX

Witnesses

For Petitioner:

Shane Berger
Edward Koster
Jill Fischman
Leonardo Marin III
Vincent Kearney
Nicholas J. Dotoli

For Respondents:

Gladys Rivera
Amarilis Martinez
Aida Ortiz
Richard Mendez

Exhibits

For Petitioner:

P-1 Not in evidence
P-2 Comprehensive Report dated January 13, 2017
P-3 Official Statement from Leonardo Marin III
P-4 Investigation Report dated January 13, 2017

For Respondents:

R-1 Subpoena Ad Testificandum and Subpoena Duces Tecum
R-2 Engagement ring receipt dated June 14, 2015
R-3 TD Bank verification letter dated January 6, 2017

170-17

O.W., ON BEHALF OF MINOR CHILD, I.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY AND BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT,	:	

SYNOPSIS

Pro se petitioner, O.W., filed a petition on September 1, 2016 on behalf of her minor daughter, I.W., who transferred from Newark Public Schools to West Orange Public Schools in March of 2012. The respondent Boards filed separate motions to dismiss in October 2016, asserting, *inter alia*, that the petition is time barred as it was filed outside of the 90 day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i).

The ALJ found, *inter alia*, that: it appears petitioner feels that some inappropriate actions were taken by Newark and West Orange school officials with respect to her daughter, I.W., while she was a student in the respondents' school districts; however, the incoherent nature of the petition in the instant case makes it impossible to discern exactly what petitioner's claims are, or what relief she requests; petitioner lists fourteen separate New Jersey statutes under which she requested a declaratory ruling; the dates of the violations alleged by petitioner are also difficult to discern, but all of the claims appear to reference incidents that allegedly occurred between 2008 and 2012; of the fourteen statutes cited by petitioner, six are not school laws; therefore, the Commissioner has no jurisdiction to hear cases arising under them; as to the remaining statutes, the incidents alleged by petitioner occurred well past the 90 day time limitation on such claims. Accordingly, the ALJ concluded that the petition should be dismissed.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter for the reasons stated therein. The petition was dismissed.

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

June 20, 2017

170-17

OAL DKT. NO. EDU 16479-16
AGENCY DKT. NO. 243-9/16

O.W., ON BEHALF OF MINOR CHILD, I.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY AND BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT,	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Commissioner does not have jurisdiction over any of the allegations that do not arise out of the school laws of this State. *N.J.S.A.* 18A:6-9. The Commissioner further agrees with the ALJ that petitioner's claims are time-barred, as the petition references events that took place between 2008 and 2012, while this petition was filed on September 12, 2016. As such, the matter is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i).

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein and the petition is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington
ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/20/17
Date of Mailing: 6/20/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION TO DISMISS
OAL DKT. NO. EDU 16479-16
AGENCY DKT. NO. 243-9/16

O.W. ON BEHALF OF MINOR CHILD, I.W.,
Petitioner,
v.
CITY OF NEWARK STATE-OPERATED SCHOOL DISTRICT, ESSEX COUNTY AND TOWNSHIP OF WEST ORANGE BOARD OF EDUCATION, ESSEX COUNTY.
Respondent.

O.W., petitioner, pro se

Arsen Zartarian, Esq., for respondent City of Newark

Frances L. Febres, Esq. for respondent West Orange BOE (Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys)

Record Closed: May 9, 2017 Decided: May 9, 2017

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petition in this matter was filed on September 12, 2016. Petitioner O.W. is the mother of the minor student, I.W., who transferred from the Newark Public Schools, to the West Orange Public School System, in March of 2012.

Respondent City of Newark filed a Motion for Dismissal of the petition on October 6, 2016. Respondent Board of Education of the Township of West Orange filed a Motion for Dismissal of the petition on October 20, 2016.

FACTUAL DISCUSSION[1]

O.W. ("Petitioner") filed this petition on behalf of I.W., who has been a West Orange student since 2012. The Petition ("Pet.") was filed against both Newark and West Orange. Petitioner has requested a declaratory ruling with respect to the following statutes:

1. N.J.S.A. 18A:3A-2;
2. N.J.S.A. 18A:6-1;
3. N.J.S.A. 26:14-5;
4. N.J.S.A. 52:17B-210;
5. N.J.S.A. 2C:34-3;
6. N.J.S.A. 2C:13-4;
7. N.J.S.A. 2C:13-9;
8. N.J.S.A. 9:2-4.2;
9. N.J.S.A. 18A:38-2;
10. N.J.S.A. 18A:38-25;
11. N.J.S.A. 18A:38-29;
12. N.J.S.A. 18A:20-17;
13. N.J.S.A. 18A:40-5;
14. N.J.S.A. 18A:40A-19.

[See generally, Pet.]

At best, it is possible to gather that the Petitioner feels that some inappropriate actions were taken, in violation of the statutes she cites to, by both Newark and/or West Orange officials with respect to her daughter I.W. while she was a student in the

[1] It is imperative to note that O.W.'s petition is incoherent. As such, the factual discussion presented here is merely an effort to decipher her petition, an attempt aided by Respondent's counsel's similar effort.

Newark and/or West Orange School Districts. However, due to the incoherent nature of the petition, it is impossible to discern what exactly those inappropriate actions are alleged to have been, or whether they were committed by representatives of Newark or West Orange. For example, the petitioner alleges the following with regard to her accusation of a violation of N.J.S.A. 18A:38-29, a statute that addresses truancy:

> Principal Wanda B.-Long noticed Spring 2006 parent habit standing at main entrance beneath posted clock showing correct time, four days alongside entrance meeting with Security. Principal asserted, a call to police to give warning and/or arrest of parent intent continue habitual hourly visits. Principal Long would have exercise right to place child/student with relative(s). The Principal in office on phone for an hour. [Pet. 13]

The relief Petitioner requests is as follows:

> **WHEREFORE**, petitioner requests educators power do not abuse public school student having adequate care in aspiration of bad faith arrange an experience of hardship. The educators' courteous and polite professional mannerism on a daily educational experience is civil and a good. Retiree, experienced and young educators offer public school students professional etiquette as a good deciding whom will receive educator's professional mannerism. Employer regarding placement of professionals in child care should have assessed applicants' personal manner is compatible in public schools attends an educational community for a happening of harm and irresponsible care among attendee. Explain interest is in an employee courteous and polite daily for a school year. Instead, please supervise the school as employee approve, then employee should be complaints to N.J. School Laws and United States laws for citizens. The educators' personal character in control perceive laws a good to public school students and attendee so, who will the laws apply an uninformed citizen, a qualified invitation to terrorism. Educators should work toward the future not rescind to times of retiree no free education supplies, bell ring (300) children in school the parents' responsibility, no DYFS agencies no Union Rights grace period on attendance rights and medical leave rights this is for reindulgement on implementing, employee is initiating dispute. The attendee overseeing child's responsible care and employee charges with instability of family, evident is young educator(s) reciprocated instability on employer's provisions. Parent will continue to restore civil stability in family.
>
> [Pet. 15 (errors in original).]

Petitioner offers descriptions of similar clarity and construction for all of the statutes she alleges Newark and/or West Orange have violated. Moreover, the dates

of these alleged violations are equally difficult to discern, but all of Petitioner's claims appear to reference incidents that allegedly occurred between 2008 and 2012. See generally, Pet.[2]

Petitioner's daughter I.W. was a Newark student until approximately March of 2012, when she transferred to West Orange. See Newark Memorandum in Support of its Motion to Dismiss Dated October 5, 2016 ("Newark Memo"), Page 2; West Orange District's Letter Brief in Support of its Motion to Dismiss Dated October 20, 2016 ("West Orange Brief"), Page 2.

LEGAL DISCUSSION

A. Claims subject to dismissal for lack of jurisdiction:

N.J.S.A. 6A:3-2.1(a) establishes the Commissioner of Education's authority to issue declaratory rulings:

> Pursuant to [statutory authority], any interested persons may petition the Commissioner for a declaratory ruling with respect to rights, responsibilities and status arising from any statute or rule *within the jurisdiction of the Commissioner.*
>
> [Id. (emphasis added).]

N.J.S.A. 6A:3-1.1(a) establishes the Commissioner of Education's authority to hear cases:

> This chapter sets forth the rules of procedure established by the Department of Education for the filing of petitions with the Commissioner of Education to hear and decide controversies and disputes *arising under school laws.*
>
> [Id. (emphasis added).]

[2] There is one reference to September 1, 2016 which reads: "parent on September 01, -2016 West Orange Board of Education request the names of employee dismissed for specific respondent information, Mr. D. Zacwocki requested student's name to enter in computer." Pet. 10 (errors in original). It is not at all clear what this means. Moreover, this quoted portion of the petition is found under the following heading: "7. N.J.S.A. 2C:13-9. Human trafficking as a crime of second degree: elements; proof; penalties." Pet. 9.

I FIND that statutes 3 through 8 cited by Petitioner are not "school laws" and thus the Commissioner of Education has no jurisdiction to issue declaratory rulings regarding them or hear cases arising under them. Therefore, I **CONCLUDE** that Petitioner's claims 3 through 8 should be dismissed.

B. Claims subject to dismissal for timeliness:

N.J.A.C. 6A:3-1.3(i) address time limitations on petitions to the Commissioner of Education:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.
>
> [Id.]

N.J.A.C. 6A:3-2.1(b) makes the timeliness standard from petitions to appeal found at N.J.A.C. 6A:3-1.3(i) applicable to petitions for declaratory rulings:

> [T]he rules pertaining to filing, service and answer of petitions as set forth in this chapter shall apply to petitions for declaratory ruling.
>
> [N.J.A.C. 6A:3-2.1(b).]

Of the statutes Petitioner lists that are within the jurisdiction of the Commissioner of Education, the Petition references events taking place between the years of 2008 and 2012. In light of I.W.'s transfer to West Orange in 2012, I **FIND** that any claims Petitioner might have against West Orange that are subject to the jurisdiction of the Commissioner of Education are plainly time-barred by N.J.A.C. 6A:3-1.3(i) and I **CONCLUDE** therefore that they should be dismissed.

Moreover, Newark and West Orange both state that I.W. transferred from Newark to West Orange on March 6, 2012. Newark Memo 4; West Orange Brief 2. The Petitioner's submission also appears to reference March 6, 2012, more specifically as the date I.W. was subjected to "a dishonorable order," as well as "corporal punishment." Pet. 3, 5. Therefore, I **CONCLUDE** that all of Petitioner's claims against Newark are time-barred as well and should be dismissed.

CONCLUSION

The petition warrants dismissal for a multitude of reasons, not the least of which is the fact that it appears that all of the behavior her "claims" address took place in 2008 at the earliest, and in 2012 at the latest. These incidents are well past the 90 day time limitation on such claims.

Of even greater significance is the fact that the Petitioner's submission is incoherent and incomprehensible. Even if the petition did reference actions by Newark or West Orange that were alleged to have occurred within the past 90 days, it remains impossible to decipher what exactly those actions were.

Finally, **I FIND** that the majority of the statutes cited by Petitioner are not school laws, and thus are not within the jurisdiction of the Commissioner of Education. Therefore, I **CONCLUDE** that all of Petitioner's claims should be dismissed.

ORDER

Based upon all of the foregoing, it is hereby **ORDERED** that the petition in this matter be and hereby is **DISMISSED**.

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

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

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

May 9, 2017
DATE

LESLIE Z. CELENTANO, ALJ

May 9, 2017

Date Received at Agency:

Date Mailed to Parties: MAY 10 2017

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

171-17

OAL DKT. NO. EDU 6162-17
AGENCY DKT. NO. 77-4/17

DHARMESH TRIVEDI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. In this case, the petitioner is challenging the Morris County Vocational School District's (District) admission policy. The petitioner seeks an Order requiring the District to immediately reconsider all of its admission decisions and apply an objective assessment to all applications.[1] The ALJ denied the petitioner's request for emergent relief.[2]

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The party seeking such relief

[1] It should be noted that the petitioner did not file the petition of appeal on behalf of his minor child, who was not accepted to the District's Mathematics, Science and Engineering program for the 2017-2018 school year. Instead, the petitioner named himself in the petition as a parent and taxpayer in the District and sought immediate reconsideration of all admission decisions for every applicant.

[2]The recommended Order does not state any facts or provide any indication whatsoever as to why the petitioner did not satisfy the requirements for emergent relief. Based upon a review of the audio recording from the hearing at the OAL, it appears the ALJ found that the petitioner did not show that he would personally suffer irreparable harm if the relief was not granted because he was not an applicant. Additionally, the ALJ suggests that the petitioner did not establish a likelihood of success on the merits because he did not provide any evidence that the current admission process was unlawful. Although the ALJ's determinations on these *Crowe* factors can be gleaned from the ALJ's exchange with the parties at the hearing, the ALJ did not issue a verbal Order on the record outlining his reasons for denying petitioner's motion for emergent relief.

must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

Upon a review of the record in this matter, the Commissioner finds that the petitioner has failed to meet the standard required for emergent relief. Most notably, the petitioner has failed to demonstrate a likelihood of success on the merits of the underlying appeal. Specifically, the petitioner has not made a preliminary showing that the District's current admission policy is arbitrary, capricious or unreasonable.

In response to the petition of appeal and request for emergent relief, the District submitted an affidavit of the superintendent wherein he states that the District has developed a multiple-measure admissions rubric that is designed to be as fair and equitable as possible to all applicants. Among other factors, the admissions rubric involves the use of an applicant's final 7th grade averages for English, Mathematics, Science and Social Studies, without distinction between honors, traditional or special education courses and without assigning a factor for weighing different school districts. In his petition, the petitioner challenges the District's practice of interviewing the applicants and he maintains that the criteria for admission that is used by the District is unfair to students who take honors courses. The petitioner, however, has failed to present the requisite evidence necessary to show on a motion for emergent relief that the District's multi-discipline approach to the application process is arbitrary, capricious or unreasonable, or is in violation of any school law. *See, Ann Kopera v. Board of Education of West Orange, Essex County, et al.*, 60 *N.J. Super.* 288, 294-296 (App Div 1960). Therefore, in light of the fact

that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the remaining factors.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed herein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley S. Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/20/17
Date of Mailing: 6/20/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 06162-17
AGENCY DKT. NO. 77-4/17

DHARMESH TRIVEDI,

Petitioner,

v.

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

Respondent.

Dharmesh Trivedi, petitioner, pro se

John M. Mills, III, Esq., for respondent (Mills & Mills, attorneys)

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

THIS MATTER having been brought before this tribunal by petitioner, Dharmesh Trivedi, upon application for emergency relief; and having considered the papers both in support of and in opposition to the application; and having heard oral argument; and having concluded that petitioner failed to demonstrate that he will suffer irreparable harm if the relief is not granted, that the legal rights underlying his claims are settled, that petitioner has a likelihood of prevailing on the merits of the underlying claims, and that

petitioner will suffer greater harm than respondent will suffer if the requested relief is not granted; and for good cause having been shown;

It is on this 12th day of May 2017,

ORDERED that petitioner's application for emergency relief is **DENIED**.

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

BARRY E. MOSCOWITZ, ALJ

/bem

OAL DKT. NO. EDU 6162-17
AGENCY DKT. NO. 77-4/17

DHARMESH TRIVEDI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. In this case, the petitioner is challenging the Morris County Vocational School District's (District) admission policy. The petitioner seeks an Order requiring the District to immediately reconsider all of its admission decisions and apply an objective assessment to all applications.[1] The ALJ denied the petitioner's request for emergent relief.[2]

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The party seeking such relief

[1] It should be noted that the petitioner did not file the petition of appeal on behalf of his minor child, who was not accepted to the District's Mathematics, Science and Engineering program for the 2017-2018 school year. Instead, the petitioner named himself in the petition as a parent and taxpayer in the District and sought immediate reconsideration of all admission decisions for every applicant.

[2]The recommended Order does not state any facts or provide any indication whatsoever as to why the petitioner did not satisfy the requirements for emergent relief. Based upon a review of the audio recording from the hearing at the OAL, it appears the ALJ found that the petitioner did not show that he would personally suffer irreparable harm if the relief was not granted because he was not an applicant. Additionally, the ALJ suggests that the petitioner did not establish a likelihood of success on the merits because he did not provide any evidence that the current admission process was unlawful. Although the ALJ's determinations on these *Crowe* factors can be gleaned from the ALJ's exchange with the parties at the hearing, the ALJ did not issue a verbal Order on the record outlining his reasons for denying petitioner's motion for emergent relief.

must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

Upon a review of the record in this matter, the Commissioner finds that the petitioner has failed to meet the standard required for emergent relief. Most notably, the petitioner has failed to demonstrate a likelihood of success on the merits of the underlying appeal. Specifically, the petitioner has not made a preliminary showing that the District's current admission policy is arbitrary, capricious or unreasonable.

In response to the petition of appeal and request for emergent relief, the District submitted an affidavit of the superintendent wherein he states that the District has developed a multiple-measure admissions rubric that is designed to be as fair and equitable as possible to all applicants. Among other factors, the admissions rubric involves the use of an applicant's final 7th grade averages for English, Mathematics, Science and Social Studies, without distinction between honors, traditional or special education courses and without assigning a factor for weighing different school districts. In his petition, the petitioner challenges the District's practice of interviewing the applicants and he maintains that the criteria for admission that is used by the District is unfair to students who take honors courses. The petitioner, however, has failed to present the requisite evidence necessary to show on a motion for emergent relief that the District's multi-discipline approach to the application process is arbitrary, capricious or unreasonable, or is in violation of any school law. *See, Ann Kopera v. Board of Education of West Orange, Essex County, et al.*, 60 *N.J. Super.* 288, 294-296 (App Div 1960). Therefore, in light of the fact

that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the remaining factors.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed herein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: _____

Date of Mailing: _____

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

172-17R

172-17

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
C. ANN VOLK, EXECUTIVE COUNTY SUPERINTENDENT, NEW JERSEY STATE DEPARTMENT OF EDUCATION, AND E.H., ON BEHALF OF MINOR CHILD, K.M.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

In December 2014, the State-Operated School District of Camden (Camden) filed a petition contending that E.H. and minor child K.M. are residents of the City of Camden – despite previously being homeless after losing their home in Voorhees Township – and now live in a Camden home that is "fixed, regular and adequate," thus precluding a determination that they are homeless. Petitioner urged that K.M. is entitled to a free public education in Camden schools, not in Voorhees Township schools. The Executive County Superintendent (ECS) had rejected petitioner's position, concluding that E.H. and K.M. were homeless and, as such, K.M. is entitled to attend school in Voorhees Township at Camden's expense. After E.H. failed to file an answer to the petition, petitioner filed a motion for summary decision. An Initial Decision was issued in February 2016, wherein the ALJ found, *inter alia*, that E.H. and K.M. were no longer homeless as they had lived at a home in Camden that was fixed, regular and adequate for more than four years. Accordingly, summary decision was granted to petitioner. Subsequently, the Commissioner issued a final decision in the matter, which found, *inter alia*, that the ALJ failed to address all of the issues raised in the petition and the record was devoid of evidence regarding K.M.'s present living conditions; accordingly, the Commissioner remanded the matter to the OAL for further proceedings.

On remand, following a hearing which included testimony from E.H. and others, the ALJ found, *inter alia*, that: the Camden home that E.H. shares with family members meets the definition of "fixed, regular and adequate", and therefore K.M. is not homeless; Camden is the district in which K.M. is entitled to receive a free and appropriate education; there is no warrant in the record or circumstances presented to the Commissioner to issue injunctions against a county office; Camden has not presented a basis for any remedy of reimbursement against NJDOE; and the homelessness determination made by the ECS did not fully consider and analyze the entire scenario present in the instant case. The ALJ concluded that the ECS's determination regarding K.M.'s homelessness must be reversed, and Camden's applications for injunctive relief and financial reimbursement must be denied.

Upon comprehensive review, the Commissioner adopted the Initial Decision as the final decision, with modification. Specifically, the Commissioner found, *inter alia*, that: the appropriate standard of review for ECS decisions regarding homelessness is *de novo*; the ALJ properly found the K.M. is no longer homeless, however the ECS's 2014 decision that K.M. was homeless and deemed domiciled in Camden was also proper; the District has no basis for seeking reimbursement from the NJDOE for K.M.'s tuition and transportation costs; petitioner is not entitled to any of the injunctive or declaratory reliefs sought herein; the ECS's process for determining disputes regarding homelessness and financial responsibility for a homeless child's education comports with the requirements of *N.J.A.C.* 6A:17 *et seq.* and the McKinney-Vento Homeless Education Assistance Act, 42 *U.S.C.A.* § 11431 *et seq*; and the ECS's decision in this matter has neither created a new definition of domicile nor a "voucher" system for Camden.

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

Issued 6/20/17

OAL DKT. NO. EDU 4521-16
(EDU 6081-15 ON REMAND)
AGENCY DKT. NO. 371-12/14

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
C. ANN VOLK, EXECUTIVE COUNTY SUPERINTENDENT, NEW JERSEY STATE DEPARTMENT OF EDUCATION, AND E.H., ON BEHALF OF MINOR CHILD, K.M.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law ("OAL") have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the parties, and the replies thereto. In this matter, petitioner[1] challenges the homeless determination of the Executive County Superintendent ("ECS") for Camden County, C. Ann Volk, in reference to minor child, K.M. Petitioner seeks reversal of Volk's determination from September 2014 and October 2014 that K.M. was homeless, and that the District was financially responsible for her education.[2] Furthermore, petitioner requests various declaratory and injunctive reliefs from the Commissioner. Finally, petitioner seeks reimbursement for the cost of K.M.'s education, as well as attorney's fees, from the New Jersey Department of Education ("NJDOE"). Respondent[3] contends that her determination was proper and that K.M. remains homeless; thereby, Camden is required to

[1] Petitioner shall also be referred to as "Camden" and "District."

[2] K.M. was enrolled in Eastern Regional High School in Voorhees, New Jersey, where she remained enrolled for the time period relevant to this case.

[3] Respondent shall refer to "Volk" for the purposes of this decision.

continue providing tuition and transportation costs for K.M. Respondent further contends that petitioner's requests for declaratory and injunctive relief are improper and must be denied. Additionally, respondent submits that petitioner is not entitled to reimbursement or attorney's fee from the NJDOE.

Following transmittal of this matter to the OAL, the parties filed a motion and cross-motion for summary decision before the Administrative Law Judge ("ALJ"). The ALJ granted summary decision to petitioner on Count One of the petition – finding that K.M. is not homeless because she presently resides in a fixed, adequate, and regular dwelling – but did not address Counts Two through Five of the petition or Camden's request for reimbursement. In a decision dated March 18, 2016, the Commissioner remanded the matter to the OAL, finding that the ALJ failed to address all of the issues raised within the petition and erred in granting summary decision. The Commissioner explained that, given the lack of information contained in the record, a plenary hearing centered upon a comprehensive, fact-specific examination of the family's circumstances was necessary to determine K.M.'s status.

On remand, the ALJ concluded that K.M. lives in a "fixed, regular and adequate residence" and therefore, she is not homeless.[4] The ALJ further concluded that there is no basis for the Commissioner to issue any injunctions in this matter, and that Camden is not entitled to reimbursement from the NJDOE.

Petitioner's exceptions substantially recast and reiterate the arguments made below. Specifically, petitioner argues: 1) Camden is entitled to reimbursement of tuition and transportation costs from the 2012-2013 through the 2016-2017 schools years since K.M. is not homeless, and the NJDOE is responsible for such reimbursement; 2) Camden is entitled to injunctive relief permanently enjoining and requiring Volk to apply the law in making homelessness determinations; 3) Volk's decision has created a new definition for domicile, which permits a general education student from

[4] The ALJ also reversed Volk's decision.

the District to attend an out-of-district school at Camden's expense; 4) Volk has created a "voucher" system by directing Camden to pay for the cost of K.M.'s education in another school district; and 5) as such, the NJDOE must declare that it will not penalize Camden for incurring the cost of tuition and transportation to send its general education students to another school district.

In her reply, respondent expresses her disagreements with petitioner's specific exceptions, and also argues that the ALJ's decision leaves open the question of when K.M.'s homeless status changed. Respondent submits that petitioner cannot assume that K.M. was no longer homeless beginning in the 2012-2013 school year merely because that is the point at which Camden became financially responsible for K.M.'s education. Respondent further argues that the ALJ did not find Volk's decision incorrect; rather, the ALJ reached a different determination based on *de novo* review of the record and the additional information gathered subsequent to Volk's decision. Respondent also uses this opportunity to reassert her position that a "more-appropriate" standard of review is "arbitrary, capricious, or unreasonable, or whether subsequently-received information requires the decision be reversed."

Respondent's exceptions similarly advance her arguments below. Specifically, respondent argues that the ALJ erred in determining that K.M. is no longer homeless. Respondent submits that K.M. lacks a fixed, regular and adequate residence as demonstrated by the family's particular living situation and E.H.'s financial difficulties. Additionally, Respondent argues that the inability of a homeless person to realistically obtain their own residence in the foreseeable future due to economic hardship, together with their long-term residence in a family member's home, does not change their homeless status. Respondent also seeks modification of the ALJ's decision to clarify that there is no temporal limit to homelessness, and a homeless student has the right to attend school in their district of origin even after they are deemed domiciled in another district, so long as they remain homeless. Lastly, respondent further reiterates arguments in support of the ALJ's

determination that petitioner is not entitled to the injunctive relief or declaratory relief sought in its petition.

Petitioner argues in its reply that the District is entitled to injunctive relief because "if the Commissioner felt that [s]he was not authorized to issue injunctive relief, then [s]he would not have remanded that portion of the case to the [ALJ]." Petitioner also argues that the Initial Decision creates a new definition of domicile because Camden is "required to pay for tuition and transportation to an out of district school for a general education student who lives in and is domiciled in the City of Camden." Lastly, petitioner reasserts that the ALJ's finding that K.M. is not homeless is proper because K.M. and her family live in a home that has "running water, a kitchen, a bathroom, living areas and bedrooms." Petitioner further notes in its reply,

> Respondents would have the Commissioner issue a decision that permits a family to declare itself "homeless" for the entire length of a child's education, spanning 12 years, simply because the family is living in a home that is either not the family's own home or is not where they would prefer to live . . . Respondents are redefining homelessness by creating a situation where [K.M.]'s family, who lives in a stable house for years and years, with the usual amenities found in a regular home, and that specifically fits the definition of "fixed, adequate and regular" is still considered homeless, simply because some people in the home share a bedroom and because this is not where [K.M.]'s mother would prefer to live.

Upon a comprehensive review of the record, the Commissioner is in accord with the ALJ's decision, as modified herein. Specifically, the Commissioner finds that the appropriate standard of review for ECS decisions regarding homelessness is *de novo* (without deference to the decision below). Additionally, the ALJ properly found that K.M. is no longer homeless; however, Volk's decision in 2014 that K.M. was homeless and deemed domiciled in Camden – and, therefore, the District was responsible for the cost of K.M.'s education – was also proper. Furthermore, the District has no basis for seeking reimbursement from the NJDOE for K.M.'s tuition and transportation costs. The Commissioner also finds that petitioner is not entitled to any of the

injunctive and declaratory reliefs sought in this matter.[5] Indubitably, Volk's process for determining disputes regarding homelessness and the financial responsibility for a homeless child's education comports with the requirements of *N.J.A.C.* 6A:17 *et seq.* and the McKinney-Vento Homeless Education Assistance Act, 42 *U.S.C.A.* § 11431 *et seq.* (McKinney-Vento Act), and the decision has neither created a new definition for domicile nor a "voucher" system for Camden.[6]

Under *N.J.A.C.* 6A:17-2.7, "[i]f an appeal of a determination of district of residence also includes an appeal of the determination of homelessness and/or school district of enrollment, the appeal shall be submitted to the Commissioner pursuant to *N.J.A.C.* 6A:3, Controversies and Disputes." The regulations do not specify the standard of review for appeals from ECS decisions in matters of homelessness; however, both parties seek review of this case under the "arbitrary, capricious or unreasonable" standard. This limited scope of review is the standard used by appellate courts in considering final agency decisions. *See Campbell v. Dept. of Civil Service*, 39 *N.J.* 556 (1963). The decisions below are not disturbed "in the absence of a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence." *Id.* at 562. Similarly, in matters where the Commissioner serves as the appellate entity, the "arbitrary, capricious, or unreasonable" standard is applied to determine whether a previous ruling was improper on the basis that it was made on unreasonable grounds or without appropriate consideration of circumstances. In

[5] Petitioner's request for injunctive and declaratory relief do not merit extensive discussion, as petitioner has no basis in law for same. The Commissioner notes the following, however: 1) Even if petitioner had a right to seek such relief in this matter, Camden cannot establish irreparable harm. More importantly, the Commissioner's decision to remand the matter to the OAL had nothing to with the merits of Camden's claims; rather, it was a procedural action – the matter had already been transmitted to the OAL for a hearing so the ALJ's failure to complete fact-finding and consider *all* the issues raised in the case rendered the matter incomplete, and 2) Petitioner's request for a declaration from the Commissioner that Camden will not be penalized for paying for the educational costs of "general education students" to attend school in another school district is, simply put, far-fetched. Petitioner has conflated the rights of a "homeless" child – which will be discussed below – with that of "non-homeless" children domiciled/residing in the District.

[6] Petitioner has again misconstrued the law as it applies to homelessness. The Commissioner does not deem it necessary to address Camden's arguments relating to "a new definition of domicile" and "establish[ment] of a voucher system," in detail, as the law is sufficiently clear, and petitioner's arguments are devoid of any legal support. Instead, the Commissioner directs the petitioner's attention to *N.J.S.A.* 18A:38-1, *N.J.S.A.* 18A:7B-12, *N.J.A.C.* 6A:17-2.3 and *N.J.A.C.* 6A:17-2.5, and corresponding decisional law – which will be discussed below – as they clearly set forth the education of homeless children and the school districts' responsibilities.

making such determinations, deference is given to the decision below. *See T.R v. Bd. of Educ. of the Bridgewater-Raritan Reg'l Sch. Dist.*, Commissioner Decision No. 144-15 (May 6, 2015) (citing *Thomas v. Bd. of Ed. of Morris Twp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966)) ("[i]t is well established that when a local school board acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable").

Moreover, when the Department has decided to limit the Commissioner's scope of review of specific subordinate divisions or offices, it has expressed that limitation by regulation. *E.g.*, *N.J.A.C.* 6A:4-4.1 (decisions of the State Board of Examiners), *N.J.A.C.* 6A:3-7.5 (decisions of the New Jersey State Interscholastic Athletic Association); *see also In the Matter of the Certificates of Gail Wunsch*, Commissioner Appeal No. 421-16A (December 14, 2016) ("the Commissioner may not substitute her judgment for that of the Board [of Examiners] so long as . . . the Board's decision is supported by sufficient credible evidence in the record . . . the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious or unreasonable"), *Bd. of Educ. of North Bergen Twp. v. NJSIAA*, Commissioner Decision No. 476-12 (December 14, 2012) ("[t]he Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious or unreasonable manner"). As noted above, no such regulation similarly restricts the scope of review from an ECS determination of homelessness. Significantly, "the agency head is not legally required to give any deference to the staff of the agency, but as the head of an administrative agency is instead required to decide the matter as the agency head deems legally appropriate." *Bd. of Trustees of the Passaic Cnty. Elks Cerebral Palsy Center v. NJ Dept. of Educ.*, OAL Docket. No. EDU 16074-12, Commissioner Decision No. 334-14 (Aug. 14, 2014) (citing *Liberty House Nursing Home v. Dep't of Health and Senior Servs.*, OAL Dkt. No. HLT 7275-09, *adopted*, Commissioner (Sept. 23, 2010), *aff'd*, A-1069-10 (App. Div. Mar. 5, 2012) (slip op.), *cert. denied*, 210 N.J. 478 (2012)).

Accordingly, "arbitrary, capricious or unreasonable" is not the appropriate standard of review as this matter is not an appeal from a final agency decision, and petitioner has requested the Commissioner's review of a subordinate office within the Department where the Commissioner's scope of review is not limited.

It bears noting that appeals from a determination of homelessness are not solely a request to review and reverse an ECS's decision: the Commissioner must also decide – based on the facts available to her at the conclusion of the hearing at the OAL – whether the child is homeless. Such adjudications are fact-sensitive, and individual circumstances must be thoroughly considered. *See M. O'K. v. Bd. of Educ. of the Boro of Cresskill, et al*, Commissioner Decision No. 325-14 (August 12, 2014), *aff'd*, A-0828-14T4 (App. Div. Sept. 8, 2016) (slip op.) (Finding "[t]he reasons for a child's homelessness, the child's living conditions, and the resources and intentions of the parents or custodians" are relevant considerations in the evaluation of homelessness). During the time between an ECS's decision (which is ordinarily made within a short period of time and without the convenience of fact-finding or an extensive record) and the Commissioner's review of the appeal, the child's living conditions, and/or the resources and intentions of the family may change. Consequently, the Commissioner's review of the appeal is based on "the facts as they may exist at the conclusion of the hearing held in the OAL and the proper application [of] those facts [to] the existing law." Initial Decision at 13. As such, the Commissioner's independent determination of a student's homeless status is *de novo*.

In New Jersey, it is well-settled that homelessness determinations are dictated by Federal and State law. Under the McKinney-Vento Act, homeless children are defined as "individuals who lack a fixed, regular and adequate nighttime residence," which includes "children sharing housing with other persons due to loss of their own housing, economic hardship, or a similar reason." 42 *U.S.C.A.* § 11434a. Similarly, under state law, homeless children are defined as "child[ren] or youth who lack[] a fixed, regular and adequate residence pursuant to *N.J.S.A.* 18A:7B-

12 and *N.J.A.C.* 6A:17-2.2," which includes children living in the "residence of relatives or friends where the homeless child resides **out of necessity** because his or her family lacks a regular or permanent residence of its own." *N.J.A.C.* 6A:17-1.2 and 2.2 (emphasis added). As discussed above, determination of homelessness is not temporal, *i.e.*, there is no maximum duration of homelessness, and therefore, the determination must be made on the specific facts and circumstances of the case. The facts in this case support a finding that K.M. is *not* homeless pursuant to *N.J.A.C.* 6A:17 *et seq.*, and the McKinney-Vento Act because she does not lack a "fixed, regular, and adequate nighttime residence" and her family's continued residence at her grandmother's home can no longer be considered "resid[ing] out of necessity" due to "economic hardship." *See N.J.A.C.* 6A:17-1.2 and 2.2; 42 *U.S.C.A.* § 11433 and 11434a. *See also M. O'K*, *supra*; *Bd. of Educ. of the Boro. Of Englewood Cliffs v. E.S. and W.S., o/b/o A.S. and E.S., et al*, Commissioner Decision No. 196-10 (June 30, 2010); *L.C. o/b/o B.C. v. Bd.of Educ. of the Twp. of Branchburg*, 96 *N.J.A.R.* 2d (EDU 1003).

A review of the record indicates that K.M.'s family moved from Voorhees to Camden in 2011 due to loss of residence and economic hardship. The record also reveals that E.H. has been gainfully employed since September 2012 and receives a salary of $65,000, and her two adult children are employed in part-time positions.[7] E.H. testified that she is unable to receive approval for a mortgage or a rental apartment due to debt and poor credit. E.H. also testified that there are default judgments entered against her for which she makes monthly payments.[8] Finally, E.H. testified that she does not pay rent to live in the Camden residence, but she contributes towards the household expenses by paying for the bills when her mother asks her to pay for a particular bill, which varies

[7] It is observed from the transcript of the hearing that E.H. was hesitant to disclose the exact amount of her annual income and questioned the relevance of such information.

[8] There is no record of how much E.H. is paying on a monthly basis, and in response to the ALJ's request for an approximate amount, E.H. claimed that it is a substantial portion of her income without providing a specific amount.

from month to month.[9] Respondent has argued that the family's economic hardship has prevented E.H. from being able to find a residence of her own, and the shared residence cannot be considered "fixed, regular, and adequate" because of the sleeping arrangements,[10] and the family's previous short-term relocations to hotels due to conflict between E.H. and her mother on several occasions.[11]

In *M. O'K.*, *supra*, the Commissioner found, and the Appellate Division affirmed, that the O'K family – two parents and three children – become homeless due to the foreclosure of their home in Cresskill, and although they had been deemed domiciled in Little Ferry as a result of their residence in the district for over one year, the O'K family continued to remain homeless due to their shared living conditions and the parents' economic hardship.[12] The O'K family initially moved into S. O'K's parents' house in Little Ferry, but after a year of living in that home, they were temporarily displaced from the residence due to flooding caused by Hurricane Sandy. At that point, they were forced to relocate to a relative's home in New York. After a few months, the O'K family returned to Little Ferry and resumed living in S. O'K's parents' house. At the Little Ferry residence, the O'K family occupied the bottom floor of the house, which consisted of one small bedroom and a common area. There was no bathroom or kitchen on that floor. The parents and two of the children – a teenage daughter and the ten year old son – shared the bedroom, while the older son slept in the

[9] E.H. also testified that she pays for food but it is not clear from the transcript whether she pays for all of the food for the household or just her family, or contributes towards the total cost of food for the household.

[10] E.H. testified that she sleeps in the living room, the two daughters share one bedroom, while her son has his own room, and her mother has her own room. E.H.'s brother sleeps in the unfinished basement. E.H. also testified that her brother, who lived in the home prior to their move in 2011, voluntarily relocated to the basement.

[11] It is not clear from E.H.'s testimony the exact number of times the family left the Camden residence and stayed at a hotel, but E.H. testified that it was between five and ten times over the last six years. E.H. also testified that in some years, the brief relocation occurred more frequently than in others. It is also not clear whether such incidents have occurred in recent years, but the ALJ did not find this to detract from his conclusion because of the number of years that the family has occupied the Camden residence and the fact that they have moved back to the Camden residence after every hotel stay. The Commissioner agrees – to the extent that the family returned to the Camden residence and has continued their occupancy of the home – that such relocations do not impact the family's present status as there is no indication that the family is in imminent or foreseeable risk of losing their place in the home.

[12] Neither parent was employed at the time of the litigation, and the family's sole income consisted of Social Security Disability benefits.

common area. The O'K family lived in those conditions *out of necessity*, especially considering the family's financial challenges. Prior to their displacement, the O'K family had always lived in Cresskill and they expressed a desire to return to Cresskill and continue to raise their children in that community. During the pendency of the litigation, the O'K family represented that they were actively searching for a house in Cresskill. In fact, at the time of the Appellate Division proceedings, the O'K family still had not acquired housing of their own and moved into a two-bedroom apartment in Little Ferry being rented by the adult, emancipated son, while continuing to seek permanent housing.

In the instant matter, the living conditions of K.M. and her family, as well as E.H.'s financial situation, are distinguishable from those of the O'K family. First, K.M. and her family enjoy occupancy and use of the entire Camden residence, as they are not relegated to a portion of the home that would otherwise be considered inadequate. Moreover, although the sleeping arrangements may be less than ideal, it is not uncommon for siblings to share the same room.[13] Second, E.H. is presently employed; notably, she has been employed for over four and a half years. Additionally, her two adult children are also employed in part-time positions. While E.H. has testified that she has outstanding debt and judgments against her – which she claims has resulted in economic hardship – she has not been forthcoming about the amounts of such judgments and debts, and the extent to which they have prevented her from finding alternate housing for her family. Without such proofs, the Commissioner is not persuaded that E.H., who is gainfully employed and earns an annual salary of $65,000, is unable to find an apartment that is suitable for her family in Voorhees, while making payments for the alleged judgments and debt.[14] Third, E.H.'s testimony reveals that she stopped

[13] The Voorhees apartment also had three bedrooms, and at least five occupants at one point. As such, it is probable that the two sisters were also sharing a room in the Voorhees apartment.

[14] E.H. has not indicated where she has been looking for an apartment; however, based on her desire to have K.M. remain enrolled in Eastern Regional, it would be reasonable to expect that E.H. has been looking for an apartment in Voorhees for the last four and a half years. There is also nothing barring E.H. from looking for adequate housing in

looking for apartments in June 2016.[15] While the Commissioner is certainly sympathetic to E.H.'s predicament, the Commissioner is not persuaded – based on the facts in this case – that K.M. and her family continue to remain in the Camden residence out of necessity and economic hardship. Furthermore, since the Camden residence qualifies as a "fixed, regular, and adequate" nighttime dwelling-place, K.M. is deemed not homeless.[16]

Homelessness, particularly in cases like the present matter, is best viewed in a continuum. For instance, a family may move into a relative's home out of necessity and hardship, but over time, that home may become a regular, *albeit* temporary, dwelling-place where the members of the household seamlessly co-habit and share the expenses and amenities of the home. *See L.C., supra* (finding "while [petitioner's] living arrangements with her brother may not be permanent in the sense that she may wish to eventually return to Branchburg, the evidence shows them to have become sufficiently fixed, regular and adequate so as to preclude a finding of homelessness"). In *L.C., supra*, the C. family was evicted from their home in Branchburg, causing them to move into L.C.'s brother's apartment. The apartment was small and did not have room for the C. family's belongings, which were placed in storage. At the time of the hearing, L.C. testified that the C. family had continued to remain in the brother's apartment and that L.C. was paying half of the rent for the apartment. L.C. also indicated her desire to move back to Branchburg.

Here, E.H. similarly contributes to household expenses at the Camden residence, but – unlike in *L.C., supra* – her circumstances appear less temporary, as there is no indication that any

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Camden or in its vicinity, as the S. Family did in Teaneck when they could not find a home in Englewood Cliffs. *See E.S., supra.*

[15] It is also unclear whether E.H. has attempted to find housing where she is not required to submit a rental application or undergo a credit check: E.H. testified that she would not be approved for an apartment due to her credit as she has been rejected in the past.

[16] It is noted that E.H. sleeps in the living room and her brother – whose living condition should not be factored in deciding K.M.'s status as a homeless child – sleeps in the basement. Unless E.H. opts to share one of the three bedrooms – which is certainly not ideal – her continued living situation is a result of her decision to remain in the Camden residence despite having the potential means to move into an adequate home of her own.

of the family's possessions had to be placed in storage until such time as the family moves to a different home. E.H. may consider the Camden residence temporary, and her intention may be to eventually move back to Voorhees (or to a different home in Camden) in the future. However, while intention is a factor to be considered in determining homelessness, the totality of the facts and circumstances in this case renders a finding that K.M. is no longer homeless. Significantly, E.H. stopped looking for another home in June 2016; her financial situation is not typical of the economic hardships usually related to homelessness; and the Camden residence is fixed, regular, and adequate. *See E.S., supra*, where the ALJ found, and the Commissioner concurred, that the S. family – who had been evicted from their rental home of two years in Englewood Cliffs, which precipitated their move to Teaneck in November 2008 – was not homeless despite their representation that the small home in Teaneck was temporary, and that they were forced to remain there because of issues with their credit.[17] The ALJ noted that the parents were steadily employed for many years, and the S. family did not suffer from the typical financial hardships that are often related to homelessness.

It is important to distinguish between a family's decision to remain in a relative's home or temporarily settle elsewhere *out of necessity – i.e.*, they do not have the resources or the ability to find alternate housing – and a situation in which a family remains in the relative's home *out of choice*, *e.g.*, they have not found the home that they desire, even when other suitable housing is available to the family, or one where a family – like *E.S., supra* – claims homelessness just because they do not live in the community of their preference. As such, when a homeless family moves into a relative's home that is adequate – and the adults in the family are sufficiently employed with the financial means to find alternate housing, and the family continues to live in the home for an extended period of time without any imminent or foreseeable risk of losing their place in that home, and they share the space as a cohesive unit – a finding of homelessness would be improper.

[17] The ALJ also found that the home was in need of repairs but habitable.

As conceivable as it may be that a child could be homeless for the duration of their education (in limited circumstances), such determination must not be based on broad application of the governing statutes and regulations, as respondent has proposed. The purpose of the law is to ensure that a homeless child is not denied a free public education; it is not meant to enable a child to receive an education in a school district of preference by circumventing residency requirements. For that reason, the notion that homelessness has no maximum duration must be applied with caution, taking into consideration the totality of the circumstances. Consequently, when a child's circumstances change such that the child is no longer homeless, the finder of fact must also determine the point at which the child's homelessness ceased. A child's homeless status may change well before the case concludes, and it would be inequitable to hold a school district responsible for a child's education until a final decision is rendered if that district is not in fact responsible for the cost of the child's education. In this case, the Commissioner finds that K.M. stopped being homeless in June 2016, because that is when E.H. stopped looking for another place to live, despite having the resources and claiming that her intent was to move. The Commissioner finds that implicit in E.H.'s actions is the intent to remain in her mother's home for the foreseeable future – a home that is fixed, regular and adequate, and where she no longer resides out of necessity. Therefore, K.M. was homeless when she moved to Camden in 2011; she was properly found homeless in 2014 by ECS Volk; she is presently not homeless (as of June 2016); and therefore, K.M. was not entitled to a free public education in Voorhees for the 2016-2017 school year.

With regard to Camden's demand for reimbursement from the NJDOE for the cost of K.M.'s education,[18] and its request for attorney's fees, the Commissioner finds that there is no legal basis for same. Notwithstanding petitioner's failure to cite to any legal authority and convincingly

[18] In the limited instances where the district of residence cannot be determined or in situations where the child has resided in a domestic violence center or transitional living facility located outside of the district residence for more than one year, the State will assume financial responsibility for the tuition of the child. See *N.J.S.A.* 18A:7B-12(d). Such circumstances are not present in this matter.

argue why the District is entitled to such relief, it appears that Camden also seeks to change how the district of residence and the responsibility for the cost of a homeless child's education is determined. As such, the Commissioner will clarify the ALJ's finding in this matter. It is undisputed that a homeless child's district of residence – when the parent or guardian temporarily moves out of one district to another – is the district where the parent or guardian last resided prior to becoming homeless. *See N.J.S.A.* 18A:7B-12. In this case, K.M.'s district of residence was Voorhees when she moved from Voorhees to Camden in 2011. The district of residence is responsible for the educational costs of the child, which includes determining where the child shall be enrolled, paying the cost of tuition if the child is enrolled in another school district, and providing transportation as necessary. *See N.J.A.C.* 6A:17-2.3. Therefore, during the 2011-2012 school year, Voorhees was responsible for K.M.'s education and the associated costs. *N.J.A.C.* 6A:17-2.3(c) further provides, "[f]inancial responsibility will remain with the homeless child's school district of residence until the family is deemed domiciled in another jurisdiction, pursuant to *N.J.S.A.* 18A:38-1.d." In other words, if a homeless child moves to another school district and is deemed domiciled in that district, then for the purposes of the homeless child's education, the new school district is the child's district of residence, and the last school district is no longer financially responsible for the child's education.

Entitlement to a free, public education can be established once "[a]ny person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place within the district for one year or longer shall be deemed domiciled within the district . . ." *N.J.S.A.* 18A:38-1(d). It follows that the child is then entitled to a free, public education in that district. It is important to reiterate that when a child is "deemed domiciled in another jurisdiction" it does not mean that the child is no longer homeless, because the conditions of homelessness may still persist. Additionally, throughout the duration of a child's homelessness, they have a conditional right to continue education in the last

school district.[19] In this case, when K.M. and her family lived in Camden for a year, she was deemed domiciled in the District, and the District then became financially responsible for her education. Since K.M. was deemed homeless at the time, Camden had the option of continuing her enrollment in Voorhees, which the District decided was in K.M.'s best interest during the school years between 2012 and 2016. To now seek reimbursement for the 2012-2013, 2013-2014, 2014-2015, and 2015-2016 schools years from the NJDOE or any other similar entity for Camden's calculated decision to enroll K.M. in Voorhees, is improper.

With regard to the 2016-2017 school year, however, K.M. was not entitled to attend school in Voorhees as she was no longer homeless. Neither Voorhees nor the NJDOE is legally responsible for K.M.'s education as her present domicile is Camden. As K.M. was not homeless during the 2016-2017 school year, Camden may seek reimbursement from E.H. for: 1) the cost of K.M.'s transportation to Voorhees (deducting any cost of transportation Camden may have incurred had K.M. attended school in the District); and 2) the difference between the cost of K.M.'s tuition at Voorhees for the 2016-2017 school year and Camden's per pupil cost for the 2016-2017 school year (should Camden's cost of tuition be higher than Voorhees, the difference shall be credited towards the cost of transportation from Camden to Voorhees).

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is hereby adopted – as modified herein – as the final decision in this matter. Volk's determination in September 2014 and October 2014 that K.M. was homeless was proper given the totality of the family's circumstances at that time. K.M.'s status changed in June 2016 when E.H. – who has been satisfactorily employed for four and a half years – stopped looking for another place to live and

[19] The right to an education in the last school district is defined as "conditional" by the Commissioner because the determination of which school district the child will attend is made by the present school district based on the "best interest of the child," which includes consideration of factors such as the parents' wishes, continuity of the educational program, eligibility for special instructional programs, and the "distance, travel time, and safety factors in coordinating transportation services from the residence to the school." *N.J.A.C.* 6A:17-2.5. Therefore, unlike respondent's assertions, an absolute right to enroll in the last school district does not exist as such attendance may not be in the best interest of the child.

decided to continue her residence in a fixed, regular and adequate home in Camden despite having the resources and ability to move. Petitioner's request for reimbursement for tuition from the 2012-2013 school year through to the 2016-2017 school year, attorney's fees, injunctive relief and declaratory relief are denied on the basis that Camden has no legal right to same. Petitioner may, however, seek reimbursement of K.M.'s educational costs for the 2016-2017 school year from E.H., as outlined above.

IT IS SO ORDERED. [20]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/20/17

Date of Mailing: 6/20/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4521-16
AGENCY DKT. NO. 371-12/14
(ON REMAND OAL DKT. NO.
EDU 6081-15)

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,
Petitioner,
v.
C. ANN VOLK, EXECUTIVE COUNTY SUPERINTENDENT, NEW JERSEY STATE DEPARTMENT OF EDUCATION, AND E.H., ON BEHALF OF MINOR CHILD, K.M.,
Respondents.

Derlys Gutierrez, Esq., for petitioner (Adams, Stern, Gutierrez & Lattiboudere, attorneys)

Geoffrey Stark, Deputy Attorney General, for respondents C. Ann Volk and New Jersey State Department of Education (Christopher S. Porrino, Attorney General of New Jersey, attorney)

E.H., respondent, pro se, on behalf of K.M.

Record Closed: February 15, 2017 Decided: March 22, 2017

BEFORE **JEFF S. MASIN,** ALJ t/a:

This initial decision is the result of a remand of a prior decision issued concerning a dispute between the petitioner, State-Operated School District of Camden City (Board or SOSD Camden), and respondents, the State Department of Education, C. Ann Volk, formerly the Executive County Superintendent ("ECS") for Camden County, and E.H., the mother of a student, K.M. The dispute concerned a decision made by Volk regarding the alleged homelessness of K.M., and of her family. Volk had determined that the family was homeless and that as such, K.M. was entitled to attend school in Voorhees Township, New Jersey—the district of origin—at the expense of the SOSD Camden. The Board filed a Petition of Appeal with the Commissioner, which was referred for hearing to the Office of Administrative Law. The Initial Decision, issued on February 5, 2016, found that E.H., who, despite clear warnings concerning the possible consequences, had never responded to the original Petition or to the ongoing proceedings concerning a motion for summary decision filed by the Board, had defaulted. On the merits, the decision granted summary decision to the Board, concluding that E.H. and K.M. were not homeless, and thus Camden was both responsible for providing the student with a free and appropriate education and for determining the location where such education would be provided, with due consultation with the parent as to the latter issue.

On March 18, 2016, the Commissioner of Education issued a Decision, remanding the contested case to the Office of Administrative Law (OAL) for further proceedings. The Commissioner found the Initial Decision had not addressed all of the issues raised by Camden in its Petition of Appeal, specifically Counts Two through Five, as well as petitioner's request for reimbursement from the State.[1] Additionally, the Commissioner found that the record had not provided sufficient evidence to support the determination that K.M. "presently resides in a fixed, adequate, and regular residence and is, therefore, not homeless." Thus, the remand Order sought additional information to assist in assessing this issue. The Commissioner's Decision did not address the issue of whether E.H. had defaulted, or what, if anything, a default on her part meant

[1] The Petition of Appeal does not contain any claim for reimbursement. However, the Commissioner has noted this as an issue to be considered on this remand.

regarding the search for additional evidence. Camden asserts that the default has consequences for the record, but as will be explained, given the Commissioner's mandate, it is likely that he did not view the lack of response by E.H. as consequential, and she did testify in the remand hearing.

It is important to note that at the hearing on remand, SOSD Camden expressly stated that it did not seek to require that K.M., now a high school senior still attending Eastern Regional High School, which serves students from Voorhees Township, actually attend school in Camden, regardless of whether the District prevailed on its claim that she is not homeless. Therefore, the dispute is now focused on the Board's request to correct what it views as an incorrect decision as to the student's homelessness made by the then Executive County Superintendent, and on the financial consequences of the student's actual status, as well as the Board's claims for injunctive relief.

As the previous Initial Decision related, and the current testimonial record confirms, before 2010, E.H. and her family, consisting of her children and until 2009, her then husband, lived in a rental property in Voorhees Township, New Jersey. The parents separated and ultimately divorced, and according to E.H., when she could no longer meet the income requirements for the lease, the family was forced to relocate. They moved into E.H.'s mother's home in Camden in 2011. Since that time, they have not lived in any other rented or purchased location, either in or outside of Camden. K.M. continued to attend school in Voorhees and at Eastern Regional High School.

The Board has for some time contended that E.H. and her family, including K.M., are residents of the City of Camden, and that while in the past the family may have been homeless, they have for some time and are now not homeless. As a result, the student's right to a free education entitles her to attend school in Camden, not in Voorhees Township. The Executive County Superintendent twice rejected this position and concluded that E.H. and K.M. were homeless, and as such, the child was entitled to attend school in Voorhees Township at the expense of Camden, which was responsible for both the educational tuition and the costs of transportation. See letter decision dated September 23, 2014, and second decision letter dated October 15,

2014. In her first written decision, Executive Superintendent Volk made the following determinations:

1. The family was displaced from their home.
2. The family is living in a "doubled up" situation with a relative," and
3. The family is experiencing financial hardship.

Based upon these determinations, and without other written analysis, Superintendent Volk found that the family was homeless and therefore, under N.J.A.C. 6A:17 and the Federal "McKinney-Vento" legislation, 42 U.S.C. 11434, the Camden Board was responsible for tuition and transportation costs. The Superintendent's second decision letter of October 15, 2014, simply iterated the determination of eligibility for Camden to bear these costs. In neither decision did the Executive Superintendent discuss the evidence upon which she relied to make her decision.

N.J.S.A. 18A:38-1 provides

> Public schools shall be free to the following persons under 20 years of age:
>
> > d. Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for the purposes of this section;

During the remand hearing, Sandra Cintron, who performs services as a homeless liaison for the Camden School District, testified that she was familiar with K.M., and her family, having first been advised that they were being displaced from the Eastern Regional School District and wanted the children to stay in school in that district. Ms. Cintron was unsure whether this occurred in 2012 or 2013, but documentation from 2012 indicates that the reason for the displacement was the "nonrenewal of lease." In April 2012, the family requested that the District provide transportation to Eastern Regional. Ms. Cintron would provide information to the Camden District's business office about such requests. The address provided for the family after its displacement was on Bradley Avenue in Camden, where the family was

residing with K.M.'s grandmother.[2] The witness reviewed other documentation previously discussed in the prior initial decision, including intake packets, school residency forms and McKinney-Vento forms. All information gathered would be provided to the District's legal counsel. In August 2014, a letter was sent to E.H., advising that as the family had resided within the City of Camden since April 2012, a period of over twelve months from the date of the letter, "New Jersey law deems your child domiciled in the Camden City school district. Your child is entitled to a free public education within the Camden City school district." In response to this letter, E.H. e-mailed, advising that having received the letter, she appreciated, "[H]aving the option to enroll K. in the Camden City Public School District." However, she added, "it is my opinion that her interest is best served at Eastern Regional High School(school of origin)."

Ms. Cintron testified that she had never been in the home at Bradley Avenue, but had reviewed tax records which showed the number of bedrooms in the home and which showed that M.H., the mother of E.H. and the grandmother of K.M., was the owner of the property. She had also looked at the Zillow website, which showed the square footage of the property and described a single family home. After considering the information available, the District decided that the family was not homeless. According to the information available to her, the family still resided at the time of the hearing at the Bradley Street address. The District has paid bills for educational services provided the family since its displacement, but has not done so during the 2016-17 school year. During the time that the District has been considering the family's situation, there have been several meetings with E.H., attended first by Ms. Cintron's predecessor, Mr. Smith, and at least twice by Miss Cintron herself.

Richard Farr, a licensed private investigator, testified that he performs investigative services for the SCSD Camden concerning residency issues. He described observations of E.H. exiting from the Bradley Avenue address on several occasions and of a teenage female getting on a school bus early in the morning. As there is no real dispute regarding the fact that the family does live at Bradley Avenue address, this testimony was of limited significance. Although Mr. Farr never entered the

[2] The exact address has been purposely not provided in this decision.

home, he described it as a brick row house, with an open front porch, apparently built in the 1930s. He also confirmed that E.H. worked at an insurance firm in Evesham Township, again a matter which is not in dispute as E.H. herself testified to this employment.

E.H. testified that she and her family live on Bradley Avenue in Camden. Currently living in the house are her mother, her three children and her brother. Her mother owns the home. Her brother is sixty years old. The house has two stories and an unfinished basement. The first floor consists of a living room, dining area and kitchen. On the second floor are three bedrooms and a bathroom. E.H.'s two daughters share a bedroom on the second floor. Her son has a bedroom by himself on the second floor, and her mother has her own bedroom on second floor. E.H. sleeps on a sofa bed in the living room on the first floor. Her brother lives in the basement.

When the family resided in Voorhees Township they had a three-bedroom apartment. Although a bit shaky on dates, E.H. recalled that she had become unemployed in 2009. She received severance pay and/or unemployment benefits until 2011. When the lease renewal came due in 2011, her husband had already left the home. Even before his departure from the home he had not provided financial support and this situation has continued after the separation and subsequent divorce, with E.H. receiving neither spousal nor child support. In 2011, E.H. no longer met the income requirements for the Voorhees rental and her lease was not renewed. Having no other options at the time, her family went to Camden to live in her mother's home. E.H. is currently employed as a compliance analyst for a firm in Marlton, New Jersey, earning approximately $65,000 a year. She is supporting her two adult children, who have part-time jobs. A significant portion of her income goes to pay civil judgments that accumulated over the years and other debts.

According to E.H., her family has resided in her mother's home on Bradley Avenue ever since arriving in 2011. The children have always been there with her. However, there have been times when due to the stress of living with her mother, who is ill, and with whom she has not always had the best relationship, it has been requested that the family leave the house. On these several occasions, perhaps five to

ten times, they have relocated to hotels or motels for at least three to four days, at most for seven to ten days, all of these being relatively short stays away from Bradley Avenue. On each occasion, the family has then returned to that home. E.H. spoke of her attempts to find more permanent housing, indeed, noting that she does not consider her present living arrangement as "permanent." She has tried without any success to find apartments to rent or to obtain mortgages, but has been unable to make other living arrangements for her family. She described looking for other living arrangements once or twice a year, having last attempted to do so in June 2016. She described herself as "always looking mentally for another situation." At the same time, she is "not trying to beat the system." It is necessary for her to rebuild her credit. It has been very hard for her to dig out of the significant debt that she accumulated over time, including several civil judgments. While living with her mother she has contributed toward the household, but has not paid any fixed amount over any period of time. The payments she makes depend upon the bills she is asked to cover and she also pays for her family's food. Utilities are in her mother's name. E.H. has no credit cards. She pays a cell phone bill. Her driver's license lists her address as Bradley Avenue, She receives her mail at that location. She acknowledged that her mother could ask her to leave the home at any time. She does not know if her brother contributes anything to the home's expenses.

Arenda Fleming, a planning associate with the Camden County Board of Education, testified that one of her responsibilities is to perform evaluations concerning families that may be homeless. She collects and reviews information and discusses the material collected with the Executive County Superintendent. On September 11, 2014, the County Superintendent received a letter from the General Counsel for the Camden City School District concerning a dispute "regarding the determination of homelessness," concerning the family of E.H. and K.M. In order to review the matter, Ms. Fleming contacted Ms. Cintron, reviewed documents that had been developed over time by the Eastern Regional School District, and she "may have reached out to mom." Among the documents reviewed was an "Affidavit as to Homeless Status," prepared in April 2012 and signed by E.H., which noted that the family had left its Voorhees home due to "nonrenewal of the lease." She also saw a "Student Residency Form," prepared in April 2011 for student E.M., another of the family's children. Additionally, she

reviewed a McKinney-Vento education program form prepared by the Gloucester County Special Services School District in April 2011 for E.M., and an "Affidavit as to Homeless Status," prepared in August 2013 and signed by E.H., which noted that the departure from the Voorhees home was due to "annual lease not renewed, separation from spouse" and reported the Bradley Avenue address as the place where the family was residing. According to Ms. Fleming's certification, provided as part of the documentation regarding the motion for summary decision, she did speak to E.H. Ms. Fleming recalled that E.H. had advised her that they had lived for a number of years at the Bradley Avenue address, but that they had lived in one hotel or motel during that same period of time. In addition to all this, Ms. Fleming spoke to the State monitor for homelessness and reported the information received from this source, along with the other material she gathered with the Executive County Superintendent, Ms. Volk, who was to make the decision regarding the homeless status of the family.

On cross-examination, Ms. Fleming advised that other than gathering information and speaking to the persons noted, no independent investigation was conducted concerning the status of the family. She could not recall the details of her conversation with E.H., did not know how long the family had stayed in a hotel and was not sure whether she had asked E.H. what her intentions were regarding her living arrangements. As for the letter issued on September 23, 2014, by Ms. Volk to the Superintendent of the Camden School District, in which Ms. Volk provided her decision that the family remained homeless, Ms. Fleming described the form of the letter as a "template," in which the necessary information is filled in. In respect to the determination of homelessness, Ms. Fleming mentioned a "guidance document" from the Department of Education, which referred to living with a friend or relative as a factor to be considered. With regard to Ms. Volk's having noted in her decision, as one of the factors upon which the determination was based, that the "family is experiencing financial hardship," Ms. Fleming was unable to recall "offhand" what documents might have been available, if any, from which this conclusion was drawn.

C. Ann Volk, now serving as the County School Business Administrator for the Camden County Superintendent's Office, services as the Interim Executive County Superintendent from June 2013 until April 2014, and again from June 2014 to August

2015. Ms. Volk testified that prior to making her decision regarding the family's status, she spoke with Ms. Fleming on more than one occasion. She described the information regarding the family's financial hardship as "limited." This was the only decision regarding a family's homelessness that she had to make during her time as the Interim ECS. She considered that the family was living in a "doubled-up" situation.

Ms. Volk commented that there is no process for fact-finding hearings at the County level in regard to these determinations of homelessness. The County Superintendent depends largely upon information provided by the school district, including affidavits. Questions regarding what the family's intent was with respect to its living arrangements were not discussed with Ms. Fleming and there was no independent verification of intent or even a question about intent, as according to Ms. Volk, such was "not within our purview." Ms. Volk further commented that "[T]he question that we do ask, 'is this temporary,' that we can ask and we depend on the school district that they're in and the other affidavits that we get from other sources." Asked to define what "temporary" meant to her, Ms. Volk said that "Whatever temporary means to the person that's there. They don't intend to stay there." Asked whether her interpretation of temporary, "Is determined by each individual . . . temporary for K.M. is different for somebody else maybe," Ms. Volk explained that "each situation is different and would have a different intent." Asked if "five years" was temporary, Ms. Volk explained that it could be. Given that answer she was asked if, "Based on that logic, a student could become homeless in kindergarten and the parents move in with another family—with a relative for the next twelve years and that's temporary," Volk responded, "I have seen that happen. I didn't say it was right. I just said that I have observed that that has happened in other counties, that even has occurred over several years." As for the determination of financial hardship, Ms. Volk had no conversations with E.H. about her finances. Her determination regarding homelessness was based solely on the conversations Ms. Fleming had with E.H., with the State monitor Ms. Thomas, and the documents identified in the record.

Discussion

In a recent decision, the Commissioner of Education discussed factors relevant to determining if a child is "homeless."

> A "homeless child" is one who lacks a fixed, regular and adequate residence. N.J.A.C. 6A:17-2.2. Not every child residing temporarily with a relative is "homeless." Rather, pursuant to N.J.A.C. 6A:17-2.3(a)3, such a child is homeless when he or she resides in "[t]he residence of relatives or friends with whom the homeless child is temporarily residing out of necessity because the family lacks a regular or permanent residence of its own." An examination of the conditions that precipitated the family's relocation is critical to ascertaining whether the living arrangement arose "out of necessity," and whether the family is without access to a "regular or permanent residence of its own."
>
> [Bd. of Educ. of the Borough of Hawthorne, Passaic Cnty., v. Bd. of Educ. The Borough of Prospect Park, Passaic Cnty., and N.J. Dep't of Educ., EDU16270-13, (Final Dec. May 12, 2014)]

As the Commissioner noted, regulations adopted by the Department of Education define "homeless" children. N.J.A.C. 6A:17-2.2.

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

3. The residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own;
4. Substandard housing; or
5. Any temporary location wherein children and youth are awaiting foster care placement.

The Federal Government has adopted a similar set of definitions as part of what is known as the McKinney-Vento legislation.

For purposes of this subtitle [42 USCS §§ 11431 et seq.]:

(1) The terms "enroll" and "enrollment" include attending classes and participating fully in school activities.
(2) The term "homeless children and youths"--
(A) means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of section 103(a)(1)) [42 USCS § 11302(a)(1)]; and
(B) includes--
(i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;
(ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings (within the meaning of section 103(a)(2)(C)) [42 USCS § 11302(a)(2)(C)];
(iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and
(iv) migratory children (as such term is defined in section 1309 of the Elementary and Secondary Education Act of 1965 [20 USCS § 6399]) who qualify as homeless for the purposes of this subtitle [42 USCS §§ 11431 et seq.] because the children are living in circumstances described in clauses (i) through (iii).

In her September 23, 2014, decision finding that the student K.M. was homeless, County Superintendent Volk cited three factors upon which her determination was based. The first of these was that a student's family "was displaced from their home." As to this, the evidence clearly demonstrates that E.H. and her family were in fact displaced from their residence in Voorhees Township, New Jersey, due to their inability to obtain a new lease for the rental property in which they resided. This situation appears to have arisen from a combination of factors, including E.H.'s loss of employment, the departure of her husband from the family residence and his lack of any financial support for his family after his departure, and the termination of severance pay and unemployment benefits that E.H. had been receiving. Superintendent Volk's determination regarding this first factor, regarding as it does the originating cause for the family's presence in Camden and not in Voorhees, was thus fully supported by the information available to her. Nothing presented during this hearing has changed the appropriateness of that conclusion. That said, and before considering the other factors relied upon by the Superintendent, as well as the factors identified in statute and case law, it is necessary to consider the standard of review to be applied regarding the issue currently before this forum and the Commissioner.

In their briefs both parties appear to consider the appropriate standard of review to be whether the determination made by the ECS was "arbitrary, capricious, or unreasonable." The language, "arbitrary, capricious or unreasonable" is typically the formula used by appellate courts when reviewing determinations made by administrative agencies. In limited circumstances, the same standard is utilized by agency heads when reviewing certain actions of local administrative bodies, such as reviews by the Commissioner of Education of the determinations by local school boards in disciplinary proceedings against students. However, the use of the "arbitrary, capricious or unreasonable" standard when an agency head is reviewing determinations made by constituent elements of that same agency would be quite unusual. Here, the Commissioner of Education is asked to consider whether K.M. is homeless. It may well be that the decision of the ECS, who holds a position within the structure of the very Department that the Commissioner heads, made based on the information available to her at the time, was a reasonable one based upon the application of the existing law to the facts as they were known to her. If nothing

produced during this hearing has materially changed that factual setting such as to require a change in determination after applying the applicable legal standards for determining homelessness, then it can be fairly said the ECS's decision was not arbitrary or unreasonable. However, reference to cases in which it has been noted that a decision by the ECS concerning homelessness was reasonable must note that that characterization was used where nothing produced at the hearing on appeal necessitated a change in the decision, again given the applicable law. Indeed, in his brief, the Deputy Attorney General, while first suggesting that review should be under the arbitrary, capricious and unreasonable standard, notes that, "[T]he only way that the ECS's decision should be reversed now, is if subsequently-received information requires its reversal." This recognition that subsequently-received information is to be used in deciding the question of homelessness proves the point. If the only thing we were concerned with was whether the ECS's decision was reasonable, based on what Ms. Volk had before her at the time, there would be no reason to receive "subsequent information." The true test is not whether the ECS was "arbitrary, capricious, or unreasonable," but whether, given all the facts produced at the hearing, the student is or is not homeless based on the application of the applicable law to those facts. In the end, if the facts existing in the record at the time of the decision made by the administrative law judge, and subsequently by the Commissioner, do not require that the ECS's decision be changed, that decision may be seen as neither arbitrary nor capricious and certainly as reasonable. But the appellate review standard is not the proper standard for considering the issue. Instead, the review on what is termed an "appeal" is effectively a de novo consideration, first by the judge and then by the Commissioner, of the facts as they may exist at the conclusion of the hearing held in the OAL, and the proper application to those facts of the existing law.

Returning to the merits, again, in addition to noting the family's displacement from their home as a basis for the finding of homelessness, Ms. Volk identified two other bases. These were that the family was living in "a 'doubled-up' situation with a relative" and that it was "experiencing financial hardship." The Board contends that these stated grounds are not proper criteria for determining if a family/student is homeless.

N.J.A.C. 6A:17-2.2 defines a "homeless child" as one who lacks a "fixed, regular and adequate" residence. This regulation further identifies several circumstances in which children may live that the statute deems to be indicative of "homeless" status. Many are obvious, children living in cars, shelters, motels, parks, etc. None of these apply to the current case. But the statute, and the Federal enactment known as the McKinney-Vento legislation, also identify a circumstance in which a child lives in what is likely a more traditional living setting, but where the child lives in "[T]he residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own." The federal provision also includes "children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, . . ." In this case, it is undeniable that E.H. and her family first came to her mother's home in Camden due to economic necessity and that K.M. shares the housing of "other persons," i. e., the home owned by her grandmother, and came to that home "due to loss of housing" and "economic hardship." The Board has not suggested otherwise. It has not challenged the description provided by E.H. of the reasons for her having to vacate the Voorhees Township residence; it has not suggested that at the time the family had any viable way to maintain that residence. It does not dispute that she lives in a home with other family members besides her children, a home that she does not have any ownership in or lease for. What it does argue, though, is that after so many years residing in the Bradley Avenue home, the family is no longer "homeless." And it appears to suggest, at least implicitly, that E.H. no longer has to live there due to ongoing financial hardship, pointing out her now over four years of steady employment at a salary which she herself described as between $55,000-70,000 a year, currently at $65,000. Thus, what the Board really seems to contend is that while Ms. Volk may have cited as bases for her determination factors that properly relate to the total picture of the family and student's circumstances, she did not properly assess the significance of these factors in the ultimate, statutorily-grounded consideration of whether K.M. lives in a "fixed, regular, and adequate residence."

If the home in which the family resides is not "adequate," then a child living in that home is, by definition, "homeless." Is the home in which student K.M. living on Bradley Avenue in Camden "adequate?" The evidence reveals that this structure is a

row home, typical in Camden and many other localities, in which there are living a grandmother, a mother and her three children, and the mother's brother. The home has kitchen facilities, a living room, a dining area, three bedrooms on the second floor, and a bathroom. There is a basement. The home is serviced by standard utilities. The grandmother has her own bedroom on the second floor, the two female children share a bedroom and their brother has a separate bedroom, these two latter bedrooms also being located on the second floor. E.H. sleeps in the living room on a pull-out sofa. Her sixty-year-old brother sleeps in the basement. The evidence does not indicate that the student and her siblings, as well as E.H.'s mother, are limited in regard to use of the kitchen and bathroom facilities. E.H. testified that she paid for her family's food, and there is no indication that there is any deprivation with respect to cooking facilities. While the home may only have one bathroom, there is no evidence that this presents any significant difficulties for the student or her family.

In M.O'K & C.O'K, o/b/o minor children K.O'K, A.O'K, & C.O'K v. Bd. of Educ. of the Borough of Cresskill, Bergen Cnty., and Bd. of Educ. of the Borough of Little Ferry, Bergen Cnty., EDU 14830-13N (Final Dec. August 12, 2014)(adopting in part, rev'g in part initial dec. of June 13, 2014), the Commissioner considered a situation in which

> petitioners returned to S.O'K.'s parents' home in Little Ferry, where the two parents and three children occupy the bottom floor of the house, which floor has no shower, sink or kitchen. Because there is only one small bedroom on that floor, the 13-year old daughter and ten-year old son share a bunk-bed in the parents' bedroom and the oldest son, 18, sleeps in the common area.

The Commissioner determined that these conditions did not constitute an adequate residence. While the case involved other factors as well which led the Commissioner to conclude that the children were homeless, clearly the living conditions described in the quoted section of the decision differed in some marked degree from the conditions in which the children in this case, most particularly K.M., live. In Cresskill, two children, a boy and a girl, shared a bunk bed in the same bedroom as their parents. Another child slept in a common area. Here, two girls share one bedroom, not at all an uncommon situation for children of the same sex. The male child resides in a separate bedroom. Their grandmother has her own bedroom; their uncle sleeps in a totally separate part of

the home. There is no indication that these children have any difficulty accessing the bathroom facilities. The children sleep in separate bedrooms from their mother. The fact that she sleeps on a pull-out sofa in the living room hardly suggests that the home is not adequate. The statutory provision certainly does not aim at perfection. Based upon the evidence here, I **CONCLUDE** that there is no basis for concluding other than the Bradley Avenue residence is "adequate."

That said, is the residence "fixed" and "regular?" The Commissioner reviewed applicable legal provisions in Cresskill.

> The regulation N.J.A.C. 6A:17-2.3(a)(3), for example, provides that children are homeless when they stay in the home of relatives or friends, with whom they are temporarily residing because the family lacks a regular or permanent residence of its own. Similarly, 42 U.S.C. sec. 11434a(2)(A) and (B)(i) describe homeless children as those "who lack a fixed, regular, and adequate nighttime residence . . .," including, inter alia, "children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason . . . ." Thus, an evaluation of "homelessness" cannot rest upon a simple calculation of the amount of time that children have spent in a particular location or municipality. The reasons for the children's homelessness, their living conditions, and the resources and intentions of the parents or custodians are relevant.

Here, E.H.'s family, having been forced to vacate their Voorhees Township residence due to financial hardship, reside with relatives. The home in which they reside is owned by E.H.'s mother. Thus, I **FIND** that this is a family that are living, at least initially due to economic hardship, in housing they share, that is not their own, but, in the case of the children, in their grandmother's home.[3] As Cresskill notes, the fact that, as here, the family has spent a number of years at Bradley Avenue is not in and of itself determinative of the lack of homeless status. In addition to the time factor, the Commissioner notes the significance of living conditions, resources and parent intentions. Again, here, the residence, that is, the "living conditions," is "adequate." As for the "resources" of the parent, E.H. testified, credibly, that although she has had a steady job for over four years, which now pays a salary of about $65,000 a year, given

[3] Thus, the living situation does involve a "doubling-up" of family, the grandmother and brother with E.H. and her children.

her financial history, accumulation of debt, including court judgments, and her support of her adult children who continue to live with her in the home while working part-time, she has been unable to obtain either appropriate leased premises or to obtain a mortgage for her family of four. It is not clear exactly how aggressive she has been in seeking some alternative housing arrangement. Nevertheless, the record indicates that her finances are limited, and given the need for at least a three-bedroom home so long as the mother and her children all stay together, her difficulty in locating adequate housing is not suspicious. As for her "intentions," she clearly stated did she did not consider the present residence at Bradley Avenue to be permanent. She certainly has in mind the idea of moving to some other housing. Nevertheless, at least based on the experience she testified about and her financial limitations, it is entirely unclear how realistic such a change of residence may be, at least in any foreseeable timeframe.

Thus, the case presents a picture of a child living in adequate housing, but in a shared home that she was taken to by her mother out of economic necessity that continues to limit the mother's ability to relocate to her own home, whether rented or purchased, and in a home her mother, not unreasonably, does not consider to be a "permanent" home, but "temporary" in the sense that she has the intention to relocate.

This case then appears to present a classic situation where the law may define something in a way that might not be obvious to the casual observer, or make sense to the average taxpayer. As the home in which this child is residing, now for a period of about six years, where she lives with her family, which is her grandmother's home, is adequate housing, and is not remotely akin to living in cars, shelters, parks, motels, buses, or any of the other places identified in the federal and state legislation, it certainly does not seem as if E.H. and K.M. are "homeless." Yet they came there due to economic hardship, they remain economically challenged, at least as far as obtaining "adequate" alternative housing of their own, and the place they live in is, legally, someone else's which they "share." And the law defines a child whose housing situation is defined by these conditions as "homeless." But does the existence of these facts dictate that the "homeless" label must remain fixed regardless of the full circumstances existent at any given time?

If the key to determining whether a child living in an otherwise adequate home ("living conditions") is still to be considered homeless is, as the Commissioner notes in Cresskill, a consideration of "resources and intentions," then the question is whether once a family is forced by economic hardship to live in such a shared circumstance in another's home that status of "homelessness" is fixed and ongoing, even if the understandable intention of the parent is that she "intends" to move and does not consider the current residence as "permanent" but instead as "temporary." As the Board's question to Ms. Volk as to her understanding of the definition of who is "homeless," and her response thereto pointed out, it is conceivable to her that a child could be considered "homeless" for an entire educational "career," if the family was forced to relocate to a shared housing situation when the child was in kindergarten and economic realities worked to foil the parental "intent" to obtain housing of the family's own for so many years. Yet it is hard to imagine that anyone would see that child as homeless, at least in the sense that children living in all of the other conditions listed in the state and federal definitions exist.

Possibly then this case presents the question of when the realities of long-term economic hardship, or at least of long-term economic limitations, shared by so many families, and the reality that hoped-for intentions are not realistic, at least for any foreseeable time, again a circumstance no doubt common, work to convert a state of "homelessness" to one where the child is no longer "homeless." The definitions do not assist in understanding the limits that may apply in such circumstances. But to the extent that homeless status is identified as one without a "fixed, regular and adequate" living place, here, given the very lengthy period of residence, the adequacy of the living place and the regularity of occupation, I **FIND** that she does live in a "fixed, regular, and adequate residence" and **CONCLUDE** that K.M. is not homeless. See L.C. on behalf of her Minor Child B.C. v. Bd of Educ. of the Twp. of Branchburg, Somerset County, 96 N.J.A.R. 2d(EDU)1003 (Commissioner found that "while her living arrangements with her brother [in his apartment] may not be permanent in the sense that she may wish to eventually return to Branchburg, the evidence shows them to have become sufficiently fixed, regular, and adequate so as to preclude a finding of homelessness.")[4] As such,

[4] The short periods where the family had to stay in a motel due to conflict between E.H. and her mother do not detract from this conclusion, as they do not appear to have been of substantial length and each time,

Camden is the district wherein the student is entitled to receive a free and appropriate education, and in the normal course, it is Camden that would be responsible for selecting the school in which that education would be provided. That said, it is again noted that in regard to this student, the Board, quite wisely, does not seek to have her finish her senior year of high school in the Camden schools and does not seek to have her leave Eastern Regional High School. As Camden is the district responsible for educating K.M., it must of course pay for that education. This outcome, however, is limited to the circumstances of this student and this case, and is not meant to suggest that in other cases, the Board would not be authorized to seek to have students found to be domiciled in Camden and not homeless placed in schools within the Camden District.

The Board's Petition of Appeal seeks several remedies besides a declaration that K.M. is not homeless. Primarily, the Board asks for injunctive relief, more specifically defined as a permanent injunction to require that the Executive County Superintendent's Office "must use proper and legal criteria for determinations of homelessness." More specifically, the Petition requested injunctive relief to compel the use of "only proper legal citations for informing potential litigants of their appeal rights"; "to refrain from asserting the wrong legal citations in homeless determinations"; to analyze legally relevant criteria in making homeless determinations . . . to state its findings of fact and conclusions in its homeless determination letters based on legally relevant criteria . . . to refrain from making homeless determinations that do not include an analysis of legally relevant criteria . . . to refrain from making homeless determinations based on legally irrelevant criteria . . . to cease and desist from directing the CCSD to violate the law in directing CCSD to fund out-of-district placements of non-classified students domiciled with the City of Camden who are not the subject of sending-receiving relationships or the Inter-district Public School Choice program . . . from placing the CCSD in an untenable, Catch 22 situation, whereby it must decide whether to violate the law or a NJDOE directive that is contrary to the law . . ." and "to not fine, sanction, penalize, or reduce the State aid of CCSD" if it follows "ECS Volk's directive and funds" such placements. Finally, the District requests that if

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the family has returned to the home and remained. Given the many years of that occupancy, these familial difficulties are insufficient proof that E.H. and her children have not established a regular, fixed and adequate residence.

the Department affirms Ms. Volk's decision, it "declares" that the NJDOE has "effectively changed the historical consequences, effects of domicile . . . " "no longer recognizes that entitlement to a free public education within the district is a consequence/effect of domicile . . . no longer recognizes that the district of domicile has educational decision-making responsibility over students domiciled within district . . . " and "has recognized CCSD's ability and authority to fund the out-of-district placements of non-classified . . . non-sending-receiving relationships."

The Board concedes that the K.M. case is the only example of a homelessness decision made by the ECS Office in this record.

Initially, it is important to note exactly what the Board proposes. The ECS is an official of the State's Department of Education. The Commissioner is the head of that agency. Despite common references to it as a "court," the OAL is not a court, and unlike a judicial-branch forum, it has absolutely no independent judicial, or quasi-judicial authority. The OAL cannot on its own issue injunctions, even where the test for injunctive relief might otherwise be met. Thus, the only source for the issuance of an injunction is the agency head, to the extent that the agency has the authority to issue such relief. But here, the request, or demand, is that the Commissioner issue an injunction against a member, as it were, of her own staff. It is, to say the least, unusual to seek what is in effect an internal injunction. Should the Commissioner be persuaded that the ECS is not using appropriate standards or is relying on incorrect factors to assess homelessness, she can issue new regulations, internal guidance, provide legal assistance to the Office, and provide additional training. In individual cases, she can reverse a decision if persuaded that the proper standards were not utilized, or, even where they were utilized, where the outcome is at variance with a reasoned assessment of the facts and the applicable law. The Board has not provided any authority or reasoning as to why, given all this, the Commissioner should enjoin her subordinate. And, besides this concern, it would be highly unusual to issue such an injunction based upon the example of one case. There is no record here upon which to conclude that there is any real danger that the Camden County ECS, who it must be noted is no longer Ms. Volk, will continue to utilize improper procedures or standards in future assessments of homelessness. And to the extent the Board is concerned about cases

similar to this one, where long-term presence in Camden by students claiming homelessness may be presenting the District with similar funding concerns as with K.M., the Commissioner has the power to provide guidance to her staff through the mechanisms just listed, including even in her final decision in this case. Assessments of homelessness must of necessity be made on a case-by-case basis. If the Board does believe that a case can be made concerning a systemic failure of the County Executive Superintendent's Office, then it may wish to initiate a more global proceeding in order to present the necessary record to sustain more general relief against the DOE and its subordinate Office. But it has not done so here. I **CONCLUDE** that there is no warrant in this record, or in the circumstances presented, for the Commissioner to issue any injunctions.

In regard to a request for reimbursement, it is noted that the Board has not presented any authority for the proposition that the DOE, or its constituent office, has any responsibility to it to pay for the educational and/or transportation costs it has expended in funding K.M.'s education at Eastern Regional. Perhaps there may be a claim against that district for reimbursement, but the Board never initiated a Petition before the Commissioner against Eastern, which is not a party to these proceedings and cannot be impleaded under the Uniform Administrative Procedure Rules. Again, it is noted that the request for reimbursement was not made in the Petition of Appeal here, but added as a remedy sought by the Board later in the proceedings. I **CONCLUDE** that the Board has not presented a basis for any remedy of reimbursement against the DOE or the ECS.

For the reasons stated, I **CONCLUDE** that K.M. is not homeless. I **CONCLUDE** that the determination made by Ms. Volk, while identifying certain factors properly considered in determining whether homelessness exists, did not fully consider and properly analyze the entire picture in assessing that issue. Her decision is therefore **REVERSED**. The Board's applications for injunctive relief and reimbursement are **DENIED**.

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

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

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

March 22, 2017
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency: 3/22/17

Date Mailed to Parties: 3/22/17

mph

WITNESSES:

For petitioner:

Sandra Cintron
Richard Farr

For respondents:

Arenda Fleming
C. Ann Volk
E.H.

EXHIBITS:

For petitioner:

P-1 Curriculum Vita of Richard Farr
P-2 Farr's Report
P-3 Farr's Report
P-4 Letter from District to ECS
P-5 Letter, dated September 23, 2014
P-6 Not in evidence
P-7 Zillow and Google map information
P-8 Westlaw search
P-9 Affidavit of homelessness
P-10 Eastern Regional's Student Residency Form
P-11 McKinney-Vento Form
P-12 Homeless registration, August 30, 2013
P-13 Not in evidence
P-14 Letter to K.M. re: status August 14, 2014
P-15 E.H.'s Linked-in pag3
P-16 City of Camden Tax Records
P-17 Assessment of home
P-18 Camden City tax website listing

For respondent C. Ann Volk and New Jersey State Department of Education:

R-1 E-mail to Fleming from Volk
R-2 Fleming's Certification

For respondent E.H.:

None

178-15

OAL DKT. NO. EDU 17849-16
AGENCY DKT. NO. 270-10/16

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
S.P., M.P., AND V.P., ON BEHALF OF MINOR CHILD, Y.P,	:	
RESPONDENTS.	:	

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

Upon review, it is noted that the settlement makes reference to a payment schedule, beginning immediately upon entry of an order by the Administrative Law Judge. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

Subject to the foregoing, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed – subject to compliance with the terms of the settlement – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/26/17

Date of Mailing: 6/27/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 17849-16

AGENCY REF. NO. 270-10/16

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,

Petitioner,

v.

S.P., M.P. AND V.P. ON BEHALF OF MINOR CHILD Y.P.,

Respondents.

David B. Rubin, Esq., for Petitioner

Vinay Mavinkurve, Esq., for Respondents

Record Closed: May 2, 2017 Decided: May 4, 2017

BEFORE: **JOHN P. SCOLLO**, ALJ

Petitioner, the Piscataway Township Board of Education, seeks payment of tuition from Respondent's for Y.P.'s ineligible attendance in the school district from the 2010-2011 school year through September 28, 2016.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on November 28, 2016.

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

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

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

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

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

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

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

May 4, 2017
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

5-10-2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:

MAY 5 2017

db

DAVID B. RUBIN, P.C.
Attorney at Law
44 Bridge Street
P. O. Box 4579
Metuchen, New Jersey 08840
(732) 767-0440
Attorney for Petitioner Piscataway Township Board of Education

PISCATAWAY TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY, Petitioner, vs. S.P., M.P. and V.P., Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Agency Docket No. 270-10/16 OAL Dkt. No. EDU 178492016 **STIPULATION OF SETTLEMENT**

The parties having amicably resolved their differences, the within matter is hereby settled on the following terms:

1. Respondents Sanjay Patel, Manisha Patel and Virangi Patel shall pay to Petitioner Piscataway Township Board of Education the sum of $15,000.00, in two equal installments: the first, immediately upon entry of an order by Administrative Law Judge John Scollo approving the settlement, and the second, within 30 days thereafter.

2. Payment shall be made by check payable to "Piscataway Township Board of Education," and delivered to Petitioner's counsel.

3. In the event that either installment payment is not made when due, Respondents shall immediately become jointly and severally liable for $63,302.84 less any payments previously made, plus any reasonable attorney fees and costs incurred in pursuit of collection.

4. This Stipulation of Settlement is entered into solely to avoid the expense and inconvenience of continued litigation, and does not represent an admission by any party of the correctness of any other party's factual or legal position in this matter.

5. Respondents represent that they have been represented by Vinay Mavinkurve, Esq., in this matter, that they have consulted with their counsel regarding the meaning and effect of this Stipulation of Settlement, and that they enter into it voluntarily and without coercion.

6. This Stipulation of Settlement resolves all claims for back tuition with respect to the time periods referenced in the Petition of Appeal. Respondents acknowledge their ongoing obligation to maintain residency sufficient to continue lawful enrollment of Y.P. in the Piscataway Township Public School District, and Petitioner's right to pursue any lawful remedy should they fail to do so.

DAVID B. RUBIN, P.C.
Attorney for Petitioner

Dated: 5/2/17 By: **DAVID B. RUBIN**

Dated: 04/26/2017 **SANJAY PATEL**

Dated: 04/26/17 **MANISHA PATEL**

Dated: 04-26-17 **VIRANGI PATEL**

PISCATAWAY
TOWNSHIP SCHOOLS

1515 Stelton Road
Piscataway, NJ 08854
732 572-2289
Fax 732 572-7889
www.piscatawayschools.org

Teresa M. Rafferty
Superintendent of Schools

David Oliveira
Business Administrator/Board Secretary

BE IT RESOLVED that a settlement be approved in the matter of Piscataway Township Board of Education v. S.P., et als, OAL Dkt. No. EDU 17849-16, pursuant to the terms of a written agreement in a form satisfactory to General Counsel.

Moved by: Ms. Cherry Seconded by: Mr. Stern

Roll Call Vote: Yeas 8 Nays 0 Abstain 0

****

I certify that the foregoing is a true and correct abstract of a resolution passed at a meeting of the Piscataway Township Board of Education held on April 27, 2017 and in that respect is a true and correct copy of its minutes.

School Business Administrator/
Board Secretary

179-17

OAL DKT. NO. EDU 18002-16
AGENCY DKT. NO. 299-11/16

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF VINCENT J. VITIELLO, SCHOOL DISTRICT OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY	COMMISSIONER OF EDUCATION DECISION

This matter was opened before the Commissioner of Education by petitioner (Edison Board of Education or Board), seeking suspension of respondent's (Vincent J. Vitiello) teaching certificate pursuant to *N.J.S.A.* 18A:26-10. The Board alleged that respondent resigned from his teaching position without providing the requisite notice to petitioner. Following transmittal of the matter to the Office of Administrative Law (OAL), the parties proposed a Settlement Agreement and Release (Agreement), which the Administrative Law Judge sent to the Commissioner with a recommendation for approval.

Upon review of the terms of the proposed Agreement, the Commissioner rejects same because the parties wish to apply a six-month suspension retroactively – from October 5, 2016 to April 7, 2017 – and the record below is devoid of affirmation from the parties that the respondent was not employed as a teacher elsewhere during the proposed suspension period above. Under *N.J.S.A.* 18A:26-10, the Commissioner may suspend a teacher's certificate for up to one year for wrongful cessation of performance of her duties. The central purpose of the statute is to ensure proper notice to the school to deter the disruption of services and adverse impact on the students when teachers abruptly resign. *See Penns Grove-Carney's Point Board of Education v. Leinen, 94 N.J.A.R. (EDU) 405, 407.* As the parties in this matter have agreed to retroactive suspension of respondent's certificate, the Commissioner may – at her discretion – consider the proposed suspension, provided that respondent remained unemployed as a teacher for the duration of the

suspension, and has attested to same by way of an affidavit. In the absence of any affirmation from the respondent in this regard, the Commissioner cannot approve the within settlement.

Accordingly, this matter is remanded to the OAL for revision of the Agreement or for further proceedings consistent with the concerns set forth above.

IT IS SO ORDERED.

Kimberley S. Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/26/17

Date of Mailing: 6/27/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 18002-16
AGENCY DKT. NO. 299-11/16

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE(S) OF VINCENT J. VITIELLO, SCHOOL DISTRICT OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY.

Amanda N. Castrogiovanni, Esq., for petitioner Edison Township Board of Education (Busch Law Group, attorneys)

Vincent J. Vitiello, respondent, pro se

Record Closed: May 1, 2017 Decided: May 2, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

Petitioner, the Edison Township Board of Education (the Board), seeks the suspension of the teaching certificate of respondent Vincent J. Vitiello. The Department of Education transmitted this matter to the Office of Administrative Law, where it was filed on November 29, 2016, for hearing as a contested case. A telephone prehearing conference was held on January 6, 2017, during which a hearing date was

discussed and scheduled for May 19, 2017. Prior to the scheduled hearing, under letter dated April 28, 2017, counsel for the Board submitted the attached Agreement and Release indicating the terms of agreement between the parties.

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

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

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

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

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

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

5/2/17

DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency:

5-3-17

Date Mailed to Parties:

MAY 3 2017

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AGREEMENT AND RELEASE

This AGREEMENT AND RELEASE (the "Agreement") is made this 27 day of February, 2017 by and between the Edison Township Board of Education, including members, officers, agents, attorneys, administrators, employees, representatives, agents, affiliates, subsidiaries, successors, or assigns (the "Board") and Vincent Vitiello, including his agents, representatives, assigns, heirs and successors ("Mr. Vitiello") (collectively referred to as the "Parties").

WHEREAS, Vincent Vitiello ("Mr. Vitiello") was a tenured teacher employed by the Edison Township Board of Education (the "Board"); and

WHEREAS, On or about May 4, 2016, the Board passed a resolution confirming Mr. Vitiello's reappointment to the teaching position for the 2016-2017 school year; and

WHEREAS, Mr. Vitiello notified the Board on September 13, 2016 via electronic correspondence that he intended to retire effective October 5, 2016; and

WHEREAS, Peter Pittuco, Director of Personnel ("Mr. Pittuco"), informed Mr. Vitiello on September 14, 2016, via electronic correspondence, of Mr. Vitiello's contractual and statutory obligations to provide 60 days' notice; and

WHEREAS, Mr. Vitiello relinquished his position on October 5, 2016; and

WHEREAS, on or about October 21, 2016 the Board filed with the Acting Commissioner of the New Jersey Department of Education an Order to Show Cause compelling Mr. Vitiello to explain why the Commissioner should not suspend his teaching certificate for unprofessional conduct (retirement without sufficient notice), pursuant to N.J.S.A. 18A:26-10 and N.J.A.C. 6A:9-17.9; and

WHEREAS, in order to avoid the costs, expenses, delays, and uncertainties of the hearing process and/or civil litigation, the Parties hereto wish to fully and finally settle and resolve any and all claims which have been and/or could have been asserted by the Board;

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties incorporate the above recitals and agree as follows:

1. **Suspension**. Mr. Vitiello's teaching certificate shall be suspended for a period of six (6) months. The six (6) month suspension shall have a retroactive initiation date of October 5, 2016 and continue through April 5, 2017.

2. **Withdraw Pending Action.** The Board agrees to send a letter to the Honorable Michael Antoniewicz within five (5) days from receipt of a fully executed copy of the herein

Agreement, withdrawing OAL Docket number EDU 18002-2016 N, Agency Reference number 299-11-16, In The Matter of the Suspension of the Teaching Certificate(s) of Vincent J. Vitiello / School District of the Township of Edison, Middlesex County within.

3. **Compromise/No Admission of Liability**. The Parties understand, represent, and warrant that this Agreement is not an admission of wrongdoing or liability by or on the part of any Party.

4. **Release.** Mr. Vitiello hereby irrevocably and unconditionally waives, releases and forever discharges any and all claims or rights, whether known or unknown, which he has or may have against the Board, in any venue, as well as any of its members, officers, agents, attorneys, administrators, employees or representatives, related in any way to his employment with the Board or retirement therefrom, and in respect of, any and all charges, promises, actions, causes of action, covenants, contracts, controversies, agreements, complaints, claims, counterclaims, liabilities, obligations, suits, demands, grievances, arbitrations, costs, losses, sums of money, accounts, bills, judgment, executions, damages, debts and expenses, including attorneys' fees and costs, of any nature or description whatsoever, in law or in equity, asserted or unasserted, express or implied, foreseen or unforeseen, real or imaginary, suspected or unsuspected, known or unknown, liquidated or non-liquidated, of any kind or nature or description whatsoever, arising from the beginning of the world to the effective date of this Agreement, including but not limited to any claim under State or Federal law for discrimination based on age, race, gender, disability or any other actual or perceived characteristic. To the extent that Mr. Vitiello is authorized by law to file a claim or complaint with the U.S. Equal Employment Opportunity Commission or any other such institution, Mr. Vitiello additionally and specifically waives any right to receive monetary damages as a result of such claim or complaint. With respect to his waiver of any and all potential age discrimination or similar claims hereunder, Mr. Vitiello understands that he has twenty-one (21) days to consider this Agreement and shall have seven (7) days after signing the agreement to reconsider and revoke his signature, though such revocation shall relieve the Board of any duty to abide by its obligations herein.

5. **Enforceability and Severability**. The Parties agree and acknowledge that each of the provisions of this Agreement are reasonable and should be fully enforceable, and the Parties waive any right to argue, assert or allege any claim to the contrary. However, if any provision of this Agreement is determined by a Court of competent jurisdiction to be unenforceable because it is overbroad or unreasonable, the Parties agree that such provision(s) shall be modified and enforced to the maximum extent permissible. If any provision of this Agreement is held to be invalid and cannot be modified so as to make it enforceable, then such provision shall be deemed to be severed from the Agreement and the remaining provisions shall remain in full force and effect.

6. **Mutual Non-Disclosure and Non-Disparagement Agreement**. The Parties agree that the terms and existence of this Agreement shall not be disclosed to any third party,

unless required by law. Further, the Parties agree that they shall not make any disparaging remarks (verbally or in writing) to any third party (or via social media) about and/or concerning each other.

7. **Entire Agreement**. This Agreement constitutes the sole and complete agreement among the Parties with respect to the subject matters hereof.

8. **Drafting and Negotiation by Counsel**. The drafting and negotiating of this Agreement have been participated in by each of the Parties and their respective counsel and/or representatives and, for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the Parties. The Parties hereby acknowledge that they have been represented by counsel, or any other representative of their choice, throughout the Action, throughout the negotiation of this Agreement, and at the execution of this Agreement, and have read and consulted with counsel, or their chosen representative, regarding this Agreement. To the extent any party chose not to consult with counsel and/or a representative, such a decision was made knowingly and voluntarily and said party expressly agrees that they were given ample opportunity to confer with counsel and/or a representative, but chose not to, and therefore waives their right to argue, at a later date, that they did not understand the terms of this Agreement because they did not confer with counsel and/or a representative.

9. **Governing Law**. This Agreement shall be construed under, subject to, and governed by the laws of the State of New Jersey.

10. **Costs of Additional Litigation**. If the Board is forced to incur any fees to enforce the terms of this Agreement, or to recover damages pursuant to this Agreement, or to defend any actions brought by Mr. Vitiello, or by the Edison Township Education Association with the assistance of and/or participation in by Mr. Vitiello, contrary to the terms of the Agreement, the Board shall be entitled to recover, from Mr. Vitiello, all attorneys' fees and costs expended.

Vincent Vitiello

Dated: 2/10/2017

Frank Heelan
Board President
Dated: 2-21-17

Attested to by:

_____

Dated:

Attested to by:

Daniel Michaud
Business Administrator
Dated: 2/21/17

WHEREAS, the New Jersey Constitution authorizes the Governor to call the Legislature into special session to address specific issues when it is in the public interest to do so; and

WHEREAS, in light of the need for immediate and decisive action to reform the system of school funding in New Jersey, a special session of the Legislature is obviously in the public interest;

NOW, THEREFORE,
BE IT RESOLVED: that the Edison Board of Education hereby calls upon Governor Chris Christie to call the Legislature into a special session for the purpose of enacting comprehensive school funding reform legislation; and

BE IT FURTHER
RESOLVED: that a copy of this Resolution be sent to Governor Christie, Senate President Sweeney, Assembly Speaker Prieto, the Board's local representatives in the State Legislature and the New Jersey School Boards Association Delegate Assembly, as well as be posted on the Board's website.

4. Settlement Agreement – S.A.

BE IT
RESOLVED: that upon the recommendation of the Superintendent of Schools, the Edison Board of Education hereby (1) approves the settlement agreement in the matter of J.A. and C.A. o/b/o S.A. v. Edison Twp. Bd. Of Educ., EDS 04101-2016; and (2) authorizes the Board President and the Board's administration to take all necessary and appropriate steps to carry out this action of the Board.

5. Settlement Agreement – S.H.

BE IT
RESOLVED: that upon the recommendation of the Superintendent of Schools, the Edison Board of Education hereby (1) approves the settlement agreement in the matter of J.H. and J.H.. o/b/o S.H. v. Edison Twp. Bd. Of Educ., EDS 13864-2016; and (2) authorizes the Board President and the Board's administration to take all necessary and appropriate steps to carry out this action of the Board.

6. Settlement Agreement – V.V.

BE IT
RESOLVED: that upon the recommendation of the Superintendent of Schools, the Edison Board of Education hereby (1) approves the settlement agreement I/M/O the Suspension of the Teaching Certificate(s) of V.V./School District of the Township of Edison, Middlesex County, EDU 18002-2016; and (2) authorizes the Board President and the Board's administration to take all necessary and appropriate steps to carry out this action of the Board.

181-17

181-17L

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

June 29, 2017

A[redacted] B[redacted]
[redacted]
Tinton Falls, New Jersey 07724

A[redacted] B[redacted]
[redacted]
Red Bank, New Jersey 07701

Anthony P. Sciarrillo, Esq.
Sciarrillo, Cornell, Merlino, McKeever,
& Osborne, LLC
238 St. Paul Street
Westfield, New Jersey 07090

Re: *Board of Education of the Red Bank Regional High School District, Monmouth County v. A.B., on behalf of minor child, T.B., Agency Dkt. No. 59-3/17*

Dear Parties:

Upon review of the Petition of Appeal filed in connection with this matter and based upon the respondent's failure to submit an Answer to the Petition that complies with *N.J.A.C.* 6A:3-1.5, I have determined to grant summary decision in favor of the petitioner.

On March 28, 2017 the Board filed its Petition of Appeal pursuant to *N.J.A.C.* 6A:3-8.1 seeking an order assessing tuition and claiming that minor child, T.B., was not entitled to attend school in the district for 92 days – between September 6, 2016 and January 31, 2017 – during the 2016-2017 school year, pursuant to *N.J.S.A.* 18A:38-1 *et seq.* A copy of the petition was served upon respondent on March 28, 2017 via certified mail, regular mail, and hand delivery, to both known addresses for respondent. An acknowledgment of filing and notice – dated March 28, 2017 – that an Answer to the Petition was due within 20 days was also sent to the respondent. *N.J.A.C.* 6A:3-1.5.

When A.B. failed to respond to the initial notice, a second notice was sent on April 19, 2017, via certified and regular mail, clearly indicating that – absent receipt of an Answer to the Petition within 10 days – each count in the Petition would be deemed admitted

and the matter may be decided on a summary basis pursuant to *N.J.A.C.* 6A:3-1.5(e). According to information obtained from the U.S. Postal Service, the copy sent via certified mail was not claimed, but the copy sent via regular mail was never returned to this office. A.B., nevertheless, failed to respond to the second notice. A third and final notice was sent to A.B. via certified and regular mail on May 23, 2017, reiterating the information contained within the prior notice. Again, the certified mail was returned as "unclaimed", but the regular mail was never returned to this office.

To date, no Answer has been filed on behalf of respondent. Accordingly, petitioner's claim that T.B. was not entitled to attend school in the district pursuant to *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted. It is hereby ordered that respondent reimburse the petitioner $7,099.64[1] in tuition costs for T.B.'s ineligible attendance in the district for 92 days – from September 6, 2016 through to January 31, 2017 – during the 2016-2017 school year.

IT IS SO ORDERED.[2]

Sincerely,

Kimberly Harrington

Kimberly Harrington
Acting Commissioner of Education

c: County Superintendent
State Law Library

KH/MKD/ATA

VIA REGULAR MAIL & CERTIFIED MAIL

[1] The tuition is assessed based on the number of days T.B. attended school as an ineligible student. The Board has certified that the annual cost of tuition is $14,200 and there are a total of 184 school days, which makes the per day cost $77.17. Therefore, $7,099.64 is the total tuition owed for 92 days.

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

182-17

182-17LM

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

June 29, 2017

J[redacted] S[redacted], *pro se*
[redacted]
Monroe Township, New Jersey 08831

Mary H. Smith, Esq.
Office of General Counsel
Monroe Township Schools
423 Buckelew Avenue
Monroe Township, New Jersey 08831

Re: *J.S., on behalf of minor child, A.S. v. Board of Education of the Township of Monroe, Middlesex County, Agency Dkt. No. 92-4/15, Commissioner Decision No. 127-16.*

Dear Parties:

I have reviewed the materials filed in connection with petitioner J.S.'s Motion for Reconsideration of the Acting Commissioner's April 5, 2016 decision ordering the petitioner to reimburse the Monroe Township Board of Education $18,706.47 in tuition costs for her minor child A.S.'s period of ineligible attendance in the district.

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

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

Upon review and consideration of the submissions, I find that petitioner's request for reconsideration of the Commissioner's decision was filed significantly out of time, which alone serves as sufficient basis for denying petitioner's request.[1]

Notwithstanding, petitioner has also failed to satisfy any of the requisites for granting such relief specified in *N.J.A.C.* 6A:3-1.15(b)(2). The petitioner does not argue that she has satisfied any of the requirements for reconsideration, nor has she provided new evidence to refute the finding that she was not domiciled in Monroe Township during the period in question – the 2014-2015 and 2015-2016 school years.

Accordingly, the Motion for Reconsideration is hereby DENIED.[2]

Sincerely,

Kimberly Harrington

Kimberly Harrington
Acting Commissioner

c: County Superintendent
State Law Library

KH/MKD/ATA

Via Regular Mail

[1] *N.J.A.C.* 6A:3-1.15(b) provides that a motion for reconsideration must be filed within 10 days of the filing of the Commissioner's Decision.

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

183-17

183-17LM

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

June 29, 2017

Sabino Valdes, *pro se*
P.O. Box 463
Paramus, New Jersey 07653

Susan Lavelle, Esq.,
1814 Kennedy Blvd.
Union City, New Jersey 07087

Re: *In the Matter of the Tenure Hearing of Sabino Valdes, Board of Education of the City of Union, Hudson County, Agency Dkt. No. 328-9/00.*

Dear Parties:

I have reviewed the materials filed in connection with Sabino Valdes' motion to reopen the above referenced matter. The Commissioner notes that this is Mr. Valdes' third motion to reopen the tenure charges that were filed against him by the Union City Board of Education in September 2000.[1] Mr. Valdes filed his first motion to reopen in April 2014, which was denied by the Commissioner in a decision dated June 14, 2014. Mr. Valdes then filed his second motion to reopen in August 2016, which was denied by the Commissioner in a decision dated November 3, 2016. The Commissioner's November 3, 2016 decision is pending appeal before the Superior Court of New Jersey, Appellate Division.

Pursuant to New Jersey Court Rule 2:9-1(a), "the supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of petition for certification is filed." As Mr. Valdes has filed a Notice of Appeal with the Appellate Division relating to his second request to reopen the tenure matter, the Commissioner does not have jurisdiction to consider Mr. Valdes' duplicate motion to reopen.

[1] The third motion to reopen contains substantially the same facts and issues raised in Mr. Valdes' previous motions.

Even if the Commissioner was deemed to have jurisdiction in this matter, upon review and consideration of the parties' submissions, I find that Mr. Valdes has failed to establish good cause to reopen the tenure charges filed against him by the Board, and he did not make such request with reasonable time or diligence. It is well-established that administrative agencies have an inherent authority to reconsider, reopen or revise a prior decision made by the agency. A motion to reopen, however, will only be granted when good cause is shown and the motion is made with reasonable time or diligence. *See Duvin v. State of New Jersey, Dep't of the Treasury, Public Employees' Retirement System*, 76 *N.J.* 203, 207 (1978); see also *Skulski v. Nolan*, 68 *N.J.* 179 (1975) and *Ruvoldt v. Nolan*, 63 *N.J.* 171 (1973).

As a preliminary matter, Mr. Valdes' first motion to reopen was filed 12 years after the State Board of Education's August 4, 2004 decision was issued, affirming the decision to remove Mr. Valdes from his tenured employment with the District for insubordination and unbecoming conduct. Significantly, his subsequent submissions asserted the same arguments and unsubstantiated claims of fraud, collusion, and conspiracy.[2] In his present motion, Mr. Valdes has not provided any new evidence nor has he alleged the existence of any new information that was not previously argued throughout the protracted litigation of this matter. Mr. Valdes has, however, raised a "new" issue relating to an old document – the Administrative Law Judge's (ALJ) Interlocutory Order of August 9, 2001. Mr. Valdes argues that the Order is "void" because the Commissioner and the State Board affirmed the ALJ's Initial Decision without reviewing and affirming the Order.[3]

When the Commissioner reviews an initial decision from the OAL, the entire record below is also reviewed. The Commissioner, therefore, reviews any orders or rulings entered by an ALJ – such as a denial of a motion to dismiss – after an initial decision has been rendered. This, however, does not mean that the Commissioner is required to independently or separately "affirm" such orders or rulings. Significantly, review and affirmation (or rejection) of any orders or rulings made by the ALJ during the pendency of the litigation is subsumed in the Commissioner's final decision in the matter. Implicit in the Commissioner's adoption of the ALJ's Initial Decision in this matter – based on the review of the record below, as indicated in the Commissioner's June 24, 2003 decision – is the fact that the Commissioner was in accord with the ALJ's August 9, 2001 ruling on Mr. Valdes' motion to dismiss. Notwithstanding, the August 9, 2001 Order had no bearing on the ultimate outcome of the case; therefore, the arguments raised by Mr. Valdes in his current motion do not amount to new evidence or information that would suggest a need to revisit the tenure charges filed against him in 2000. Accordingly, it is evident that no good cause has been shown to compel the reopening of this case after more than a decade.

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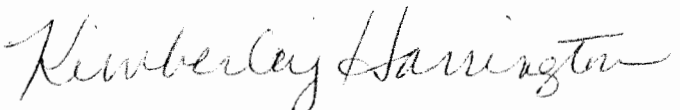
[2] Over the course of the last 17 years, the various allegations and issues raised by Mr. Valdes – including his persistent reliance on the 45-day argument – have been exhaustively addressed and rejected by different tribunals.

[3] The August 9, 2001 Order and decision of the ALJ denied Mr. Valdes' motion to dismiss the tenure charges filed against him. No review was sought with the Commissioner – pursuant to *N.J.A.C.* 1:1-14.10 – of the ALJ's August 9, 2001 Order. Consequently, the matter proceeded to hearing and an initial decision was issued by the ALJ at the conclusion of the case before the Office of Administrative Law (OAL).

For all of the foregoing reasons, the third motion to reopen the tenure charges filed against Mr. Valdes by the Union City Board of Education is hereby DENIED.[4]

Sincerely,



Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

KH/MKD/ATA

Via Regular Mail

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

184-17

C.E., on behalf of minor child, K.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* petition appealing the determination of the respondent Board that his daughter, K.E., was not domiciled in West Orange, and therefore not entitled to a free public education in the West Orange school district. Petitioner contended that he had leased a property in West Orange where he and his daughter were domiciled; further, the petitioner testified that he had purchased a home in West Orange on May 10, 2017, six days before the hearing in this matter. The Board alleged that a residency investigation had shown that C.E. and K.E. live at an address in East Orange. The Board sought tuition reimbursement for the period of K.E.'s ineligible attendance.

The ALJ found, *inter alia*, that: the testimony provided by the Board's witnesses was credible, while that of petitioner was not; pursuant to *N.J.A.C.* 6A:22-3.1(a)(1), a student is a resident of a school district if his parent or guardian has a permanent home in the district; the domicile of an unemancipated child is that of her parent or guardian; in the instant case, C.E. contested the Board's decision that K.E. was not properly domiciled in West Orange; the testimony of the Board's residency inspector and the results of the investigation were credible and indicated that K.E. and her father were domiciled out-of-district in East Orange, but continued to attend school in West Orange during the 2016-2017 school year; and the cost of tuition for K.E. in West Orange schools for the 2016-2017 school year was $17,069. The ALJ concluded that the petitioner was not a domiciliary of West Orange for the 2016-2017 school year and was therefore ineligible to attend West Orange public schools; accordingly, the respondent Board is entitled to reimbursement of tuition in the amount of $17,069.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

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

Issued 6/29/17

OAL DKT. NO. EDU 494-16
AGENCY DKT. NO. 324-12/16

C.E., on behalf of minor child, K.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Initial Decision as the final decision for the reasons set forth therein. Accordingly, the petitioner shall pay the Board $17,069.00 in tuition costs for K.E.'s ineligible enrollment in the District for the 2016-2017 school year.

IT IS SO ORDERED.[2]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/29/17
Date of Mailing: 6/30/17

[1] The record did not include a transcript of the hearing held at the Office of Administrative Law on May 16, 2017.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00494-17
AGENCY REF. NO. 324-12/16

C.E. ON BEHALF OF MINOR CHILD, K.E.,
Petitioner,
v.
BOARD OF EDUCATION OF WEST ORANGE,
Respondent.

C.E., pro se

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

Record Closed: May 16, 2017 Decided: May 18, 2017

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE

Petitioner, C.E. filed an appeal on behalf of his daughter K.E. from the determination of the respondent, West Orange, Board of Education (West Orange) that she is not domiciled in its district. West Orange counterclaims for tuition reimbursement.

Petitioner filed an appeal with the New Jersey Department of Education (DOE) on December 20, 2016. West Orange filed an Answer on January 13, 2017.

PROCEDURAL HISTORY

The contested case was transmitted to the Office of Administrative Law (OAL), where it was filed on January 12, 2017. Respondent filed a motion to amend its answer to include a counterclaim for tuition reimbursement on February 23, 2017. The motion was granted without opposition on March 6, 2017. The hearing was held on May 16, 2017 at which time I closed the record.

FACTUAL DISCUSSION

The following facts are not in dispute. Based upon the documentary and testimonial evidence presented, I **FIND** the following **FACTS**:

Gerard Drappi is a residency investigator for West Orange. He was previously a police officer for thirty years. He began an investigation on whether K.E. was a resident of West Orange because a letter was received by West Orange questioning K.E.'s residency. K.E.'s address was listed as 2 Seaman Road, West Orange, NJ on her student registration. A letter signed by D.E. the brother of C.E. dated August 19, 2015 stated that K.E. and C.E. lived with him at 2 Seaman Road, West Orange. The certificate of residency included the letter from D.E., a PSE&G bill and a pay stub.

Drappi began his investigation on October 7, 2016. He went to the Seaman Road address on that day and did not see K.E. leave the house. From October 7, 2016 to December 1, 2016, Drappi did not see K.E. enter or exit the Seaman Road address. During this time, he saw petitioners exiting the address on Norwood Street in East Orange before school.

A postal Freedom of Information request for C.E. showed his address as --- Norwood Road, East Orange, NJ. A record search of C.E.'s email address and the address connected to his phone number revealed C.E.'s address as --- Norwood Street, East Orange, NJ. A motor vehicle search on a vehicle with a license plate number of --- 5-5 which Drappi had seen C.E. primarily use revealed that the vehicle was registered to A.G. of Clifton, NJ. A subsequent motor vehicle search of license plate number P— E-X showed the vehicle to be owned by C.E. and registered at the same Norwood Street in East Orange.

Drappi went to the Seaman Road address on December 1, 2016 to deliver a letter regarding a residency hearing. At that time the house was vacant. Drappi contacted the sheriff's foreclosure unit and determined that the 2 Seaman Road address had been foreclosed on by the bank on September 1, 2015, which made the bank the owner of the property as of September 1, 2016. C.E. admitted that he left the Seaman Avenue address in September 2016 due to his brother being forced out of the house because of the foreclosure.

The notice of the meeting was given to K.E. at school with C.E.' s consent. At the December 6, 2016 Board meeting regarding K.E.'s residency, C.E. told Drappi that they had moved to East Orange. He also stated that he leased an apartment in West Orange at -- Washington Street, Unit One and provided a copy of a lease.

West Orange removed K.E. contingent on proof that petitioners were residing in West Orange. The removal letter stated, among other things, that if in his appeal C.E. could not sustain the burden of demonstrating entitlement of K.E. to attend school in West Orange, he would be required to pay tuition. K.E. was in the seventh grade during the 2016-2017 school year. The tuition rate for a student in the seventh grade during the 2016-2017 school year is $17,069.

The lease provided by C.E. stated that the owner of the property was Reggie Scott/ Transcon Bay Group. Drappi contacted the property manager at -- Washington

Street and was informed that the property was in foreclosure. The bank appointed Blue Asset Management to manage the property. James Boyle a representative of Blue Asset Management was the actual property manager. Drappi spoke to Boyle who informed him the Reggie Scott was a tenant who leased a garage and a storefront. Scott did not have the authority to sublet. In addition, Unit One was a commercial unit, and was in disrepair and uninhabitable in and around December 2016.

Blue Asset Management did not lease any unit to C.E. Blue Asset Management did not draft the lease agreement that C.E. gave Drappi on December 6, 2016. Boyle never saw C.E. at the Washington Street address in West Orange. Petitioner never moved into the Washington Street address because he was informed by West Orange that Reggie Smith/ Transcon Bay Group did not own the property.

Drappi did a search with the New Jersey Department of the Treasury Division of Revenue Enterprise Services because C.E. stated that he had several businesses. The search showed that C.E. had approximately six businesses, all of which listed his address as the Norwood Avenue in East Orange, NJ.

C.E. testified that he had purchased a house at 12 Wildwood Avenue in West Orange, NJ on May 10, 2017. He stated that the seller was Wildwood Associates with the agent being Oscar Meurma. He stated that he knew Meurma through Reggie Scott and through real estate deals. He did not do a title search or a home inspection. No attorney assisted him with the purchase. C.E. further testified that he changed his driver's license to list his address as 12 Wildwood Avenue in West Orange. C.E. provided West Orange with documents regarding 12 Wildwood Avenue. He stated that the Notice to Buyer and Seller was prepared by the title company whose name he does not know. Page thirteen of the contract has a signature of C.E. as the buyer but no signature of the seller. C.E. acquired the tax record from the city, which lists Steve Tischler as the owner of the property. C.E. stated that Steve Tischler sold the property to Meurma, but there is no record of that.

The Actual owner of 12 Wildwood Avenue per the tax assessor's office is Steve Tischler, who purchased the property on April 12, 2010. A MLS listings for 12 Wildwood Avenue, West Orange, NJ showed that the property was listed for sale and the agent was James Boyle. Drappi spoke to James Boyle who was the listing agent for the property. James Boyle told Drappi that the property was under contract but not to C.E. Boyle had never heard of C.E.

Considering the contradictory testimony presented by respondent's witness and petitioner, the resolution of this matter requires that I make credibility determinations regarding the critical facts. The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses it is my view that Drappi and Boyle were credible. Their testimony was truthful and accurate. They did not have anything to gain by their testimony. Their testimony was consistent with the documents that were presented. C.E. was not credible. He testified that he knew Meurma from real estate business but testified that he did not know the name of the title company he contracted to purchase a house from just five days before the

hearing. He did not do a title search on the property that he was about to purchase although he has a real estate background. At the December 6, 2016 residency hearing and at the present hearing C.E. provided what he stated were leases to premises he was going to rent or own in West Orange. Both documents were dated a few days before the hearing dates and neither of the documents were accurate. The owners of both premises had never heard of C.E. and did not lease or sell the properties to C.E.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J 238, 250 (1955). The domicile of an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001). Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

In support of its claim for tuition, respondent produced residency inspector Drappi, who testified in its behalf. The results of the investigation supported the finding that K.E. and her father, C.E. are domiciled out-of-district, but continued to attend public schools in the district for the 2016-2017 school year. The cost of tuition for K.E. for the 2016-2017 school year is $17,069.

West Orange asserts that it is entitled to be reimbursed for tuition for the period of K.E.'s ineligible enrollment the 2016-2017 school year. Whereas here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

> If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

N.J.S.A. 18A: 38-1(b) likewise requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioners were not a domiciliary in the West Orange School District for the 2016-2017 school year and that respondent is entitled to reimbursement for the costs of audited tuition in the amount of $17,069.

ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that petitioner and his daughter were not residents and domiciliary in West Orange, New

Jersey, and were not domiciled within its school district during the 2016-2017 school year is hereby **AFFIRMED**. It is further **ORDERED** that respondent be reimbursed tuition from petitioner in the amount of $17,069.

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

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

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

5-18-17

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

MAY 19 2017

Date Mailed to Parties:

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner:

None

For Respondent:

Gerard Drappi

James Boyle

Exhibits

For Petitioner:

None

For Respondent:

R-1 Student Registration Record of K.E. Dated September 8, 2015

R-2 Attendance Follow-Up Form of West Orange School District, dated December 6, 2016

R-3 Investigative Report of Gerard Drappi

R-4 Postal Freedom of Information Request for 530 Norwood Street East Orange, NJ dated November 28, 2016

R-5 Postal Freedom of Information Request for 534 Norwood Street East Orange, NJ dated November 28, 2016

R-6 Public Record Phone Number and Email Searches

R-7 Motor Vehicle Search Request for KGK-52S, dated October 10, 2016

R-8 Motor Vehicle Search Request for P---E--
dated October 21, 2016

R-9 Lease between C.E. and Transcon Bay Group/Reggie Smith,
dated November 29, 2016

R-10 Photos of 25 Washington Street, West Orange, Unit One

R-11 New Jersey Department of the Treasury Division of Revenue
and Enterprise Services Searches

R-12 Letter from West Orange Superintendent, Jeffrey S. Rutzky,
dated November 29, 2016

R-13 Letter from West Orange Superintendent, Jeffrey S. Rutzky,
dated December 7, 2016

R-14 Motor Vehicle Search Request for C.E. Dated March 27, 2017

R-15 Documents submitted by C.E. regarding Proposed New Address,
dated May 15, 2017

R-16 Tax Assessor Search and MLS listing of 12 Wildwood Avenue, West Orange, NJ

AGENCY DKT. NO. 23-2/16

G.P. AND I.R.-P., ON BEHALF OF MINOR CHILD, A.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	ORDER
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
RESPONDENT.	:	

On December 15, 2016, a final agency decision was rendered in this matter, wherein the Commissioner found G.P. and I.R.-P. liable for tuition in the amount of Five Thousand Eight Hundred Ninety One Dollars and Seventy Cents ($5,891.70), representing tuition for a period of ineligible attendance by their child, A.P., in the Board's school district between October 26, 2015 and March 16, 2016. The Board subsequently notified the Commissioner that G.P. and I.R.-P. had failed to comply with the decision, and requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. G.P. and I.R.-P. offered no reasons why the judgment against them should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Gaetano Pensavalle and Irma Rivera-Pensavalle are now subject to entry of a judgment by the court in the amount of $5,891.70, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/05/17

Date of Mailing: 7/05/17

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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

KIMBERLEY HARRINGTON
Acting Commissioner

July 5, 2017

Michelle M. Smith, Clerk
Superior Court of New Jersey
Hughes Justice Complex
25 Market Street, 6th Floor
P.O. Box 971
Trenton, NJ 08625

Re: Request for Docketing of Judgment

Dear Ms. Smith:

In accordance with *N.J.S.A.* 2A:58-10, I am enclosing the July 5, 2017 Order of the Commissioner of Education finding that Gaetano Pensavalle and Irma Rivera-Pensavalle are subject to entry of a judgment on the docket of the court due to their failure to pay the tuition assessment ordered in the matter of *G.P. and I.R.-P., on behalf of minor child, A.P. v. Board of Education of the Township of Hamilton, Mercer County.*[1] By copy of this letter, I am advising Mr. Pensavalle and Ms. Rivera-Pensavalle, as well as counsel for the Hamilton Township Board of Education, of the Commissioner's issuance of the enclosed Order.

If you require anything more, please contact this office at (609) 292-5706.

Very truly yours,

Kathleen Duncan /SH

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

Enclosure
c: Gaetano Pensavalle (with copy of Order)
Irma Rivera-Pensavalle (with copy of Order)
Daniel Roberts, Esq. (with copy of Order)
State Law Library (with copy of Order)

[1] Please note that, although the case caption reflects only Mr. Pensavalle's and Ms. Rivera-Pensavalle's initials, their full names are included within the body of the Commissioner's Order.

185-17

IN THE MATTER OF THE SUSPENSION :

OF THE TEACHING CERTIFICATE OF : COMMISSIONER OF EDUCATION

CARLOS BAEZA, SCHOOL DISTRICT OF THE : DECISION

TOWNSHIP OF IRVINGTON, ESSEX COUNTY. :

SYNOPSIS

In October 2016, the Commissioner of Education issued an Order to Show Cause requiring respondent to show cause why an order should not be entered suspending his teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10, for resigning his position without giving the required 60 day notice. The respondent – a non-tenured teacher – contended that he did not have a contract for the 2016-2017 school year, and was therefore not obligated to provide a 60 day notice. The Board contended that – while no formal contract for the 2016-2017 school year was offered to Mr. Baeza – a June 20, 2016 letter rescinding respondent's non-renewal created an implied contract.

The ALJ found, *inter alia*, that: *N.J.S.A.* 18A:26-10 provides, in pertinent part, that any teaching staff member "who shall, without the consent of the board...cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year"; in this case, respondent was initially employed by the petitioning Board as a middle school science teacher in March 2016, under a "Contingency Employment Contract" which expired on June 30, 2016; in May 2016, respondent received a letter from the Board informing him that his employment would not be renewed for reasons of economy; in June 2016, respondent received a second letter from the Board stating that his non-renewal was rescinded, but he received no formal contract for his review and signature; respondent received two letters in August of 2016 regarding the beginning of the school year and classroom setup, but again did not receive a written contract; the second of these letters clearly indicated that respondent's employment was contingent upon Board approval at a scheduled meeting on August 17; since respondent had still not received a formal contract for the 2016-2017 school year by late August, he accepted an offer of employment in the Paterson School District. The ALJ concluded that the respondent had no formal offer of employment for the 2016-2017 school year, but rather received a flurry of mixed messages, including: a non-renewal letter, a rescission of that letter, and a letter advising that his reemployment remained contingent on board approval. Respondent's conduct in accepting a formal contract offered by another school district was reasonable and did not violate *N.J.S.A.* 18A:26-10. Accordingly, the petitioning Board's request that the Commissioner suspend the respondent's teaching certificate was denied.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

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

Issued 6/29/17

OAL DKT. NO. EDU 18362-16
AGENCY DKT. NO. 282-10/16

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
CARLOS BAEZA, SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF IRVINGTON, ESSEX COUNTY.	:	

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

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) – for the reasons thoroughly set forth in the Initial Decision – that respondent did not enter into an employment contract with the Board for the 2016-2017 school year, and therefore acted reasonably in accepting new employment. As such, the Commissioner is in accord with the ALJ that respondent's certificate should not be suspended pursuant to *N.J.S.A.* 18A:26-10 because he is not guilty of unprofessional conduct.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/29/17
Date of Mailing: 6/30/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 18362-16
AGENCY DKT. NO. 282-10/16

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF CARLOS BAEZA, SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY.

Yadira Duran, Esq., for petitioner (Hunt Hamlin and Ridley, attorneys)

Carlos Baeza, respondent, pro se

Record Closed: May 25, 2017 Decided: May 25, 2017

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Irvington School District (Irvington), seeks an order suspending respondent's teaching certificate for a period of one year, contending that he resigned from his teaching position with inadequate notice. Respondent, Carlos Baeza, replies that he had not been given a contract of employment for the 2016-2017 school year, and thus accepted alternative employment. Baeza asserts that his actions in no way violated N.J.S.A. 18A:26-10.

On or about October 3, 2016, at the request of Irvington, the Commissioner of Education (the Commissioner) entered an Order directing Baeza to show cause why his teaching certificate should not be suspended for unprofessional conduct, pursuant to N.J.S.A. 18A:26-10. Baeza filed an answer on December 2, 2016. On December 5, 2016, the Commissioner transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case. A hearing was conducted on May 25, 2017, at which time the record closed.

FACTUAL DISCUSSION AND FINDINGS OF FACT

The facts are not in dispute and I **FIND**:

Baeza holds certification issued by the Department of Education as a teacher of elementary and middle school science. He was initially employed by Irvington in March 2016 to serve as science teacher in the seventh and eighth grades at University Middle School. He was employed pursuant to a "Contingency Employment Contract" dated February 17, 2016; his contract expired on June 30, 2016.

On May 11, 2016, Baeza and every other non-tenured staff member received an email from the Superintendent of Schools advising that their employment would not be renewed. The email cited budgetary constraints, and urged that the non-renewal was not performance related. Superintendent Neely Hackett explained that a proposed move to a new health plan could potentially ease these budgetary restrictions; that the legality of the proposed change was under review; and that she hoped to be able to rescind the non-renewals in the coming weeks.

Baeza again heard from the district via a letter from the Human Resources Department dated June 20, 2016, advising that his non-renewal had been "rescinded as of the date of this letter." But Baeza received no formal contract for his review and signature. By letter dated August 12, 2016, the principal of University Middle School shared information about the coming year; indicated that staff were required to report on September 6, 2016; and would be able to set up their classrooms during the week of August 29, 2016. Baeza received this letter, but again, received no contract of

employment. By letter dated August 17, 2016, the Irvington Schools Office of Government Programs advised that there would be a two-day orientation on August 31 and September 1, 2016. Baeza received this letter, but again, no contract of employment. And this latter letter states, quite unequivocally, "that [his] employment is contingent on Board approval at the scheduled Board of Education meeting on August 17, 2016."

Counsel for the school district confirmed that no formal contract was ever offered to Baeza, urging that the June 20, 2016, letter rescinding his non-renewal created an implied contract. As for whether Baeza's employment was approved by the Board on August 17, 2016, as noted in the letter of the same date, counsel had no knowledge whether his employment was approved by the Board that night, or any night before or after.

As a science teacher, Baeza's services are in demand. Late in August 2016, he was approached with an offer of employment by the Paterson Schools. Having not yet received a contract, or any indication that the Board had approved his employment for the 2016-2017 school year, he accepted the position in Paterson. Via email sent on August 30, 2016, Baeza advised that, "as I had received no formal notice of my continuance at University Middle School, please be advised that I will not be returning to teach this academic year, as I had to make other arrangements for employment." Hackett replied that he "most certainly did receive notice and...will be held to [his] 60-day requirement." She asked for a letter of resignation. By reply email sent September 6, 2016, Baeza stated he had no intention of resigning as there was no employment from which to resign. He pointed out that his contract expired June 30, 2016, and he had not received a successor contract.

The district called Baeza himself as its only witness, and offered no evidence that Baeza's conduct caused any inconvenience or disruption to the public schools.

CONCLUSIONS OF LAW

N.J.S.A. 18A:26-10 provides that "[a]ny teaching staff member employed by a board of education . . . who shall, without the consent of the board . . . , cease to perform

his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year." See also N.J.A.C. 6A:9-17.9. The Commissioner has held that the central purpose of N.J.S.A. 18A:26-10 is "to provide notice to the school so that a suitable replacement can be hired without adversely impacting students." Penns Grove-Carneys Point Bd. of Educ. v. Leinen, 94 N.J.A.R.2d (EDU) 405, 407. The decision to suspend a teaching certificate pursuant to N.J.S.A. 18A:26-10 is discretionary and the Commissioner has historically evaluated all circumstances specific to an individual case. Black Horse Pike Reg'l Sch. Dist. v. Mooney, 1984 S.L.D. 821; In re Capshaw, EDU 12318-06, Initial Decision (April 30, 2007), modified, Comm'r (June 12, 2007), <http://njlaw.rutgers.edu/collections/oal/>; East Amwell Twp. Bd. of Educ. v. Acken, 1986 S.L.D. 2803.

For a non-tenured staff member like Baeza, the inquiry regarding whether there has been a violation of N.J.S.A. 18A:26-10 must commence with an understanding of the "the term of his employment." The contractual understanding between the parties thus becomes the critical reference point. A binding contract is formed between two parties when there is a meeting of the minds evidenced by a written offer and an unconditional written acceptance. Morton v. 4 Orchard Land Trust, 180 N.J. 118, 129–30 (2004) (citing Johnson and Johnson v. Charmley Drug Co., 11 N.J. 526, 538–39 (1953)). Here, Baeza did not terminate his employment before the expiration of the term of his employment, because he had no contract, and thus, no term of employment. Irvington's argument that an implied contract was created by the rescission of its non-renewal notice is devoid of merit.

Indeed, N.J.S.A. 18A:27-5 makes it clear that a contract of employment must be in writing. And N.J.S.A. 18A:27-6 requires that such contracts specify a start date; the kind of certificate required; the salary; and "such other matters as may be necessary to a full and complete understanding of the contract." These statutory provisions echo the well accepted view that a contract must evidence the mutual understanding by the parties of its essential terms. A letter simply stating that an employee's non-renewal has been rescinded meets none of these requirements, and cannot be held to form a binding contract, as Irvington suggests.

Moreover, N.J.S.A. 18A: 27-10 required the school district to non-renew Baeza on or before May 15, or give him a contract by that date. And Irvington did timely non-renew him. Only if it had not, would Baeza have had any absolute expectation of continued employment, as N.J.S.A. 18A: 27-11 provides that in the absence of timely notice of non-renewal the school district "shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as required by law or policies of the board of education."

I thus agree with Baeza that he had no formal offer of employment for the 2016-2017 school year and instead, a flurry of mixed messages, to include, a non-renewal letter; a recession of that letter; and a letter advising that his reemployment remained contingent on board approval. Like most Americans, Baeza needed a job, so he did what anyone under the circumstances would have done, he accepted a formal contract offered by another school district. I **CONCLUDE** that his conduct was eminently reasonable, and did not violate N.J.S.A. 18A: 26-10.

I fully recognize that teaching is a unique occupation where a change in personnel can affect many young lives.[1] N.J.S.A. 18A:26-10 confirms that a dedicated teacher must always put his students first, and resigning teachers must afford as much notice as administration feels is needed to ensure that education will continue uninterrupted. But the statute makes it plain that the non-tenured employee's professional obligations are those established by the "term of employment" agreed upon by the parties, and not by any intrinsic notion of professionalism. An employing school is thus obliged to offer a non-tenured staff member an actual contract, and not an implied one, if it expects that staff member to feel obliged to report to work at the start of a new school year.

[1] While I am willing to take judicial notice of the fact that a change in teacher creates added work for administration, the school district is cautioned for the future that it is obliged to offer evidence of actual disruption to the district and its students in a proceeding of this kind. Each circumstance is unique. Here, Baeza left before he met his students, and it is surely possible that the district immediately found a replacement, thus causing little or no disruption to the classroom. Or conversely, it might have taken the district months to replace him. The burden is on the school district to prove disruption. And the penalty imposed may vary, based on the disruption created by the teacher's conduct.

Finally, I am compelled to point out that both the administrative law judge and the Commissioner roundly rejected the identical arguments when they were previously raised by Irvington in In Re Canela, Irvington School District, EDU 17209-16, Initial Decision (January 12, 2017), aff'd Commissioner (February 23, 2017), <http://njlaw.rutgers.edu/collections/oal/>. It is noteworthy that there too, the district cited N.J.S.A. 18:28-8 in it petition, which was inapplicable there, and is likewise inapplicable here, as that statute governs the obligations of tenured staff members.

ORDER

Based on the foregoing, it is **ORDERED** that the request by the Irvington Public Schools that the Commissioner suspend the teaching certificate of Carlos Baeza pursuant to N.J.S.A. 18A: 26-10 is **DENIED**.

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

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

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

May 25, 2017

DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

May 25, 2017

Date Mailed to Parties: MAY 26 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Petitioner:

Carlos Baeza

For Respondent:

Carlos Baeza

EXHIBITS

For Petitioners:

P-1 Email dated May 11, 2016

P-2 Email sent August 30, 2016

P-3 Email sent September 6, 2016, with email trail

P-4 Letter dated June 20, 2016, with acknowledgement of receipt

For Respondent:

R-1 Contract

R-2 Letter dated August 17, 2016

R-3 Letter dated August 12, 2016

187-17

OAL DKT. NO. EDU 216-16
AGENCY DKT. NO. 222-8/15

T.G., on behalf of minor children, T.S. and T.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
RESPONDENT	:	

On June 10, 2016, a final agency decision was rendered in this matter, wherein, the Commissioner dismissed the petition of appeal with prejudice, finding that dismissal of the petition was proper due to T.G.'s failure to appear and prosecute on the rescheduled hearing date of April 14, 2016.[1] The Commissioner assessed petitioner, Tracy Green, $46,998.62 in tuition costs for T.S. and T.S. for the period of ineligible attendance, plus each day beyond April 14, 2016 that T.S. and T.S. remained enrolled in the District's schools. The Board subsequently notified the Commissioner that petitioner had failed to reimburse respondent as directed in the final decision, and has requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Petitioner offered no reasons why the judgment against her should not be so docketed, although given an opportunity to do so by this agency.

[1] Petitioner had previously failed to appear for the original hearing date of January 4, 2016, and subsequently requested that the hearing be rescheduled. However, petitioner again did not appear at the April 14, 2016 hearing, and also failed to provide an explanation for her non-appearance and lack of prosecution.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Tracy Green is now subject to entry of a judgment by the court in the amount of $46.998.62,[2] which represents the total payment ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/06/17

Date of Mailing: 7/06/17

[2] The additional tuition per day was not assessed, as the Board has notified the Commissioner that T.S. and T.S. were withdrawn from the District.

• 187–17

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

July 6, 2017

Michelle M. Smith, Clerk
Superior Court of New Jersey
Hughes Justice Complex
25 Market Street, 6th Floor
P.O. Box 971
Trenton, NJ 08625

Re: Request for Docketing of Judgment

Dear Ms. Smith:

In accordance with *N.J.S.A.* 2A:58-10, I am enclosing the Order of the Commissioner of Education finding that Tracy Green is subject to entry of a judgment on the docket of the court due to her failure to pay the tuition assessment ordered in the matter of *T.G., on behalf of minor children, T.S. and T.S. v. Board of Education of the Township of Hamilton, Mercer County.*[1] By copy of this letter, I am advising Ms. Green as well as counsel for the Hamilton Board of Education, of the Commissioner's issuance of the enclosed Order.

If you require anything more, please contact this office at (609) 292-5706.

Very truly yours,

Kathleen Duncan / JKH

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

Enclosure
c: Tracy Green, *pro se* (with copy of Order)
Daniel R. Roberts, Esq. (with copy of Order)
State Law Library (with copy of Order)

[1] Please note that, although the case caption reflects only Ms. Green's initials, her full name is included within the body of the Commissioner's Order.

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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

KIMBERLEY HARRINGTON
Acting Commissioner

July 12, 2017

Mark G. Toscano, Esq.
Comegno Law Group, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057

Edward C. Bertucio, Esq.
Hobbie, Corrigan & Bertucio, P.C.
125 Wyckoff Road
Eatontown, New Jersey 07724

Re: *West Windsor-Plainsboro Regional School District, Mercer County v. New Jersey State Interscholastic Athletic Association*, Agency Dkt. No. 113-6/17

Dear Counsel:

I have reviewed the materials filed in connection with the petition of appeal and motion for emergent relief filed by the petitioner, West Windsor-Plainsboro Regional School District (District), in the above-captioned matter. The District is appealing the decision of the Executive Committee of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying its request for a hearing before the Executive Committee in connection with the May 23, 2017 Board Resolution, permitting West Windsor-Plainsboro students to participate in co-curricular and/or athletic programs at the other District high school when such programs are not offered at their school of residence.

The District contends that it began having concerns that it may not be able to maintain separate football programs at the West Windsor-Plainsboro High School North (HSN), which is classified as Group III school, and West Windsor-Plainfield High School South (HSS), which is classified as Group IV school. As a result, the District sought to establish a cooperative agreement for football whereby there would be one football team for the 2017-2018 school year that would be comprised of students from both HSN and HSS.[1] However, Article III, Section 10 of NJSIAA's Constitution, Bylaws, Rules and Regulations prohibits cooperative football agreements by a Group III football program. Therefore, the District applied to the West Jersey Football League (WJFL) to request a waiver of the Cooperative Sports Program Regulation and the approval of a cooperative football agreement between HSN and HSS for the 2017-2018 school year.[2] The WJFL denied the District's request, citing various reasons why the waiver would not only impact other schools in the WJFL conference but also all schools in the state.

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[1] The District contends that it was seeking a waiver of the Cooperative Sports Program Regulation based upon several factors, including: the lack of a robust feeder program; decreasing enrollment; decreasing student interest; fear of sports injury and concussions; and the District's inability to run sub-varsity programs.

[2] The District also appeared before the NJSIAA Executive Committee to present its request to advance proposed legislation regarding a formal change to the NJSIAA's Constitution and Bylaws to allow Groups III, IV, and V to enter into a cooperative agreement for football under specific provisions.

The District appealed the WJFL's decision to the NJSIAA League and Conference Committee. Following a hearing on May 23, 2017, the League and Conference Committee denied the District's request for a waiver of the Cooperative Sports Program Regulation. The District could have appealed that decision to the Executive Committee in accordance with Article XII, Section 5 of the Bylaws.[3] Instead, later that day, the District passed a Board Resolution that permitted District students to participate in co-curricular and/or athletic programs at the other District high school when such programs are not offered at their school of residence. The Board Resolution effectively allowed the cooperative agreement for football that is expressly prohibited by the NJSIAA's Constitution and Bylaws and was the subject of the waiver request that was denied by the League and Controversies Committees.

On May 24, 2017, the Board informed the NJSIAA's Executive Committee of the Board Resolution and requested a hearing before the Executive Committee on the Resolution's immediate enactment. The District sought to have an immediate decision from the Executive Committee under Article XII, Section 6 of the Bylaws, which permits the Executive Committee to hear a controversy and render a decision in "emergent circumstances where time will not permit a controversy to be heard by the Controversies Committee." The NJSIAA denied the District's request for another hearing, stating that the substance of the Board Resolution was already the subject of a hearing before the League and Conference Committee.[4] The NJSIAA also noted that the District's desire to have the Executive Committee act on the Board Resolution does not amount to a "complaint, protest or dispute" that would entitle the District to review by the Executive Committee under Article XII, Section 4 of the NJSIAA's Bylaws.

The Commissioner's scope of review in matters involving NJSIAA decisions is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a)(2); *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Nor may the Commissioner substitute his own judgment for that of the NJSIAA, where due process has been provided and where there is sufficient credible evidence in the record as a whole to serve as a basis for the decision reached by the NJSIAA. *N.J.A.C.* 6A:3-7.5(a)(1).

Additionally, pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. The party seeking such relief must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

Upon review of the parties' submissions, I find that the District has failed to meet the standard required for emergent relief because the District has not demonstrated a likelihood of success on

[3] Pursuant to Article XII, Section 5 of the Bylaws, "[a]ny party [that] is aggrieved by any decision of the Controversies Committee ... may appeal to the Executive Committee ... [whereby] the Executive Committee shall serve as an appellate body, and the appeal shall be limited to the record developed before the Controversies Committee."

[4] The League and Conference Committee is a sub-committee within the Controversies Committee.

the merits.[5] More specifically, the District has not made a preliminary showing that the NJSIAA applied its rules in an arbitrary or unreasonable manner when it denied the District's request for a hearing and immediate action on the Board Resolution based on the fact that the substance of the resolution was already decided by the League and Conference Committee after an extensive hearing.

The District contends that the NJSIAA has failed and/or refused to take action with respect to the Board Resolution that would establish one football team comprised of students from both HSN and HSS for the 2017-2018 school year. Although the District has attempted to characterize the Board Resolution as a separate action from its request for a waiver of the Cooperative Sports Programs Regulation, it is evident that the application of the Board Resolution to football has already been decided and denied by the League and Conference Committee.[6] Certainly without the NJSIAA granting a waiver of the Cooperative Sports Programs Regulation, the adoption of the Board Resolution is meaningless with respect to football.[7] A board of education cannot simply pass a resolution as a mechanism to circumvent the NJSIAA's Constitution and Bylaws; and it is undisputed that the NJSIAA Bylaws prohibit Group III schools from entering into a cooperative agreement for football. There is also nothing in the record to suggest on emergent relief that the NJSIAA's determination that the District's desire to have the Executive Committee act on the Board Resolution does not amount to a "complaint, protest or dispute" under Article XII, Section 4 of the NJSIAA's Bylaws.

In light of the fact that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the three remaining factors. Accordingly, the District's request for emergent relief and an Order granting the immediate enactment of the Board's Resolution is hereby denied.

Sincerely,

Peter Shulman
Deputy Commissioner[8]

c: County Superintendent
State Law Library

VIA FAX AND REGULAR MAIL

[5] This is not a decision on the merits of the NJSIAA's denial of the District's request for a waiver of the Cooperative Sports Program Regulation, but rather a decision on the NJSIAA's denial of the District's request for a hearing before the Executive Committee and the immediate enactment of the Board Resolution.

[6] The District was afforded the requisite due process in connection with the waiver request. Not only did the WJFL review the waiver request, but the League and Conference Committee also held a hearing during which the District had an opportunity to present testimony and thoroughly present its arguments in favor of the waiver.

[7] Not all sports are treated the same in the Cooperative Sports Programs Regulation.

[8] This matter has been delegated to the Deputy Commissioner pursuant to *N.J.S.A.* 18A:4-33.

191-17

OAL DKT. NOS. EDU 04548-16, EDU 04551-16, EDU 04549-16, and EDU 04550-16 (consolidated)
AGENCY DKT. NOS. 65-2/16, 66-2/16, 67-2/16, and 68-2/16

J.M. AND T.M., ON BEHALF OF MINOR CHILD, J.M.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

RESPONDENT,

AND

T.D. AND S.D., ON BEHALF OF MINOR CHILD, T.D.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

RESPONDENT,

AND

A.H. AND S.H., ON BEHALF OF MINOR CHILD, Z.H.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

RESPONDENT,

AND

COMMISSIONER OF EDUCATION

DECISION

M.C. AND C.C., ON BEHALF OF MINOR CHILD, M.C.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

RESPONDENT.

The record of this matter, the proposed settlement agreement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19, have been reviewed.

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

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/11/17

Date of Mailing: 7/13/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04548-16

AGENCY REF. NO. 65-2/16

J.M. AND T.M. ON BEHALF OF MINOR CHILD J.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

Respondents.

T.D. AND S.D. ON BEHALF OF MINOR CHILD T.D.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

Respondents.

OAL DKT. NO. EDU 04551-16

AGENCY REF. NO. 66-2/16

A.H. AND S.H., ON BEHALF OF MINOR CHILD Z.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

Respondents.

OAL DKT. NO. EDU 04549-16
AGENCY REF NO. 67-2/16

M.C. AND C.C. ON BEHALF OF MINOR CHILD M.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

Respondents.

OAL DKT. NO. EDU 04550-16
AGENCY REF. NO. 68-2/16

CONSOLIDATED

David Khawam, Esq., for Petitioners

Athina Lekas Cornell, Esq., for Respondents (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys)

Record Closed: May 15, 2017

Decided: May 25, 2017

BEFORE: **JOHN P. SCOLLO**, ALJ

Petitioners challenge the Board's Harassment Intimidation and Bullying (HIB) determination of October 26, 2015.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on March 24, 2016.

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

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

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

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

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

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

May 25, 2017
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: 5-30-17

Date Mailed to Parties: MAY 30 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

WHEREAS, on or about September 28, 2015, a Complaint alleging actions of harassment, intimidation, and bullying ("HIB") was filed with New Providence High School, one of the schools under the governance of the New Providence Board of Education (hereinafter referred to as "Board" or "Respondent"); and

WHEREAS, the New Providence School District (hereinafter referred to as the "District") conducted an investigation of the allegations and determined that harassment, intimidation and bullying was substantiated; and

WHEREAS, the Superintendent of Schools agreed with the investigation's findings; and

WHEREAS, the Board affirmed the recommendation of the Superintendent to substantiate the investigation's findings; and

WHEREAS, the investigation's findings pertain to Petitioners in this matter; and

WHEREAS, there is a dispute between Petitioners and the Board (hereinafter Petitioners and the Board shall be collectively referred to as the "Parties"); and

WHEREAS, on or about October 29, 2015, the Petitioners requested a hearing before the Board and a copy of the investigation file; and

WHEREAS, on December 1, 2015, the Respondent provided a redacted version of the Investigator's report and the HIB complaint; and

WHEREAS, on or about December 2, 2015, a hearing was held before Board with respect to Petitioners; and

WHEREAS, on or about March 3, 2016 a Complaint was filed with the Commissioner of Education on behalf of Petitioner J.M.; and

WHEREAS, on or about March 4, 2016, three (3) separate Complaints were filed with the Commissioner of Education on behalf of Petitioner T.D., Z.H., and M.C., respectively; and

WHEREAS, on or about March 16, 2016, Respondent filed four (4) separate Answers with the Commissioner in response to the Complaints filed on behalf of J.M., T.D., Z.H., and M.C.; and

WHEREAS, the Parties thereafter participated in the exchange of discovery documents and a series of telephone conferences with the Office of Administrative law; and

WHEREAS, on or about November 10, 2016, the Honorable John Scollo, A.L.J., signed an Order to consolidate the four (4) separate Complaints filed by Petitioners and four (4) separate answers filed by Respondent into a single matter; and

WHEREAS, the Parties agree that the conduct of J.M., T.D., Z.H., and M.C. leading to the filing of the September 28, 2015 Complaint with the New Providence High School was inappropriate and had a negative impact on the student who was the subject of the September 28, 2015 Complaint; and

WHEREAS, the Parties acknowledge that Petitioners have not challenged the discipline previously imposed on J.M., T.D., Z.H., and M.C., respectively, and all discipline has been served;

NOW THEREFORE, the Parties having a desire to settle the above matter in an amicable way, hereby agree as follows:

1. The Board shall modify the investigation finding of harassment, intimidation, and bullying and re-categorize same as Disruptive Behavior pursuant to Board Regulation 5600, Student Discipline/Code of Conduct.

2. The Parties agree that the New Providence School District records associated with this matter shall be revised to reflect a re-categorization of the initial harassment, intimidation, and bullying finding as set forth in paragraph 1 of this Agreement. All

reference to the initial harassment, intimidation and bullying findings shall be expunged from all student records, including but not limited to, Powerschool and District files. No information related to a previous HIB finding shall be disclosed and/or reported to any third parties.

3. The Parties agree that Petitioners, including but not limited to J.M., T.D., Z.H., and M.C. and their parents/guardians, expressly agree not to engage in any and all negative or inappropriate discussion of the District student who was the subject of the September 28, 2015 Complaint filed in this matter. The parties agree that Petitioners, including but not limited to J.M., T.D., Z.H., and M.C. and their parents/guardians, also expressly agree not to engage in any negative or inappropriate discussion of the District student's family.

4. The Parties have reached this compromise to avoid the expense, inconvenience, and potential acrimony of an administrative law hearing under the school laws. The Parties specifically disclaim any liability to each other. The Parties' entry into this Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the Parties' part. Any such obligation or liability on either Party's part is expressly denied. The Parties have all entered into this Agreement solely to compromise disputed claims.

5. In consideration of the settlement of the captioned matter, the Parties forever waive their right to take any action against each other regarding this matter.

6. In consideration of the settlement of the captioned matter, the Parties shall forever release each other from any and all claims, rights and liability, including but not limited to any and all claims for attorney's fees, money damages, civil liability, or any other equitable or legal relief.

7. This Agreement contains the entire Agreement and understanding between all Parties and constitutes a full and final Agreement on any and all issues.

8. Any dispute arising out of the breach of this Agreement shall be governed by the laws of the State of New Jersey.

9. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

10. The Parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. The Parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they reviewed the Agreement in detail with their counsel or representative and fully understand its requirements and limitations.

11. This Agreement shall remain confidential to the maximum extent permitted by law and the Parties shall not disclose its form or contents to any third parties.

12. The Parties expressly agree that they shall act in good faith to ensure implementation of this Agreement. The Parties mutually agree to refrain from making any derogatory comments, written or oral; retaliation or disparagement, in any manner, against the other Party or their families, family members, agents, officials, administrators, representatives and employees.

13. This Agreement shall be construed as if it were drafted by both Parties contemporaneously.

14. This Agreement is subject to ratification by the New Providence Board of Education.

J.M., Petitioner
Date: 4/19/17

T.M., Petitioner
Date: 4/19/17

J.M. o/b/o minor child J.M., Petitioner
Date: 4/19/17

T.M. o/b/o minor child J.M., Petitioner
Date: 4/19/17

T.D., Petitioner
Date:

S.D., Petitioner
Date:

T.D. o/b/o minor child T.D., Petitioner
Date:

S.D. o/b/o minor child T.D., Petitioner
Date:

11. This Agreement shall remain confidential to the maximum extent permitted by law and the Parties shall not disclose its form or contents to any third parties.

12. The Parties expressly agree that they shall act in good faith to ensure implementation of this Agreement. The Parties mutually agree to refrain from making any derogatory comments, written or oral; retaliation or disparagement, in any manner, against the other Party or their families, family members, agents, officials, administrators, representatives and employees.

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J.M., Petitioner
Date:

T.M., Petitioner
Date:

J.M. o/b/o minor child J.M., Petitioner
Date:

T.M. o/b/o minor child J.M., Petitioner
Date:

Thomas P Dolan
T.D., Petitioner
Date:

Sally Dolan
S.D., Petitioner
Date:

Thomas P Dolan
T.D. o/b/o minor child T.D., Petitioner
Date:

Sally Dolan
S.D. o/b/o minor child T.D., Petitioner
Date:

A.H., Petitioner
Date: 4/9/17

S.H., Petitioner
Date 4/9/17

A.H. o/b/o minor child Z.H., Petitioner
Date: 4/9/17

S.H. o/b/o minor child Z.H., Petitioner
Date 4/9/17

M.C., Petitioner
Date:

C.C., Petitioner
Date:

M.C. o/b/o minor child M.C., Petitioner
Date:

C.C. o/b/o minor child M.C., Petitioner
Date:

ON BEHALF OF THE NEW PROVIDENCE BOARD OF EDUCATION

Adam Smith, Board President
Date:

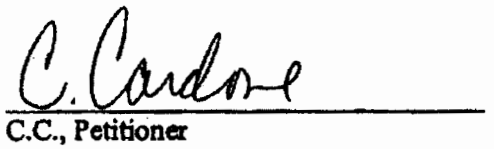
A.H., Petitioner
Date:

S.H., Petitioner
Date

A.H. o/b/o minor child Z.H., Petitioner
Date:

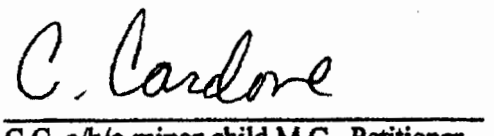
S.H. o/b/o minor child Z.H., Petitioner
Date

M.C., Petitioner
Date:



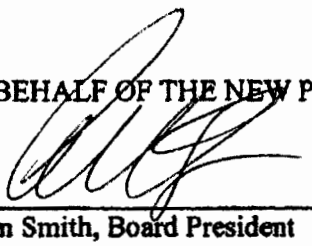
C.C., Petitioner
Date:

M.C. o/b/o minor child M.C., Petitioner
Date:



C.C. o/b/o minor child M.C., Petitioner
Date:

ON BEHALF OF THE NEW PROVIDENCE BOARD OF EDUCATION



Adam Smith, Board President
Date:

NEW PROVIDENCE SCHOOL DISTRICT

356 ELKWOOD AVENUE, NEW PROVIDENCE, NJ 07974

Fax (908) 464-9041 • www.npsd.k12.nj.us

DAVID M. MICELI, Ed.D.
Superintendent of Schools
908-464-9050 (ext. 225)

SCOTT D. HOUGH
Assistant Superintendent
of Educational Services
908-464-9050 (ext. 222)

JAMES E. TESTA
School Business Administrator/
Board Secretary
908-464-9050 (ext. 223)

ANN MARIE INZANO
Interim Director of Curriculum
Instruction, and Supervision
908-464-9050 (ext. 221)

April 28, 2017

ACTION ITEMS

Education Action

Mrs. Cuccaro, Committee Chairperson, moved to approve Item 4 as listed below:

4. Approve the settlement agreement for all parties, Students #1240148, #1240119, #1240515, and #1240110, copies in the hands of each Board member.

The motion was seconded by Mr. Dinerman and carried on the following roll call vote:

Mrs. Cuccaro	Yes
Mr. Dibble	Yes
Mr. Dinerman	Yes
Mr. Krauss	Yea
Mrs. Misiukiewicz	Absent
Mr. Smith	Yes
Mr. Walsh	Yea

This is a true copy of the minutes of April 27, 2017.

James E. Testa
School Business Administrator/Board Secretary

J/JT/CertMin/ResolutionSettlementAgreement4-27-17

192-17

OAL DKT. NO. EDU 08155-17
AGENCY DKT. NO. 114-6/17

S.R., ON BEHALF OF MINOR CHILD, J.G.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST ORANGE ESSEX COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. In this case, the petitioner is appealing the decision of the East Orange Board of Education (Board) not to allow J.G. to participate in her 8th grade promotional ceremony. The ALJ denied the petitioner's request for emergent relief.*

Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe*. *Ibid.* The party seeking such relief must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the

* The recommended Order states that the petitioner's motion for emergent relief is denied under *N.J.A.C.* 6A:3-1.6, but it does not explain the relevant facts, nor does it specifically state why one or more of the *Crowe* prongs were not established.

equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

In this case, the petitioner has failed to demonstrate a likelihood of success on the merits that the Board acted in an arbitrary, capricious or unreasonable manner in determining that J.G. is ineligible to participate in the 8th grade promotional exercises. The Board advised petitioner on May 31, 2017 that J.G. would be ineligible to participate in the promotional exercises due to chronic absenteeism, excessive tardiness, multiple infractions against the code of conduct and multiple violations of the 8th grade contract. (Exhibit R14) Pursuant to *N.J.A.C.* 6A:16-7.1(d)(1), "[a] district board of education may deny participation in extracurricular activities, school functions, sports, graduation exercises or other privileges as disciplinary sanctions when designed to maintain the order and integrity of the school environment."

Judging from the testimony at the emergent hearing in this matter, it is clear that the Board took the position that J.G. was ineligible to participate in the promotional exercises because she continued to violate school policy. Specifically, J.G. was absent 18 times, was tardy 51 times, and had numerous disciplinary infractions, including cell phone violations, entries into unauthorized areas of the school, and a physical altercation with other students. The Board informed J.G. via a "redemption contract agreement" that she was ineligible to attend the class field trip to Dorney Park due to a January 18, 2017 cell phone violation, but that she could earn her privileges back through maintaining positive relationships, completing all class assignments, and refraining from receiving any discipline referrals. (Exhibit R6) Thereafter, following an unauthorized area violation on March 2 and a group fight on March 23, 2007, J.G. received two more redemption contracts indicating that she lost her privileges to attend not only the Dorney Park trip, but also the 8th grade social and the promotional exercises. (Exhibits R7 and R8)

Following those incidents, J.G. received another unauthorized area violation on April 28, threw student binders on the floor on May 3, and had a verbal altercation with another student on May 11, 2017. (Exhibits R4, R9, and R10) Considering J.G.'s behavior, especially after she was informed that she would be ineligible to attend the promotional exercises absent displaying positive behavior and avoiding any disciplinary referrals, it is clear that the school did not act in an arbitrary, capricious, or unreasonable manner in refusing to allow J.G. to participate in the 8th grade promotional exercises. Therefore, in light of the fact that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the three remaining factors.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted as modified. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/11/17
Date of Mailing: 7/13/17

Email 6-15-17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 08155-17
AGENCY DKT. NO. 114-6/17

S.R., on behalf of minor child, J.G.,

Petitioner,

v.

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

Respondent.

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

THIS MATTER HAVING COME BEFORE THE COURT, on Petitioner's Motion for Emergency Relief, Petitioner appearing Pro se, with Leonard V. Jones, Esq. appearing for Respondent and the Court having read the papers submitted by Petitioner, heard the arguments of the parties and having considered the respective positions of the Parties and the applicable laws;

NOW, FOR GOOD CAUSE SHOWN, IT IS ON THIS 15th day of June, 2017 ORDERED that based on the testimony and decision on the attached CD, petitioner's Motion for Emergency Relief is hereby **DENIED**.

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

June 15, 2017

Date

JEFFREY A. GERSON, ALJ

sej

cc: Robert Giordano, Clerk

193-17

OAL DKT. NO. EDU 2364-16
AGENCY DKT. NO. 8-1/16

S.L. and J.L., on behalf of minor child, J.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement & Release Agreement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In so doing, however, the Commissioner notes with respect to paragraph 16 of the Agreement that the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.* in regard to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential. Additionally, with respect to paragraphs 8 and 9, as set forth in *N.J.A.C.* 6A:3-3.1(b), parties seeking enforcement of agency judgments must bring action in the Superior Court as provided in New Jersey Court Rules at R.4:67-6. Therefore, the parties may not seek enforcement of the Agreement with the Commissioner of Education.

Accordingly, this matter is hereby dismissed, subject to compliance with the terms of the settlement consistent with applicable public records law and *N.J.A.C.* 6A:3-3.1(b).

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 7/13/17
Date of Mailing: 7/13/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 02364-16
AGENCY DKT. NO. 8-1/16

S.L. AND J.L., ON BEHALF OF THEIR MINIOR CHILD, J.L.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

Respondent.

Richard J. Kaplow, Esq., for petitioners

Athina L. Cornell, Esq., for respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys)

Record Closed: May 30, 2017 Decided: June 6, 2017

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

On October 19, 2015, respondent determined that J.L. had committed an act of harassment, intimidation, and bullying in violation of the New Jersey Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq. On January 11, 2016, petitioners appealed the determination to the Department of Education. On February 8, 2016, the Bureau of

Controversies and Disputes transmitted the case to the Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On February 22, 2016, the case was assigned to me for hearing. After steadfast negotiations, the parties entered into a settlement agreement, which is attached to this decision. On May 22, 2017, Board of Education approved the settlement agreement.

Having reviewed the terms of the settlement agreement, I **FIND** that the parties have entered into the settlement agreement voluntarily, as evidenced by their signatures, or the signatures of their representatives, on the settlement agreement.

I **CONCLUDE** that the settlement agreement disposes all of the issues in controversy between the parties and that the settlement agreement is consistent with law.

Given my finding of fact and conclusion of law, I **ORDER** that the parties comply with the terms of the settlement agreement.

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

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

6/6/17
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

6-8-17

Date Mailed to Parties: JUN 8 2017

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Attorney ID #012111977
RICHARD J. KAPLOW
53 Elm Street
Westfield, New Jersey 07090
(908) 232-8787
Attorney for Petitioners

S.L. and J.L. o/b/o J.L.	:	
	:	
Petitioners,	:	BEFORE THE STATE OF NEW JERSEY
	:	DEPARTMENT OF EDUCATION AND
vs.	:	OFFICE OF ADMINISTRATIVE LAW
	:	
BOARD OF EDUCATION OF THE	:	OAL DKT. NO. EDU-2364-2016 N
BOROUGH OF NEW PROVIDENCE,	:	AGENCY REF. NO. 8-1/16
NEW PROVIDENCE, UNION COUNTY,	:	
	:	
Respondent.	:	SETTLEMENT AGREEMENT
	:	

WHEREAS, J.L. is a student enrolled within the School District of the Borough of New Providence, Union County, New Jersey; and

WHEREAS, the Board of Education OF the Borough of New Providence ("Board") is the local educational authority with the responsibility of providing a free, appropriate, public education to J.L.; and

WHEREAS, Petitioners S.L. and J.L. are the parents of J.L., referred to as "Petitioners"; and

WHEREAS, a dispute existed with regard to a reported incident of alleged harassment, intimidation and bullying ("HIB") involving J.L. which was investigated by the District (the New Providence Board of Education, its Board Members, Administrators, employees, agents and representatives, herein collectively referred to as "the

District) pursuant to its statutory obligations and its HIB Policy; and

WHEREAS, following the District's investigation and an affirmation by the Board of the recommendation of the Superintendent of Schools, J.L. was determined to have engaged in an act of HIB against another student, which J.L. denied and disputed, resulting in the filing of a Petition of Appeal with the Commissioner of Education ("Commissioner"), which was assigned Agency Reference Numbers 8-1/16 and OAL Docket Number EDU-02364-2016-N for J.L.; and

WHEREAS, the parties each having a desire to amicably settle any and all claims in all jurisdictions, asserted and unasserted, now hereby agree as follows:

1. The Board hereby agrees that it shall modify the HIB documentation relating to J.L., including the Investigative Findings, Conclusions and Recommendations, and all other documentation relating thereto, in a manner that will reflect that J.L has solely been found to have engaged in an act that has resulted in "Disruptive Behavior" in violation of the District's Code of Conduct for students;

2. The Parties hereto agree that the New Providence School District records associated with this matter within the District's possession and control shall be modified and revised as set forth herein. All references to the HIB findings, conclusions and recommendations shall be expunged from all student records, including but not limited to Powerschool and District files.

3. The parties agree that the District as collectively defined herein shall not release or authorize the release of any document or student record, or any information, written or oral, contained therein, relating to the HIB incident involving J.L. unless specifically directed by court order upon application on notice to all named parties and their counsel. All such documents and information shall be deemed privileged and confidential.

4. The parties further agree that all documents relating to the HIB incident and the District's investigation shall not be included in J.L.'s cumulative record nor shall the alleged HIB incident and the District's investigation be considered a disciplinary action reportable to any third parties without a specifically directed court order upon application on notice to all named parties and their counsel. In the event any District representative is asked about J.L.'s disciplinary history, all District representatives must state that J.L. has not been disciplined at any time in the District up through and including the date of the within Agreement.

5. The parties hereby stipulate and agree that the Law Firm of Richard J. Kaplow, P.A., 53 Elm Street, Westfield, New Jersey 07090, as attorney for the Petitioners S.L. and J.L. and Sciarrillo Cornell, Merlino, McKeever & Osborne, LLC, Athina Lekas Cornell, Esq., attorney for the Board of Education of the Borough of New Providence, Union County, New Jersey and the District shall take physical possession of the original and all copies of all of the HIB documents related to the HIB investigation, findings, code of

conduct interventions, detentions, this Agreement, and all other aspects of the HIB proceedings involving J.L. No copies of said documents shall be maintained by any other person or anywhere in or by the District except by the Law Firm of Richard J. Kaplow, P.A. and Sciarrillo Cornell, Merlino, McKeever & Osborne, LLC, as set forth herein. The documents referred to herein shall be transferred to the physical possession of Richard J. Kaplow, P.A. within five (5) days following the ratification of this Agreement by the Board with written notice to counsel.

6. The parties agree that neither Richard J. Kaplow, Esq. nor the Law Firm of Richard J. Kaplow, P.A., Athina Lekas Cornell, Esq. nor the Law Firm of Sciarrillo Cornell, Merlino, McKeever & Osborne, LLC shall release or authorize the release of any document or student record, or any information contained therein, relating to the HIB incident involving J.L. unless specifically directed by court order upon application on notice to all named parties and their counsel.

7. S.L. and J.L. on their own behalf and on behalf of J.L. and the District mutually release and forever discharge each other, its/their officers, employees, administrators, agents and servants from any and all past, present or future claims, whether known or unknown to S.L. and J.L. o/b/o J.L., arising out of the alleged HIB incident that was the subject of this litigation.

8. It is expresaly understood and agreed that the parties reserve the right to bring a claim before any tribunal of competent jurisdiction to enforce their rights under this Agreement.

9. In the event that any member, employee or authorized agent or representative of the Parties breaches or violates any provision of this Agreement, then in that event the Parties shall have a right to forthwith seek an order of enforcement from either the New Jersey Department of Education, Office of Administrative Law or New Jersey Superior Court. If the Parties are required to seek enforcement pursuant to this provision, and if any such enforcement is obtained by either Party, the other Party shall be required to pay and/or reimburse the aggrieved Party for all counsel fees and costs incurred in any such enforcement application and proceeding.

10. The terms of this Agreement represent the compromise of disputed claims between the parties. This Agreement shall not be treated as an admission of any liability or wrongdoing whatsoever on the part of the District or either of the Petitioners, or that any party has failed to act in accordance with any laws, statutes, regulations and/or codes.

11. Each party shall be responsible for its own attorney's fees and expert costs.

12. The drafting and negotiation of this Agreement have been participated in by each of the parties and their respective counsel and, for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the parties. No ambiguity shall be resolved against any party based upon authorship. The parties acknowledge that they have been represented by counsel throughout the settlement of this matter, throughout the negotiation of this Agreement, and at the execution of this Agreement, and that they have read and consulted with counsel regarding this Agreement and fully

understand its requirements and limitations. The parties further acknowledge that they enter into this Agreement voluntarily and free of coercion.

13. This Agreement shall be governed by the laws of the State of New Jersey and constitutes a complete legal release of any and all claims related to the alleged HIB incident referenced in this litigation, that were or could have been raised by Petitioners against the District regarding J.L. at any time up through the time of the mutual execution and/or entry hereof.

14. This Agreement shall be subject to ratification by the Board and is without prejudice to either party if the terms are not ratified. Petitioners are not bound by this Agreement until it has been ratified by the Board. Upon ratification of this Agreement, the Board shall cause a copy of the relevant resolution to be forwarded to Petitioners. When ratifying this agreement, the Board shall not identify J.L. or J.L.'s family, and to the extent permitted by law, no member of the public will be permitted to review a copy of the agreement. The Resolution ratifying the Agreement shall not contain any personally identifying information, including J.L.'s student ID number, before or after ratification.

15. This Agreement contains the entire agreement between the parties hereto and is intended to resolve any and all disputes and issues related to the alleged HIB incident referenced in this litigation, between them as of the date of execution of this Agreement.

16. This Agreement shall be considered by the parties to be confidential on a mutual basis and neither the District as collectively defined herein nor any of the Petitioners shall be permitted to disclose the terms and conditions of this Settlement

Agreement except upon court order, issued upon application, on notice to all named parties and their counsel or as otherwise required by law.

17. Upon the signing of this Agreement by all parties, Petitioners shall withdraw their Petition of Appeal (Docket No. EDU-02354-2016 M) without prejudice. Upon ratification by the Board, the Petition of Appeal shall be withdrawn with prejudice.

18. The parties stipulate and agree email or fax signatures on this Settlement Agreement shall have the same effect as an original signature.

On Behalf of Petitioner J.L.:

S.L. b/b/o J.L.

Dated: 16-MAY-2017

J.L. o/b/o J.L.

Dated: 5/16/2017

Richard J. Kaplow, Esq.
Attorney for Petitioners
S.L. and J.L. o/b/o J.L.

Dated: 5/16/2017

On behalf of Respondent Board of Education of the Borough Of New Providence:

~~Dr. David Bilsell~~ Adam Smith
~~Superintendent of Schools~~ BOE President
For the New Providence School District

Dated: 5/23/17

Athina Lekas Cornell, Esq.
Attorney for Respondent
Board of Education of the
Borough of New Providence

Dated: 5/22/17

NEW PROVIDENCE SCHOOL DISTRICT

356 ELKWOOD AVENUE, NEW PROVIDENCE, NJ 07974

Fax (908) 464-9041 • www.npsd.k12.nj.us

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JAMES E. TESTA
School Business Administrator/ Board Secretary
908-464-9050 (ext. 223)

ANN MARIE INZANO
Interim Director of Curriculum Instruction, and Supervision
908-464-9050 (ext. 221)

May 24, 2017

ACTION ITEM

Mrs. Misiukiewicz moved to approve the action item as listed below:

> Approve the settlement agreement for Student #1240068, copies in the hands of each board member.

The motion was seconded by Mr. Walsh and carried on the following roll call vote:

Mrs. Cuccaro	Yea
Mr. Dibble	Yea
Mr. Dinerman	Yea
Mr. Krauss	Yea
Mrs. Misiukiewicz	Yea
Mr. Smith	Yea
Mr. Walsh	Yea

This is a true copy of the minutes of May 22, 2017.

James E. Testa
School Business Administrator/Board Secretary

JET/JA
J/JT/CertMin/SettlementAgree5-22-17

194-17

C.H., on behalf of minor child, M.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the respondent Board's disciplinary determination with respect to his son, M.H. Petitioner contended that the Board's determination that M.H. had made "terroristic threats" – and the subsequent imposition of a four-day out-of-school suspension, forty-five demerits, and placement in an alternative education program – was improper because the District failed to conduct a manifestation determination in accordance with its policy and applicable law. Concurrent appeals challenging the Board's determination were filed before the Commissioner and the Office of Special Education Programs (OSEP). Based on the ALJ's determinations in the OSEP matter – wherein the ALJ found that M.H.'s behavior did not meet the definition of "terroristic threats" and the District failed to conduct a manifestation determination, as well as establish the existence of any special circumstances for removing M.H. from school – petitioner sought expungement of the four-day suspension and the forty-five demerits. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: the District's own policy with respect to classified students requires that "prior to disciplining a classified student, it must be determined that the student's behavior is not primarily caused by his disability and the program provided meets the student's needs"; while the Individuals with Disabilities Education Act requires a manifestation determination before a student is removed from his/her current placement, the District's policy requires such a determination prior to any discipline being imposed upon a classified student; in this case, the District made no determination as to whether M.H.'s behavior was a manifestation of his disability; the District's assertion that the suspension was warranted, based on M.H.'s actions in writing a rap song that makes reference to guns while at school, was determined to be baseless in the OSEP matter; and the forty-five demerits assessed upon M.H. were never reported in his record, and therefore render that issue moot. The ALJ concluded that the imposition of the four-day suspension was improper, but since it has already been served, the only remedy is to remove the suspension from his disciplinary record. Accordingly, the ALJ ordered that any reference to the suspension in M.H.'s disciplinary record, or other school record, be expunged.

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

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

Issued 7/13/17

OAL DKT. NO. EDU 01733-16
AGENCY DKT. NO. 7-1/16

C.H., on behalf of minor child, M.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by respondent, and petitioner's reply thereto. In this matter, petitioner challenges the Board's disciplinary determination pertaining to M.H. Specifically, petitioner contends that the Board's determination that that M.H. made "terroristic threats against staff; students; and/or faculty" and its subsequent imposition of forty-five demerits and a four-day out-of-school suspension on M.H., followed by placement in an alternative education program, were improper because the District failed to conduct a manifest determination in accordance with its policy and applicable law; and therefore, M.H.'s permanent record should be expunged.[1]

Petitioner had filed concurrent appeals before the Commissioner and the Office of Special Education Programs (OSEP) challenging the Board's determination. In the OSEP matter, the Administrative Law Judge (ALJ) determined that the Board improperly placed M.H. in an alternative education program because the District failed to conduct a manifest determination and establish the existence of any special circumstances for removing M.H. from school. The ALJ also found that

[1] This particular disciplinary action was triggered by a staff member's discovery of rap lyrics referencing guns in M.H.'s journal. The parties agree that M.H. was previously advised not to discuss guns in school.

M.H.'s behavior did not meet the definition of "terroristic threats."[2] Based on the ALJ's findings in the OSEP matter, petitioner now seeks expungement of the four-day suspension and the forty-five demerits from M.H.'s records.

In the matter before the Commissioner, the ALJ found that M.H. did not receive the forty-five demerits, thereby rendering the issue moot. The ALJ also found that the District – in violation of its own policy – failed to conduct a manifestation determination before imposing disciplinary action on M.H. The ALJ concluded that imposition of the four-day suspension was improper because the tribunal had already determined that M.H.'s behavior did not rise to the level of "terroristic threats" – which was the Board's sole basis for its disciplinary action in this matter – and as such, any reference to the four-day suspension in M.H.'s records should be removed.

The Board takes exception to the ALJ's determination that the suspension was unmerited and that any reference to same must be expunged from M.H.'s records. The Board argues that irrespective of whether the behavior rose to the level of "terroristic threat," the behavior nonetheless occurred – notably, M.H. defied previous warnings about such behavior. The Board contends that the four-day suspension was, therefore, imposed for good cause, and should be upheld. In reply, petitioner argues that the Board violated its own policy by failing to perform a manifestation determination before imposing the four-day suspension, and therefore, it should not be allowed to maintain a record of the suspension for "terroristic threats," especially when the ALJ found that M.H. did not make terroristic threats.

Upon consideration and review, the Commissioner is in accord with the ALJ's determination that pursuant to *N.J.A.C.* 6A:32-7.7, expungement of the four-day suspension from M.H.'s permanent record is proper because the specific misconduct – terroristic threats – did not occur. The Commissioner also agrees with the ALJ's determination that the District failed to adhere to its

[2] The ALJ did not make a determination on the appropriateness of the four-day suspension or the demerits, nor did the ALJ decide whether M.H.'s behavior was a manifestation of his disability.

own policy when it did not conduct a manifestation determination prior to imposing disciplinary action on M.H.

Board Policy No. 5131 provides, in pertinent part, "before disciplining a classified pupil, it must be determined that: A. The pupil's behavior is not primarily caused by his/her educational disability"; and "B. The program that is being provided meets the pupil's needs." In other words, in accordance with its policy, the Board must conduct a manifestation determination before imposing any form of discipline on a classified student. Here, the Board admittedly did not conduct a manifestation determination before suspending M.H. for four days. The Board now seeks to bypass its policy requirements and maintain the disciplinary action in M.H.'s records, which is improper. More importantly, when the sole basis for the four-day suspension – terroristic threats – is found not to have occurred, there is no justification for upholding such discipline.[3] Therefore, expungement of any reference to the four-day suspension – pursuant to *N.J.A.C.* 6A:32-7.7 – is proper.

Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter. Petitioner's motion for summary decision is granted in part and denied in part. The Board is hereby directed to expunge the record as to M.H.'s four-day suspension in December 2015; however, expungement is moot as regards the demerits, since they were never recorded. The Board's cross-motion for summary decision is denied.

IT IS SO ORDERED.[4]

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 7/13/17
Date of Mailing: 7/13/17

[3] In its exceptions, the Board attempts to argue that the suspension was imposed as a result of M.H.'s defiance of authority and pattern of behavior, which clearly contradicts the substance of the Board's notice of suspension – which was issued in relation to a specific incident that the Board considered to be an act of "terroristic threat."

[4] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 01733-16
AGENCY DKT. NO. 7-1/16

C.H. ON BEHALF OF M.H.,
Petitioner,
v.
SALEM CITY BOARD OF EDUCATION,
Respondent.

Gerald J. Neski, Esq., for petitioner (Garofala & Neski, P.C., attorneys)

Corey E. Ahart, Esq., for respondent

Record Closed: May 19, 2017 Decided: May 31, 2017

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

Petitioner, C.H. on behalf of his minor son, M.H. challenges the Board of Education of the City of Salem's (Board) disciplinary determination and suspension of M.H. from school. The Board disciplined M.H. for allegedly making terroristic threats.

PROCEDURAL HISTORY

On January 15, 2016, petitioner, C.H., filed with the Office of Special Education Programs (OSEP), New Jersey Department of Education, an expedited petition for due process, seeking an order overturning Board's decision to place his son, M.H., in an alternative interim placement due to terroristic threats alleged to have been made by M.H. On January 20, 2016, the matter was filed with the Office of Administrative Law (OAL) for expedited hearing, which was held before this tribunal on February 9, 2016. A decision was rendered in the special education matter on March 1, 2016. Petitioner simultaneously filed this matter seeking the removal of Board's disciplinary determination from M.H.'s record. This matter was filed with the OAL on February 3, 2016. On August 11, 2016, petitioner filed a motion for Summary Decision. Due to the passing of the District's solicitor, a response and Cross Motion for Summary Decision was not filed until December 15, 2016. Oral argument was originally scheduled for January 20, 2017, but on January 17, 2017, both parties agreed to have the matter decided on the papers.

FACTUAL DISCUSSION

M.H. is a fifteen-year-old student who resides within the Salem City School District (District). He is eligible for special education and related services under the classification of Specific Learning Disability (SLD) and the district has prepared an Individualized Education Plan (IEP) to assist him with disabilities in basic reading skills, mathematical problem solving and written expression. He is a Junior at Salem City High School.

On December 12, 2015, M.H. was subjected to discipline by the District for alleged terroristic threats when district employees discovered lyrics to a rap song written in M.H.'s school journal. The Board conducted a hearing on January 6, 2016, and affirmed the recommendations of the Superintendent that M.H. be suspended for four-days, receive forty-five demerits and be placed in an alternative school program at Salem Middle School. As the aforementioned statements are not in dispute, I hereby **FIND** them as **FACT**.

After having had an opportunity to observe the appearance and demeanor of the witnesses, and consider the testimonial and documentary evidence presented at the hearing on February 9, 2016, I made the following additional **FINDINGS** of **FACT**:

1. M.H. wrote in a class journal a rap song that had the following lyrics: "U better dip like a chip because I got a new gun with 2 clips I can't wait to use it better yet shoot it roll up in your club like a blunt we smoke it can't comprehend no more we baking like hot cakes."

2. At the hearing conducted by the Board, the Board affirmed this action after hearing testimony and M.H.'s attorney was given an opportunity to cross-examine witnesses.

3. The term "terroristic threats" is not defined in the District student handbook.

4. M.H. had been warned in November 2015, that this is not appropriate when his father was called in to school after M.H. was taking about shooting a gun at a gun range. M.H. was advised at that time that he cannot talk about guns in school. Both M.H. and his father understood and agreed.

5. District staff secured M.H., checked his bags and locker and found no weapons of any kind. The rap lyrics were not given to anyone or performed in school by M.H. They were discovered by a teacher that was reviewing M.H.'s journal to check his work as required by his IEP.

6. The District's Child Study Team was not consulted as part of the discipline process. In December 2014, the Child Study Team had recommended a psychiatric evaluation be conducted upon M.H., but his father refused the evaluation. The Child Study Team wanted him evaluated because his last psychiatric evaluation was conducted when M.H. was in second grade. At

that time, M.H. drew pictures of guns and stated that he was mad at another child and would shoot him if he had a gun.

7. M.H. does not own a gun, has never shot a gun or even touched a gun in his life.

8. The District recommended a change in placement, primarily based upon a perceived threat to the safety and welfare of the District's staff and students.

I concluded in my March 1, 2016, decision, that the Board cannot remove M.H. to an alternative educational setting because the Board has failed to prove any special circumstance for removal of a child whose conduct has not been determined to be a result of his disability or that maintaining M.H.'s current placement is substantially likely to result in injury to himself or others. 20 U.S.C.A. § 1415(k)(3)(B)(ii); 34 C.F.R. § 300.532(b)(2) (2014); see also N.J.A.C. 1:6A-14.2(e). No determination regarding petitioner's claim that M.H.'s due-process rights were violated at the Board's hearing on January 6, 2016, was rendered in the special education matter. I further made no determination whether the four-day suspension or the demerits imposed upon M.H. were appropriate. It is clear and I **FIND** as **FACT** that M.H. was suspended for four-days for making terroristic threats. I further **FIND** as **FACT** that the District made no determination that M.H.'s behavior was a manifestation of his disability.

In his response and Cross Motion for Summary Decision the District for the first time advises that the forty-five demerits assessed upon M.H. were never recorded and are, therefore not on his permanent record. I therefore **FIND** as **FACT** that M.H. did not receive forty-five demerits and thereby render that issue moot.

LEGAL ANALYSIS AND CONCLUSION

Under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. §§ 1400–1482, and its implementing regulations, a school district "may remove a student to an interim alternative educational setting for not more than forty-five school days without

regard to whether the behavior is determined to be a manifestation of the child's disability", if the child brings a weapon to school, inflicts serious bodily injury on another person at school, or "knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function." 20 U.S.C.A. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g) (2014); see also N.J.A.C. 6A:14-2.8(d), (f). If the school district believes that maintaining the child's current placement is substantially likely to result in injury to the child or others, the school district may request an expedited due-process hearing. 20 U.S.C.A. § 1415(k)(3), (k)(4)(B); 34 C.F.R. § 300.532(a) and (c) (2014); see also N.J.A.C. 6A:14-2.7(n); N.J.A.C. 1:6A-14.2(a). In such a case, a hearing officer may "return a child with a disability to the placement from which the child was removed" under certain circumstances or "order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than forty-five school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others."[1] 20 U.S.C.A. § 1415(k)(3)(B)(ii); 34 C.F.R. § 300.532(b)(2) (2014); see also N.J.A.C. 1:6A-14.2(e).

Under State Law, the school district bears the burden of proof and the burden of production in any due-process hearing held in accordance with the IDEA with respect to "the identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action, of a child with a disability." N.J.S.A. 18A:46-1.1. In a due-process hearing before the OAL, "[t]he judge's decision shall be based on the preponderance of the credible evidence, and the proposed action of the Board of Education or public agency shall not be accorded any presumption of correctness." N.J.A.C. 1:6A-14.1(d).

The District's own policy with respect to classified students requires that "prior to disciplining a classified student, it must be determined that the student's behavior is not primarily caused by his or her disability and the program provided meets the student's needs. (See, J-1 attached to petitioners Brief in Support of Summary Decision at page

[1] The child shall remain in the interim alternative educational setting until an administrative law judge (ALJ) renders a decision or until the expiration of the forty-five-day removal period, whichever occurs first. 20 U.S.C.A. § 1415(k)(4)(A); 34 C.F.R. § 300.533 (2014); see also N.J.A.C. 6A:14-2.7(u); N.J.A.C. 6A:14-2.8(f).

44.) While the IDEA requires a manifestation determination before a student is removed from his/her current placement, District policy requires such a determination prior to any discipline being imposed upon a classified student. Here the District made no determination if M.H.'s behavior was a manifestation of his disability.

The District asserts that the suspension is warranted based on M.H's actions of writing a rap song making reference to guns while in school. The District also concedes that since my March 1, 2016, decision concluded that M.H. did not make "terroristic threats" pursuant to neither District policy nor N.J.S.A. 2C:2-3, any reference to "terroristic threats" will be removed from his Disciplinary Record. In a letter, dated December 11, 2015, the District advised petitioner that the reason for the suspension is "Terroristic threats against staff; students; and or faculty." (See, P-1 attached to petitioner's Brief in Support of Summary Decision.) This is the only reason given for the discipline. It has already been concluded by this tribunal that no "terroristic threats" were made. Although New Jersey Law permits a District to suspend a student for good cause, which includes many various acts of misconduct, the specific act of misconduct alleged to have occurred by M.H., based on my March 1, 2016, decision, did not occur. I therefore **CONCLUDE** that the imposition of the four-day suspension was improper. N.J.A.C. 6A:32-7.7 permits a parent or adult student to seek to expunge inaccurate, irrelevant or otherwise improper information from a student record. M.H. has already served the suspension. The only remedy is to remove the suspension from his disciplinary record. For the foregoing reasons, I **CONCLUDE** that any reference made to the four-day suspension served by M.H. on December 10, ,11, 14 and 15, 2015 should be expunged.

ORDER

Accordingly, it is hereby **ORDERED** that any reference made in M.H.'s disciplinary record or any other record maintained by the District to the four-day suspension served by M.H. on December 10, 11, 14 and 15, 2015, shall be expunged.

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

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

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

5/31/17
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: May 31, 2017

Date Mailed to Parties: May 31, 2017

JSK/dm

APPENDIX

EXHIBITS

Petitioner:

Brief in Support of Summary Decision with Exhibits A, B, J-1, J-3 and P-1

Respondent:

Brief in Response and Cross Motion for Summary Decision with Exhibits A and B

196-17

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges by

ELIZABETH BOARD OF EDUCATION

"Petitioner"

-against-

JERRY PASCHER

"Respondent"

Pursuant to N.J.S.A. 18A:28-5 and 6-10

Agency Docket No. 71-3/16

APPEARANCES

FOR THE PETITIONER
FLORIO, PERRUCCI, STEINHARDT & FADER
By: Jenna A. Rottenberg, Esq.

FOR THE RESPONDENT
OXFELD & COHEN
By: Gail Oxfeld Kanef, Esq.

BEFORE: Earl R. Pfeffer, Arbitrator

DISCUSSION AND FINDINGS

On January 7, 2016, Helga Hugelmeyer, Superintendent for the Board of Education of the City of Elizabeth ("the Board"), filed Sworn Tenure Charges against Respondent Jerry Pascher in accordance with N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, and also on January 7, 2016, same were served on Respondent with notice of opportunity to submit evidence and argument in opposition to the Charges. Thereafter, the Board, following its review of the Charges and any opposition thereto at a duly convened meeting on February 18, 2016, found probable cause to credit the evidence in support of the Charges and it consequently determined to certify the Charges to the Commissioner of Education for a hearing pursuant to law. Thereafter, Harold E. Kennedy, Jr., the Board's Business Administrator and Secretary, signed a Certification of the Board's actions and same was served upon Pascher.

On or about February 29, 2016, Respondent, through counsel, filed his Answer denying all counts set forth in the Charges, and on March 14, 2016, I was appointed Arbitrator to hear and decide this tenure matter. A Status Conference was scheduled for March 28, 2016, and subsequently adjourned to April 7, 2016, and reconvened on April 25, 2016. On May 9, 2016, counsel advised me the parties had agreed upon the terms of a stipulation settling the Charges and same was signed on May 11, 2016. It received final Board approval on August 4, 2016.

Thereafter, the parties informed me they had reached agreement settling this case, and on March 28, 2017, pursuant to N.J.A.C. 6A:3-5.6, they forwarded to me for review and approval a fully executed copy of their Employment Separation Agreement and Release ("Agreement"), which is attached and incorporated herein.

I have carefully reviewed the Agreement and I determine it satisfies the statutory requirements for withdrawal and settlement of tenure charges, as set forth in N.J.A.C. 6A:3-5.6. In particular:

1. The nature of the Charges are part of the record of this proceeding and were known to all parties to the Agreement;

2. The circumstances justifying settlement and withdrawal are incorporated into the Agreement. For the Respondent, the Board agreed to withdraw the Charges and to extend his employment until an agreed-upon retirement date of June 30, 2016. For the Board, Pascher's retirement is irrevocable, and he has agreed in perpetuity to waive any rights to re-employment or to a consultant relationship with the Board. The Board has promised to cooperate with the Pension Board and/or any other State or Local government body promptly and completely with respect to Pascher's pension application, and Pascher has provided the Board with a broad release which irrevocably and unconditionally waives and discharges any and all claims or rights stemming from the facts and circmstances that gave rise to the instant Charges. The release broadly extends to the Board's members, officers, administrators, agents, attorneys and employees, and includes without limitation claims under common law as well as federal, state and local labor laws and regulations. The Board has promised it will provide to Pascher neutral references in response to any future employment inquiries, and both parties are protected by a broadly worded non-disparagement provision.

3. The Agreement advised Respondent of his rights under

the Older Workers Benefit Protection Act of 1990, in particular of his right to review and consider the Agreement for a period of up to twenty-one (21) days and of his right revoke and rescind his execution of the Agreement within seven (7) calendar days after he signed it on May 11, 2016.

4. The Agreement is signed by the parties and their representatives, and incorporates the May 12, 2016, Board Resolution accepting Pascher's resignation and its authorization the Board President and it authorizes the Business Administrator/Board Secretary to execute the Agreement and carry out the actions of the Board stipulated therein. Pascher has averred he entered into the Agreement freely and voluntarily, with a full understanding of his rights following satisfactory and unimpeded discussions with his representative which were conducted without duress or coercion. I find it complies with N.J.A.C. 6A:3-5.6(b)

5. The Agreement, I find, does not contain terms which restrict access to information or records deemed public by law, accurately represents the circumstances of Respondent's resignation and is in the public interest.

I approve the Agreement.

June 28, 2017.

Earl R. Pfeffer, Arbitrator

STATE OF NEW JERSEY)
) ss.:
COUNTY OF ESSEX)

On this 28th day of June 2017, before me personally came and appeared EARL R. PFEFFER, Arbitrator, ~~became known and~~ known ~~by me~~ to be the individual described herein, and who executed the foregoing instrument and who acknowledged to me that he executed the same.

Sworn to and subscribed
before me this 28th day
of June 2017.

Notary Public

SHAWN P POLANCO
Notary Public
State of New Jersey
My Commission Expires Jan 16, 2019

EMPLOYMENT SEPARATION AGREEMENT AND RELEASE

This Agreement and Release ("Agreement") is entered into and effective as of the 11TH day of MAY, 2016 by and between the Elizabeth Board of Education ("Board") and Jerry Pascher.

WHEREAS, the Board is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A: 11-1, which is entrusted with maintaining and conducting the public schools of said school district; and

WHEREAS, the Board has its administrative offices located at 500 North Broad Street, Elizabeth, New Jersey 07028; and

WHEREAS, Mr. Pascher, a tenured teacher employed by the Board, has his current address located at 231 Palisade Road, Elizabeth, NJ 07208; and

WHEREAS, on or about January 7, 2016, Olga Hugelmeyer, Superintendent of Schools, filed Sworn Tenure Charges, together with a Sworn Statement of Evidence in support of the charges, against Mr. Pascher, with the Board; and

WHEREAS, on or about February 18, 2016, the Board certified the Charges to the Commissioner of Education; and

WHEREAS, Mr. Pascher does not wish for the Board to proceed to a hearing regarding the subject tenure charges, but intends to continue employment through and retire effective June 30, 2016; and

WHEREAS, the parties, now desiring to resolve the within matter amicably and without the need for further litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein; and

NOW, THEREFORE, the parties hereby agree, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged, as follows:

TENURE CHARGES TO BE MOOT/NO FURTHER BOARD ACTION

The Board agrees that upon execution of the within Agreement by the parties and Mr. Pascher's fulfillment of the obligations as set forth herein, that the subject tenure charges shall be moot and shall be deemed withdrawn, and that no further action shall be initiated by the Board regarding the underlying charges. The Board reserves all rights in the event this Agreement is breached by Mr. Pascher, as well as with respect to any third party claims that may be made against the Board as a result of any acts and/or omissions by Mr. Pascher during his employment with the Board. Mr. Pascher retains his rights to enforce this agreement should the Board breach same.

RESIGNATION

Mr. Pascher, by signing this Agreement, hereby tenders his irrevocable resignation for the purposes of retirement (annexed hereto as Attachment A) effective June 30, 2016. Mr. Pascher shall not be responsible for providing the Board with sixty (60) days' notice of his resignation for the purposes of retirement. Mr. Pascher's retirement shall be irrevocable upon approval of this Agreement by the Board. Mr. Pascher agrees that he will not seek any future employment or consultant relationship with the Board in perpetuity and that the Board has no obligation, contractual or otherwise, to re-hire or re-employ him.

NO ADMISSIONS

This Agreement is entered into for the sole purpose of resolving issues related to Mr. Pascher's employment, and neither the execution, delivery, nor performance of this Agreement, nor Mr. Pascher's retirement shall constitute or be construed at any time or for any purpose to be an admission of liability or wrongdoing by any of the parties; the parties further agree that neither this Agreement and Release nor Mr. Pascher's retirement shall be used as evidence in any judicial, administrative, or quasi-judicial proceedings, except to enforce the terms of this Agreement.

NO FURTHER COMPENSATION/BENEFITS

Prior to the effective date of Mr. Pascher's resignation for the purposes of retirement, he shall be entitled to salary and benefits during the period April 1, 2016 through June 30, 2016. He shall be entitled to no further compensation or fringe benefit of any kind with the exception of any summer pay to which he is entitled and pay for unused sick days to which he is entitled. Mr. Pascher specifically waives his right to any additional pay and benefits, except for any benefits to which he may lawfully be entitled under the Workers' Compensation Act or the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"). Mr. Pascher represents that as of the date of this agreement, he has not filed and does not intend to file any Workers' Compensation claim related to his employment with the Board.

LEAVE PERIOD

The parties recognize that during the period February 23, 2016 through March 31, 2016, Mr. Pascher was on unpaid administrative leave.

DUE DILIGENCE

The Board shall cooperate fully with the Pension Board and/or any other State or Local governmental body and comply promptly and completely with all requests and requirements in conjunction with Mr. Pascher's future pension application.

RELEASE

In exchange for the above consideration, Mr. Pascher, his heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any and all claims or rights stemming from the facts and circumstances which gave rise to the tenure charges referred to herein or the basis for same, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, all officers and administrators, its attorneys, agents and employees, personally and officially, as well as their successors, and assigns, including, but not limited to any and all claims for attorney's fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this Agreement, and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Act of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retraining Notification Act, the New

Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any and all other claims that could be initiated in any venue, for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims arising under the Worker's Compensation Act, N.J.S.A. 34: 15-1 et seq., for health insurance continuation coverage under and pursuant to COBRA, and any claims concerning enforcement of this agreement.

INQUIRIES

The Board agrees not to make any disparaging remarks regarding Mr. Pascher in response to any future employment inquiries and will limit any statements made, either orally or in writing, to confirming the dates of Mr. Pascher's employment within the District, the amount of Mr. Pascher's salary in the final year of his employment, and the position(s) that Mr. Pascher held with the District. Nothing herein shall be deemed to limit the Board's actions in compliance with the Open Public Records Act, or its obligation to respond fully and accurately to any and all inquiries from State agencies, such as, without limitation, the Public Employees Retirement System, the State Department of Education and the State Board of Examiners and its agents.

NON-DISPARAGEMENT

The parties and their agents shall refrain from public negative comments regarding each other, and each other's employees and/or agents. However, nothing in this Agreement shall be construed to limit Mr. Pascher or the Board and its agents' obligation to provide accurate information in response to legitimate requests for public information, including copies of the Tenure Charge documents, nor to provide information requested by various State Agencies, including, but not limited to, the State Department of Education, the State Board of Examiners and its agents, the Division of Pensions and Benefits and the Unemployment Compensation Board and/or their agents

SURRENDER OF BOARD PROPERTY

Mr. Pascher shall surrender all school keys and property in his possession to the Superintendent of Schools or her designee. If necessary, the Superintendent of Schools shall arrange an appointment for Mr. Pascher to retrieve his personal property.

BOARD APPROVAL

This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

ASSENT TO TERMS

Mr. Pascher hereby acknowledges that he enters into this Agreement with a full understanding of his rights and that he was fully informed of the implications of this Agreement by his attorney, and does so without duress of his own free will and volition.

Mr. Pascher further acknowledges that he was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and was given seven (7) days from the execution of this document to revoke this Agreement, by delivering written notification to Jenna A. Rottenberg, Esq., Florio Perrucci Steinhardt & Fader, LLC, 235 Broubalow Way, Phillipsburg, New Jersey 08865. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Mr. Pascher will not be entitled to the consideration described herein. Furthermore, it is understood that if this Agreement is revoked, the underlying tenure charge proceedings shall be reinstated and the Board will not be obligated to re-serve Mr. Pascher and/or his attorney with a copy of same but may consider and certify, if it so chooses, said tenure charges at its next Board of Education meeting following said revocation.

SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

PUBLIC INTEREST

This proposed settlement will serve the public interest. As a result of Mr. Pascher having tendered his irrevocable resignation for the purposes of retirement, the Board will not have to engage in litigation related to his employment.

ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations,

discussions, and understandings and agreements, whether oral or written. This Agreement shall not be amended, changed or modified, except in a writing signed by all parties. Each party acknowledges that neither the other party, nor any agent or attorney or the other party, have made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

SEVERABILITY

If any non-material portion of this Agreement shall be determined by any court or agency of competent jurisdiction to be contrary to law, then it shall be deemed to be severed from the remainder of this Agreement, which shall continue in full force and effect. Should any material provision be stricken by a court or agency of competent jurisdiction, then the entire Agreement shall by null and void, ab initio.

GOVERNING LAW

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

Witness:

Jerry Pascher

JERRY PASCHER

Dated: MAY 11, 2016

Diane Gourley

DIANE GOURLEY

Dated: May 11, 2016

For the Elizabeth Board of Education

CHARLENE BATHELUS

Board President

Dated: 9/14/16

HAROLD E. KENNEDY, JR.

Board Secretary/Business Administrator

Dated: 9/14/2016

Attachment A

Irrevocable Resignation for the Purposes of Retirement

Elizabeth Board of Education

c/o Harold E. Kennedy, Jr., Board Secretary/Business Administrator

500 North Broad Street

Elizabeth, New Jersey 07208

Re: Irrevocable Resignation for the Purposes of Retirement

Dear Ladies and Gentleman,

Subject to the terms and conditions of our Separation from Employment Agreement and Release, and approval of same by the Board of Education, I hereby tender my irrevocable resignation for the purposes of retirement, effective June 30, 2016 from all employment with the Elizabeth Board of Education.

Very truly yours,

Jerry Pascher

Jerry Pascher

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BOARD OF EDUCATION

RESOLUTION ACCEPTING RESIGNATION

BE IT RESOLVED that the Elizabeth Board of Education hereby approves the attached Employment Separation Agreement with Jerry Pascher (Employee 100966); and

BE IT FURTHER RESOLVED that the Elizabeth Board of Education hereby accepts Jerry Pascher's (Employee 100966) irrevocable resignation for the purposes of retirement effective June 30, 2016.

NOW, THEREFORE, BE IT RESOLVED that the Elizabeth Board of Education authorizes the Board President and the Business Administrator/Board Secretary to execute the Employment Separation Agreement on behalf of the Board; and to take such further steps as may be necessary to effectuate the within Employment Separation Agreement and carry out this action of the Board

Elizabeth, New Jersey
May 12, 2016

15-237

197-17

T.N., on behalf of minor child, I.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE ETHICAL COMMUNITY CHARTER SCHOOL, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the respondent Board's practices for identifying, investigating, and resolving allegations of harassment, intimidation and bullying (HIB) at the Ethical Community Charter School. Petitioner had filed a grievance seeking improvement in these practices, after which her claims were investigated by the Board. The Board communicated the findings of that investigation to the petitioner on July 15, 2015. Petitioner filed her appeal on October 27, 2015. The Board filed a motion to dismiss in lieu of an answer, based upon the failure of the petitioner to file an appeal within ninety days pursuant to *N.J.A.C.* 6A:3-1.3(i).

The ALJ found, *inter alia*, that: the petitioner filed her appeal on October 27, 2015, 105 days after notice of the Board's decision; in order to relax the ninety-day rule, the circumstances must be exceptional or the reason compelling, pursuant to *N.J.A.C.* 6A:3-1.16; there is no basis herein by which the petitioner is entitled to relax the ninety-day rule. The ALJ concluded that petitioner is barred by *N.J.A.C.* 6A:3-1.3(i) from bringing her appeal out of time. Accordingly, the petition was dismissed.

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

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

Issued 7/18/17

OAL DKT. NO. EDU 18839-15
AGENCY DKT. NO. 350-11/15

T.N., on behalf of minor child, L.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE ETHICAL COMMUNITY CHARTER SCHOOL, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination that the petition of appeal was time barred under *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 7/18/17
Date of Mailing: 7/19/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 18839-15
AGENCY DKT. NO. 350-11/15

T.N. ON BEHALF OF L.C.,
Petitioners,
v.
BOARD OF TRUSTEES OF THE ETHICAL COMMUNITY CHARTER SCHOOL, HUDSON COUNTY,
Respondent.

T.N., petitioner, pro se

Thomas O. Johnson, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: May 1, 2017 Decided: June 9, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

Petitioner, T.N. on behalf of L.C., filed a grievance with the respondent Board of Trustees of the Ethical Community Charter School (Board) on June 8, 2015.

Respondent acknowledged receipt of the grievance and an investigation was conducted by the respondent regarding the allegations contained therein. After the completion of the investigation, the respondent gave notice of the findings of that investigation to the petitioner, T.N., on July 15, 2015.

PROCEDURAL HISTORY

On October 27, 2015, the petitioner filed a petition before the Commissioner of Education regarding the decision. Respondent raises grounds for the dismissal of the petition herein based upon a failure of the petitioner to file a petition within ninety days of the action of Ethical, N.J.A.C. 6A:3-1.3(4)(i) via a motion to dismiss in lieu of an answer. Respondent maintains that it processes applications based upon a procedure authorized under N.J.A.C. 6A:19-2.3(b). The only submission made by the petitioner was submitted on February 29, 2016, and no additional submissions were made by the petitioner despite requests for same.

The New Jersey State Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-8.2 where it was filed on November 24, 2015, and assigned to Administrative Law Judge Tiffany Williams. Thereafter, Judge Williams resigned and the case was reassigned to the undersigned. The respondent moved for a dismissal based on a motion to dismiss in lieu of an answer. Petitioner opposed said motion based on previously submitted documents.

DISCUSSION

Initially, I note that petitioner provided no certification or affidavit in opposition to the respondent's motion in this matter or no follow up reply to the respondent's motion. For this record, the undersigned will rely on respondent's motion for dismissal and the submission by the petitioner T.N. without any certification or affidavit. The petitioner stated that she was going to file opposition paperwork, after a telephone conference; however, no such submission was ever filed by the petitioner. I will rely extensively on

the fully briefed motion submitted by the respondent, along with a supporting certification.

FACTS

The following **FACTS** are not disputed, and I **FIND**:

1. The Ethical Community Charter School in Hudson County is a charter school established pursuant to N.J.S.A. 18A:36A-1.

2. Petitioner is a parent and a student enrolled in the Ethical School and filed a grievance seeking improvement in the practices for identifying, investigating, and resolving HIB allegations at the Ethical School.

3. Respondent investigated the claims of the petitioner and communicated its final decision to the petitioner on July 15, 2015.

4. Petitioner filed a Petition of Appeal on October 27, 2015

ADDITIONAL FACTS FOUND

Based upon the review of respondent's certification and moving papers, including excerpts of the certified answers to interrogatories, and the request for hearing, I **FIND** the following as additional **FACTS**:

5. Petitioner's submission stated that she filed a grievance that was not about the bullying investigation.

6. L.C. is a gender non-conforming student at the respondent school with allegations of bullying other student from March 2014 until the end of the school year.

7. The allegations of bullying include hitting L.C. and telling L.C. that he was a "freak, gay and had no friends."

8. After the investigation, the respondent found that the incident between L.C. and the other student was a back-and-forth situation and L.C. was required to apologize to the other student.

9. T.N., L.C.'s mother, had difficulty with the manner in which the HIB investigation was conducted.

10. As a basis to the above, T.N. requested that the respondent open another investigation.

LEGAL DISCUSSION

A motion to dismiss the petitioners' appeal is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute and the application to that set of material facts of the applicable law and standard of proof lead to a determination of the case without the necessity of a hearing at which evidence and testimony need be taken. The procedure is equally applicable in judicial and executive-branch administrative cases. N.J.A.C. 1:1-12.5.

Petitioner acknowledged that the petition was received from the respondent on July 15, 2015. Based on the document submitted by the respondent, the petitioner clearly filed the petition on October 27, 2015, 105 days after notice of the decision.

There is no basis for which the petitioner is entitled to relax or otherwise not apply the ninety-day rule. In order to relax the ninety-day rule the circumstances must be exceptional or the reason must be compelling. N.J.A.C. 6A:3-1.16. Respondent cites Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572,590 (1993) in support of their position that the petitioner has failed to file the petition within ninety days. The adequate notice to trigger the ninety-day statute of limitations is from the day

the petitioner learns of the existence of facts that would enable one to file a timely claim. Ibid. The Kaprow Court stated that "[t]he limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days." Id. at 582. This limitation is put in place in order "to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims" and "to penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs." Ibid. In addition, the Kaprow Court found that "unofficial or informal notice is sufficient to trigger the ninety-day limitations period." Id. at 588.

The Commissioner of Education promulgated N.J.A.C. 6A:3-1.3(4)(i), as requiring a petition be brought within ninety days of notice of the action. T.N. did not do that here. Furthermore, T.N. did not substantiate any exceptional or compelling reasons for the failure to file.

The ninety-day rule must be strictly applied and has been strictly followed by the Commissioner of Education. Markalin v. Bd. of Educ. of the Twp. of Neptune, 92 N.J.A.R.2d (EDU) 406. In addition, New Jersey courts have strictly construed the ninety-day requirement. Riely v. Bd. of Educ. of Hunterdon Central Reg'l High Sch. Dist., 173 N.J. Super. 109 (App. Div. 1980). As argued by the respondent and supported by caselaw, this ninety-day rule represents a fair and necessary requirement for the proper and efficient resolution of disputes under the school laws and expresses a public policy of giving school districts the security of knowing that decisions regarding the administrative operations of the school district cannot be challenged after the time period. Kaprow, supra, 131 N.J. at 582.

In this case, the evidence clearly confirms that the petitioner was given notice of the respondent's findings as to their grievance on July 15, 2015. The evidence also confirms that the petitioner filed the appeal on October 27, 2015, which exceeds the ninety-day rule as the October date is 105 days from the date of the respondent's decision.

CONCLUSION

I **CONCLUDE** petitioner is barred by N.J.A.C. 6A:3-1.3(4)(i), from bringing this petition out of time. I **CONCLUDE** petitioner has failed to demonstrate that she is entitled to a waiver of the time period of N.J.A.C. 6A:3-1.3(4)(i).

ORDER

It is hereby **ORDERED** that respondent's motion for summary decision is **GRANTED**, and petitioner's petition is **DISMISSED** and **DENIED** in all respects. This Initial Decision disposes of all issues in controversy in this matter.

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

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

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

June 9, 2017
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: June 9, 2017

Date Mailed to Parties: JUN 12 2017

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

For Petitioner:

Opposition to respondent's motion, dated February 22, 2016

For Respondent:

Motion to Dismiss In Lieu of An Answer with support certification and documentation, dated November 23, 2015

Reply submission in support of motion, dated March 11, 2016

198-17

OAL DKT. NO. EDU 8838-17
AGENCY DKT. NO. 121-6/17

M.K., on behalf of minor child, M.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

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

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 7/18/17

Date of Mailing: 7/19/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON EMERGENT RELIEF
OAL DKT. NO. EDU 08838-17
AGENCY DKT.NO. 121-6/17

M.K. ON BEHALF OF M.K.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKE, BERGEN COUNTY
Respondent.

M.K., petitioner, pro se

Stephan Fogarty, Esq. for respondent (Fogarty & Hara, attorneys)

Record Closed: June 27, 2017 Decided: June 27, 2017

BEFORE **KIMBERLY A. MOSS,** ALJ:

Petitioner, M.K., brings this action seeking an order to compel Franklin Board of Education (District) to document and incorporate a process for students to achieve the standards in the New Jersey Student Learning Standards (NJSLS) that are outside of the regular school offering of the school and require the District to approve and grant credit for established group programs outside of the District based upon specific

instructional objectives aimed at meeting or exceeding NJSLS in the same manner that in-district curriculum is approved.

On June 22, 2017, the Office of Special Education Programs transmitted the matter to the Office of Administrative Law (OAL) under Docket No. EDU 08838-17. Oral arguments were held on June 27, 2017, on which date the record closed.

FACTUAL DISCUSSION

After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony, I **FIND** the following **FACTS**:

M.E.K. has recently completed the seventh grade at Franklin Avenue Middle School. He is a general education student. Students attending the seventh grade in the district are placed into one of three mathematics courses: Math 7, Math Advanced 7, or Algebra 7. Placement is determined by seven factors: Math in focus assessment, basic math knowledge test, Terranova results, Cog AT 5 results, Iowa Algebra, students final grade in the sixth grade and work habit scores. M.E.K satisfied his math requirement by completing Math 7 Advanced. Petitioner filed for a Due Process hearing on January 10, 2017 requesting that M.E.K. be immediately moved from Math 7 Advanced to Algebra 7. The Office of Special Education Programs (OSEP) returned the due process request to petitioner for failure to follow substantive requirements. Petitioner filed a second due process petition with OSEP on February 8, 2017 again requesting that M.E.K. be moved from the Math Advanced 7 to the Algebra 7. Mediation was held on March 7, 2017 and the petition was withdrawn.

On June 6, 2017 Petitioner advised the District that M.E.K. would be enrolled in a summer algebra program and requested that the district give M.E.K. credit for the course. Petitioner proposed M.E.K. take the course at one of the following: Bergen Community College New Work for Credit, Mountain Lakes High School Summer Academy, Montclair Kimberly Academy Summer Skills for Success or the New Jersey

Virtual School. These programs will begin on either June 27, 2017 or July 5, 2017. Leisel McDonnell Steines, the District's Director of Curriculum and Instruction responded by email on June 7, 2017 stating:

> Essentially there is no circumstance in which courses that are already among the districts offerings are considered for credit (and thus appearing on the student's transcript) from an outside institution. The one exception would be remediation situations in which the student is taking summer school course for the purpose of credit recovery, which is not the case with your child.

Petitioner alleges that the District violated N.J.A.C. 8-5.1.

LEGAL ANALYSIS AND CONCLUSION

The standards for the granting of emergent relief are set forth in N.J.A.C. 6A:3-1.6(b). Emergent relief may be granted if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

N.J.A.C. 6A:8-5.1 provides:

> 6A:8-5.1 Graduation requirements
>
> (a) For a State-endorsed diploma, district boards of education shall develop, adopt, and implement local graduation requirements that prepare

students for success in post-secondary degree programs, careers, and civic life in the 21st century, and that include the following:

1. Participation in a local program of study of not fewer than 120 credits in courses designed to meet all of the NJSLS, including, but not limited to, the following credits:

i. At least 20 credits in English language arts, aligned to grade nine through 12 standards, effective with the 2009-2010 grade nine class;

ii. At least 15 credits in mathematics, including algebra I or the content equivalent effective with the 2008-2009 grade nine class; geometry or the content equivalent effective with the 2010-2011 grade nine class; and a third year of mathematics that builds on the concepts and skills of algebra and geometry and that prepares students for college and 21st century careers effective with the 2012-2013 grade nine class;

iii. At least 15 credits in science, including at least five credits in laboratory biology/life science or the content equivalent effective with the 2008-2009 grade nine class; one additional laboratory/inquiry-based science course, which shall include chemistry, environmental science, or physics effective with 2010-2011 grade nine class; and one additional laboratory/inquiry-based science course effective with 2012-2013 grade nine class;

iv. At least 15 credits in social studies, including satisfaction of N.J.S.A. 18A:35-1 and 2; five credits in world history; and the integration of civics, economics, geography and global content in all course offerings;

v. At least 2.5 credits in financial, economic, business, and entrepreneurial literacy, effective with 2010-2011 grade nine class;

vi At least 3 3/4 credits in health, safety, and physical education during each year of enrollment, distributed as 150 minutes per week, as required by N.J.S.A. 18A:35-5, 7 and 8;

vii. At least five credits in visual and performing arts;

viii. At least five credits in world languages or student demonstration of proficiency as set forth in (a)2ii(2) below;

ix. Technological literacy, consistent with the NJSLS, integrated throughout the curriculum; and

x. At least five credits in 21st century life and careers, or career-technical education;

2. The 120-credit requirement set forth in (a)1 above may be met in whole or in part through program completion of a range of experiences that enable students to pursue a variety of individualized learning opportunities, as follows:

i. District boards of education shall establish a process to approve individualized student learning opportunities that meet or exceed the NJSLS.

(1) Individualized student learning opportunities in all NJSLS areas include, but are not limited to, the following:

(A) Independent study;

(B) Online learning;

(C) Study abroad programs;

(D) Student exchange programs; and

(E) Structured learning experiences, including, but not limited to, work-based programs, internships, apprenticeships, and service learning experiences.

(2) Individualized student learning opportunities based upon specific instructional objectives aimed at meeting or exceeding the NJSLS shall:

(A) Be based on student interest and career goals as reflected in the Personalized Student Learning Plans;

(B) Include demonstration of student competency;

(C) Be certified for completion based on the district process adopted according to (a)2ii below; and

(D) Be on file in the school district and subject to review by the Commissioner or his or her designee.

(3) Group programs based upon specific instructional objectives aimed at meeting or exceeding the NJSLS shall be permitted under this section and shall be approved in the same manner as other approved courses.

ii. District boards of education shall establish a process for granting of credits through successful completion of assessments that verify student achievement in meeting or exceeding the NJSLS at the high school level, including standards achieved by means of the individualized student learning opportunities enumerated at (a)2 above. Such programs or assessments may occur all or in part prior to a student's high school enrollment; no such locally administered assessments shall preclude or exempt student participation in applicable Statewide assessments at grades three through 12.

(1) District boards of education shall choose assessments that are aligned with or exceed the NJSLS and may include locally designed assessments.

(2) District boards of education shall choose from among the following assessment options to determine if students have achieved the level of language proficiency designated as Novice-High as defined by the ACTFL and recognized as fulfilling the world languages requirement of the NJSLS:

(A) The STAMP online assessment;

(B) The OPI or MOPI; or

(C) Department-approved locally designed competency-based assessments;

iii. District boards of education shall establish a process to approve post-secondary learning opportunities that may consist of Advanced Placement (AP) courses, CLEP, or concurrent/dual enrollment at accredited higher education institutions.

(1) District boards of education shall award credit for successful completion of an approved, accredited college course that assures achievement of knowledge and skills that meets or exceeds the NJSLS.

3. Local student attendance requirements;

4. Any other requirements established by the district board of education;

5. Any statutorily mandated requirements for earning a high school diploma;

6. The requirement that all students demonstrate proficiency in the high school end-of-course PARCC assessments in ELA 10 and Algebra I, or through the alternative means set forth at (f) through (i) below;

7. Students graduating from an adult high school shall demonstrate proficiency in the high school end-of-course PARCC assessments in ELA 10 and Algebra I, or through the alternative means set forth at (f) through (i) below.

(b) In the development of Personalized Student Learning Plans according to N.J.A.C. 6A:8-3.2(a), district boards of education shall actively encourage all students who have otherwise met the requirements for high school graduation according to (a)1 through 3 above, to include in their programs of study the following additional credits:

1. Five credits in mathematics during each year of enrollment, aimed at preparation for entrance into post-secondary programs or 21st century careers;

2. Five credits in a laboratory science during each year of enrollment, aimed at preparation for entrance into post-secondary programs or 21st century careers;

3. Five credits in social studies during each year of enrollment, aimed at preparation for entrance into post-secondary programs or 21st century careers; and

4. Five credits in world languages during each year of enrollment, aimed at preparation for entrance into post-secondary programs or 21st century careers.

(c) Through the IEP process and pursuant to N.J.A.C. 6A:14-4.11, district boards of education may specify alternate requirements for a State-endorsed diploma for individual students with disabilities as defined in N.J.A.C. 6A:14-1.3.

1. District boards of education shall specifically address any alternate requirements for graduation in a student's IEP, in accordance with N.J.A.C. 6A:14-4.11.

2. District boards of education shall develop and implement procedures for assessing whether a student has met the specified alternate requirements for graduation individually determined in an IEP.

(d) District boards of education shall provide to the executive county superintendent their graduation requirements each year they are evaluated through QSAC and update the filed copy each time their graduation policies are revised.

(e) District boards of education shall provide each student entering high school and his or her parents or legal guardians with a copy of the district board of education's requirements for a State-endorsed diploma and the programs available to assist students in attaining a State-endorsed diploma, in accordance with N.J.S.A. 18A:7C-5.

(f) To ensure adequate transition to the new Statewide assessment system, district boards of education shall provide students who have not demonstrated proficiency on the high school end-of-course PARCC

assessments in ELA 10 and Algebra I with the opportunity to demonstrate such competence through one of the alternative means set forth below:

1. For the graduating classes of 2016, 2017, 2018, and 2019, students who did not take both the ELA 10 and the Algebra I end-of-course PARCC assessment or who take, but do not achieve a passing score on both assessments, as required by (a)6 above, may satisfy the State requirement to demonstrate proficiency in English language arts and mathematics in one of the following ways:

i. Achieve a passing score, as determined by the Commissioner, on a corresponding substitute competency test in English language arts and/or mathematics, as applicable, or substitute a passing score on another end-of-course PARCC assessment, including ELA 9, ELA 11, Geometry, or Algebra II; or

ii. Meet the criteria of the portfolio appeals process; and

2. For the graduating class of 2020, students who take all applicable high school end-of-course PARCC assessments for all courses in which they are enrolled, including those students who received a waiver for ELA 11 pursuant to N.J.A.C. 6A:8-4.1(c)3i, as of September 6, 2016, and thereafter, but do not achieve a passing score on both the ELA 10 and Algebra I end-of-course PARCC assessments pursuant to (a)6 above, may satisfy the State requirement to demonstrate proficiency in English language arts and mathematics in one of the following ways:

i. Achieve a passing score, as determined by the Commissioner, on a corresponding substitute competency test in English language arts and/or mathematics, as applicable, or substitute a passing score on another end-of-course PARCC assessment, including ELA 9, ELA 11, Geometry, or Algebra II; or

ii. Meet the criteria of the portfolio appeals process.

(g) Beginning with the graduating class of 2021, students who take all applicable high school end-of-course PARCC assessments for all courses in which they are enrolled, including those students who received a waiver for ELA 11 pursuant to N.J.A.C. 6A:8-4.1(c)3i, as of September 6, 2016, and thereafter, but do not achieve a passing score on both the ELA 10

> and Algebra I end-of-course PARCC assessments pursuant to (a)6 above, by the conclusion of their senior year and after multiple opportunities to take the assessments, may satisfy the State requirement to demonstrate proficiency in English language arts and mathematics by meeting the criteria of the portfolio appeals process.
>
> (h) All ELLs shall satisfy the requirements for high school graduation, except ELLs may demonstrate they have attained State minimum levels of proficiency through passage of the portfolio appeals process in their native language, when available, and passage of a Department-approved English fluency assessment.
>
> (i) Students with disabilities as defined in N.J.A.C. 6A:14-1.3 or eligible under Section 504 of the Rehabilitation Act who participate in the alternative assessment for students with disabilities are not required to participate in repeated administrations of high school end-of-course PARCC assessments.

In this case, after hearing the arguments of petitioner and respondent and considering the documentation submitted, I **CONCLUDE** that petitioner is not entitled to emergent relief because the proofs submitted have failed to establish the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b).

The District did not violate N.J.A.C. 6A:-8-5.1 in this matter. N.J.A.C. 6A:8-5.1 addresses graduation requirements for high school students, not elementary or middle school students. Throughout the regulation there are references to ninth grade class, grade nine to twelve standards, NJSLS high school level, requirements for high school graduation, and high school end of course PARCC. This regulation does not apply to elementary or middle schools. Petitioner has not shown the legal right underlying the petitioner's claim is settled. Petitioner has not shown that there is a legal right underlying her claim. Petitioner has not shown that she has a likelihood of success on the merits. The regulation that she sites does not apply to students in elementary or middle school.

Petitioner has not shown that M.E.K. will suffer irreparable harm if he is not allowed to take the math class over the summer, since the district has that class and M.E.K. would not be taking the course for the purpose of credit recovery. He completed the requirements for the seventh grade.

I note that the requirements are stated in the conjunctive and, consequently, the moving party must meet all four requirements in order to prevail. Failure to sustain even one of the requirements defeats the application.

After hearing arguments of petitioner and respondent, and considering all the affidavits, certifications and documents submitted, it is **ORDERED** that Petitioner's motion for emergent relief is therefore **DENIED**.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

June 28, 2017

DATE

KIMBERLY A. MOSS, ALJ

Date Mailed to Parties:

ljb

199-17

OAL DKT. NO. EDU 0811-17
AGENCY DKT. NO. 300-11/16

JUSTIN BOZINTA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Under the terms of the Agreement, petitioner was to be paid a certain sum of money within thirty days following the Board's receipt of a fully executed Agreement. The Agreement was signed by petitioner on May 15, 2017, which date has preceded the consideration of the Agreement by the Commissioner of Education.[1] The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

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

IT IS SO ORDERED.

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 7/18/17
Date of Mailing: 7/19/17

[1] Petitioner has also executed a Stipulation of Dismissal with Prejudice – referred to as Exhibit A in the Agreement – which was submitted separately from the Agreement, on July 11, 2017.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 0811-17
AGENCY DKT. NO. 300-11/16

JUSTIN BOZINTA
Petitioner,
v.
CITY OF EAST ORANGE BOARD OF EDUCATION,
ESSEX COUNTY,
Respondent.

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

Avis Bishop-Thompson, Esq. for respondent (DeCotiis, FitzPatrick, Cole, & Giblin, attorneys)

Record Closed: June 12, 2017 Decided: June 12, 2017

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 18, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

June 12, 2017
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: June 13, 2017

Mailed to Parties: JUN 19 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

LAW OFFICES
DECOTIIS
DeCotiis, FitzPatrick, Cole & Giblin, LLP

NEW YORK
NEW JERSEY

GLENPOINTE CENTRE WEST
500 FRANK W. BURR BOULEVARD, SUITE
TEANECK, NEW JERSEY 07666

TELEPHONE: (201) 928-1100
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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

DIRECT
AVIS BISHOP-THOMPSON, ESQ.
ATHOMPSON@DECOTIISLAW.COM
201.907.5290

June 8, 2017

Via Lawyer's Service
Hon. Danielle Pasquale, ALJ
Office of Administrative Law
33 Washington St.
Newark, NJ 07102

Re: Justin Bozinta v. East Orange Board of Education
OAL Dkt No.: EDU 00811-2017N
Our File No.: 14-082.1.32

Dear Judge Pasquale:

Enclosed please find an original copy of the resolution approving the settlement of the above-referenced matter and the executed settlement agreement.

Thank you for your continued courtesy and cooperation.

Respectfully submitted,

DeCotiis, Fitzpatrick, Cole & Giblin, LLP

By: _____
Avis Bishop-Thompson

c: Nicholas Poberezhsky, Esq. (via e-mail & regular mail w/ encl.)
Dr. Kevin R. West (w/ encl.)
Marissa McKenzie (w/encl.)

EXTRACT FROM THE MINUTES OF A MEETING
OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the City of East Orange in the County of Essex, New Jersey convened a Special Meeting on Thursday, February 23, 2017 at 6:05 p.m.

The following members of the Board were present:

Mr. Cameron B. Jones, Sr.; Ms. Marjorie Perry; Ms. Terry S. Tucker; and Mr. Bergson Leneus

The following resolution was offered by Ms. Marjorie Perry, duly seconded by Mr. Cameron B. Jones, Sr. and adopted by the Board of Education

Approving Settlement of Litigation - Docket #EDU 00811-2017N

WHEREAS, the Board is Defendant in a matter in the Office of Administrative Law, bearing Docket Number EDU 00811-2017N, Agency Ref. No.: 300-11/16; and

WHEREAS, the Board Attorney and the Superintendent have recommended resolution of this matter in an amount not to exceed $53,134; and

WHEREAS, the Settlement does call for the expenditure of Board funds;

NOW, THEREFORE, BE IT RESOLVED by the East Orange Board of Education that it hereby authorizes the Board attorney to enter into settlement negotiations in this matter.

ROLL CALL: AYES: 4
ABSENT: 3

STATE OF NEW JERSEY}
} ss
COUNTY OF ESSEX}

I, Victor R. Demming, Secretary of the Board of Education, of the East Orange Board of Education, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of said district, fully called and held on Thursday, February 23, 2017 has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Orange Board of Education, original minutes so far as the same related to the subject matter referred to in said extract, in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 16th day of May 2017.

Victor R. Demming

Victor R. Demming, Board Secretary

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (the "Agreement") is entered into this 15th day of May, 2017, by and between Justin Bozinta, ("Petitioner") and the City of East Orange Board of Education ("Board") and jointly as the "Parties". For purposes of this Agreement, the term the "Board" shall mean and include the East Orange Board of Education, its agencies, authorities, its current and former appointed officials, officers, directors, agents, administrators, employees, representatives, counsel, designees, insurers, independent contractors and all of their predecessors and successors. The term "Petitioner" shall mean and include Justin Bozinta and any and all of his executors, heirs, administrators, successors, assigns, agents and representatives. This Agreement constitutes the complete and final settlement of any and all claims Petitioner has or may have against the Board relating to or arising from Petitioner's employment by the Board, the separation from employment, and any claims or actions he has brought or could have brought against the Respondent.

WITNESSETH:

WHEREAS, Petitioner filed an administrative action against the Board in the Department of Education, entitled Justin Bozinta v. City of East Orange Board of Education, Union County, Agency Reference No.: 300-11/16 which was transmitted to the Office of Administrative Law, Docket No. EDU 00811-2017N (the "Administrative Action"); and

WHEREAS, on February 13, 2015, Petitioner was arrested at his home and charged with numerous criminal offenses; and

WHEREAS, the alleged facts set forth by Petitioner in the Administration Action purportedly give rise to the following causes of action: (1) reinstatement to the payroll and benefit plan of the East Orange School District, and (2) reimbursement of salary for the 2016-2017 school year. Petitioner seeks back and future salary, attorneys' fees and costs.

WHEREAS, the on January 31, 2017, the grand jury issued a true bill against Petitioner on the following counts: (1) maintaining or operating a controlled dangerous sub stance production facility – first degree; (2) possession with intent to distribute a controlled dangerous substance – second degree; (3) possession with intent to distribute a controlled dangerous substance within 500 feet of certain public property – second degree; (4) possession of a controlled dangerous substance – fourth degree; and (5) endangering the welfare of a child (possession of child pornography) – third degree; and

WHEREAS, the Parties desire to enter into this Agreement to fully and finally settle and resolve and dismiss with prejudice any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which Petitioner may have against the Respondent; and

WHEREAS, Petitioner acknowledges and agrees that the payment provided for herein is provided as consideration for this Agreement to voluntarily dismiss, waive and withdraw all claims, complaints, charges, administrative actions and civil actions of any kind against the Respondent;

NOW THEREFORE, the Petitioner and Respondent, for the consideration herein specified, agree as follows:

1. **COMPENSATION.** In consideration for Petitioner's and the law firm of Caruso Smith Picini's execution of this Agreement and the promises and covenants contained herein, the Respondent commits that it shall issue and remit the full payment of settlement funds as follows:

a. Petitioner agrees to dismiss with prejudice the Administrative Action entitled Justin Bozinta v. City of East Orange Board of Education, Union County, Agency Reference No.: 300-11/16, OAL, Dkt. No. EDU 00811-2017N. In that regard, Petitioner's Counsel, in accordance with the New Jersey Rules of Administrative Practice, shall, simultaneous with the execution of this Agreement, execute the Stipulation and Order of Dismissal with Prejudice attached to this Agreement as Exhibit A, dismissing the case with prejudice for the reason of the settlement reached by the Parties. It is acknowledged and understood by Petitioner that any and all rights and obligations set forth in this Agreement are conditioned completely and entirely upon the Court's dismissal of the Administrative Action with prejudice.

b. Within thirty (30) days following the Board's receipt of Petitioner's executed copy of this Agreement and signed Stipulation of Dismissal with Prejudice in the form attached hereto as Exhibit A, Respondent Board shall provide Petitioner with payment of Fifty-three Thousand One Hundred Thirty-four Dollars, $53,134.00 which represents Petitioner's salary, subject to such payroll and withholding deductions as may be required by law, for the period from September 1, 2016 to January 31, 2017 (referred to herein as the "Settlement Sum"). The Settlement Sum shall be made payable to "Justine Bozinta and the Trust Account of Caruso Smith and Picini, PC" and shall be delivered to:

Nicholas Poberezhsky, Esq.
Caruso Smith Picini, PC
60 Route 46 East
Fairfield, NJ 07004

c. Respondent will report this payment to the state and federal taxing authorities via an IRS Form 1099. Caruso Smith Picini, PC will immediately provide the Respondent with its taxpayer identification number. Petitioner bears sole responsibility for attorneys' fees and costs. Petitioner's counsel bears sole responsibility for the distribution of the settlement sum to the Petitioner.

d. Petitioner hereby certifies that if any liens exist against the Settlement Sum, they will be paid in full, compromised or satisfied and released by him. If a lien exists

which is not satisfied as required by this Agreement, and a claim is made by anyone to enforce that lien, Petitioner agrees that he will pay that lien in full. This representation is intended to include all liens, including, but not limited to, attorneys' liens, medical provider liens, Medicare and Medicaid liens, workers' compensation liens, all statutory or common law liens, and judgment liens. Petitioner agrees to indemnify and hold the Board harmless in connection with any claim made by reason of liens against or tax obligations associated with payment of the Settlement Sum. If a claim is hereafter made against the Board by anyone seeking payment of the liens, Petitioner will indemnify and hold the Board harmless for any such liens and/or defending against such a claim, including, but not limited to, attorneys' fees, costs of suit, and interest.

2. **INCOME TAXATION**. In the event that it is subsequently determined that Petitioner's owe any taxes with respect to any of the payments described in paragraphs 1, Petitioner expressly acknowledge and agree that Petitioner or his heirs, executors, administrators, successors and assigns, and not the Board, will be responsible for any such taxes, liabilities, payments or costs, interest and penalties. Petitioner agrees to indemnify and hold harmless the Board to the full extent of any such taxes, liabilities, payments, costs, interest or penalties which may be assessed against the Board in connection with any payment made to or on behalf of Petitioner hereunder.

3. **PENSION AND/OR RETIREMENT BENEFITS.** Other than the consideration provided for herein, and any pension and/or retirement benefits to which Petitioner is otherwise entitled under the Board's existing benefit plans and governing plan documents, Petitioner will not receive any compensation or benefits from the Board (including without limitation any compensation, payments or benefits to which Petitioner is entitled under Income and Benefits Policy set forth in the Board's Employee Handbook) for the period of September 1, 2016 through January 31, 2017 until such time as the pending criminal matter has been resolved.

4. **RELEASES**. Petitioner, for the consideration given by the Respondent, as set forth above, which he acknowledges is adequate and satisfactory to her, hereby commits as follows:

a. Petitioner knowingly, voluntarily, irrevocably and unconditionally remises, releases, waives and forever discharges the Board, its present and former agents, directors, present and former officers, present and former representatives, and its and their respective predecessors, successors, heirs, executors, administrators and assigns (hereinafter individually and collectively referred to as the "Releasees," from any and all manner of liabilities, actions, causes of action, contracts, agreements, promises, claims, suits and demands that arise from the subject matter of the instant Administrative action.

b. Petitioner acknowledges and agrees that other than the consideration provided for herein, he is not entitled to and will not receive any additional compensation or benefits of any kind from the Board for the period of September 1, 2016 through January 31, 2017 and that no representations have been made to him regarding any such additional compensation or benefits. Nothing in this Agreement is intended to or should be construed to affect his receipt of benefits in which he is vested or to which he is entitled.

5. **RETURN OF BOARD PROPERTY**. Petitioner agrees to return to the Board by March 5, 2017 any and all property of the Board in his possession or control including, but not limited to, computers, keys, identification cards, reports, documents, correspondence, manuals, ledgers, equipment, software, diskettes, CDs, computer files, customer lists, business cards and other tangible embodiments of the Board's Confidential Information (regardless of the media in which such Confidential Information is stored), including copies thereof, then in Petitioners possession, whether prepared by him or by others.

6. **DISPARAGING COMMUNICATION**. The parties agree that they shall not issue any communication, written, verbal or otherwise, that disparages, criticizes or otherwise reflects adversely upon either party or which encourages any adverse action against the parties, provided that the parties are permitted to testify truthfully under oath pursuant to subpoena.

Additionally, the parties agree not to disparage or make or solicit any comments, statements, or the like to the media, future/prospective employers or to others that may be considered to be derogatory or detrimental to the good name or business reputation of each other. The Board, administration and its agents agree that they will not do anything to impede or hinder any of Petitioner's future job prospects. Nothing contained herein shall be interpreted to prevent the Board and its agents from giving lawful testimony or other information to government agencies and relevant insurance carriers.

7. **PROHIBITION ON DISCLOSURE OR USE OF CONFIDENTIAL INFORMATION**. Unless Petitioner first secures the Board's written consent, he agrees not to directly or indirectly publish, disclose, market, use or authorize, advise, hire, counsel or otherwise procure any other person or entity, directly or indirectly, to publish, disclose, market or use, any secret, confidential, proprietary or trade secret information of the Board of which Petitioner became aware or informed during his employment with the Board, including but not limited to, information concerning the Board's business.

8. **CONFIDENTIALITY**. The parties hereby expressly agree to disclose the terms of this Agreement only to the extent required by law or as may be necessary for tax, unemployment, or other related purposes. Nothing in this Paragraph is intended to apply to information which is already public, nor to information which the public is entitled to procure under any law including, but not limited to, the Open Public Records Act, N.J.S.A. 47:1A-1 et. seq.

9. **NO ADMISSION OF WRONGDOING.** Nothing contained in this agreement shall be construed to constitute an admission of wrongdoing or liability by the Respondent Board.

10. **PROSPECTIVE INQUIRIES.** Responses to any employment or media inquiries that may be directed to the Board concerning Petitioner shall be factual in nature and shall provide directory type information such as length of service, salary, title and basis for separation.

11. **AGREEMENT APPROVAL.** The Board will vote on this Agreement at a duly convened public meeting. The Board President may execute this Agreement on behalf of the Board. If the Board does not approve this Agreement, this Agreement shall become null and void.

12. **ASSENT TO TERMS**. Petitioner hereby represents that he enters into this Agreement without duress and of his own free will and volition, having had the opportunity to consult with counsel of his choosing. Petitioner acknowledges that he was given the opportunity to fully consider this Agreement. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Petitioner will not be entitled to the consideration described herein.

13. **ENTIRE AGREEMENT.** This Agreement represents the entire understanding among the parties and may be modified only in a subsequent written instrument, duly dated and executed by all of the parties. No other promises or representations of any kind have been made by any party hereto and no other promises or representations shall be binding upon the parties.

14. **SEVERABILITY.** In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of the Agreement shall remain in full force and effect.

15. **ADVICE OF COUNSEL.** The parties hereto acknowledge that they have been informed of their right to seek independent legal counsel before signing this Agreement, that they understand the contents of this Settlement Agreement, and that this Agreement is entered into voluntarily. Therefore, no term or condition contained herein shall be construed against any party on the grounds that the party or its/his attorney, proposed or drafted that term or condition. This Agreement and Release constitutes the entire agreement between the parties and constitutes full and final settlement of all issues to date.

16. **GOVERNING LAW, VENUE AND EXCLUSIVE REMEDY.** This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey and claims concerning or relating to this Agreement, the breach hereof or for specific performance shall be solely and exclusively with the jurisdiction of and venued in the New Jersey Superior Court, Law Division, in the Vicinage of Essex County.

17. **EXECUTION IN COUNTERPARTS AND FACSIMILE SIGNATURES.** The Agreement may be executed in two (or more) counterparts, each of which counterparts, when executed and delivered, shall be deemed to be an original, and all of which counterparts, taken together, shall constitute but one and the same agreement. An original signature transmitted by facsimile shall be deemed to be an original for purposes of this Agreement.

IN WITNESS WHEREOF, the duly authorized representatives of the parties have set forth their respective hands and seals on the dates indicated below:

AGREED AND ACCEPTED:

Justin Bozinta

Subscribed and sworn to before me
this 15 day of May 2017

Notary Public
CLARE T. PELLEGRINI
A Notary Public of New Jersey
My Commission Expires November 10, 2020

CARUSO SMITH PICINI, PC

Nicholas Poberezhsky, Esq.

Date: MAY 15, 2017

EAST ORANGE BOARD OF EDUCATION

Bergson Leneus, President

Dr. Kevin R. West, Superintendent

Victor Demming
Business Administrator/Board Secretary

100-17

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges

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

Petitioner,

-and-

URSULA WHITEHURST,

Respondent.

AGENCY DOCKET
NO.: 263-9/16

OPINION AND AWARD

BEFORE: RUTH MOSCOVITCH, Arbitrator

Appearances:

For the Petitioner:

Christina Michelson Abreu
Scarinci Hollenbeck
1100 Valley Brook Ave.
PO Box 790
Lyndhurst, NJ 07071

For the Respondent:

Jason Sokolowski
Zazzali Fagella Nowak Kleinbaum & Friedman
150 West State Street, 3rd Floor
Trenton, NJ 08608

This matter comes before me on tenure charges brought under N.J.S.A. 18A:6-10, 6-11, 6-16, 6-17.1, 6-17.2 AND N.J.A.C. 6A:3-5.1 by Petitioner State-Operated School District of the City of Newark (the "District) against Respondent Ursula Whitehurst. The tenure charges at issue here were filed with the Bureau of Controversies and Disputes on September 29, 2016. I was appointed the arbitrator to adjudicate this matter on October 27, 2016.

In this proceeding, I heard testimony from 9 witnesses over 8 days. The District presented the testimony of Principal John Weinstein, VPs Lori Ween and

Curtis Adair from Bard Early College High School (Bard), and Principal Larry Ramkissoon, VP Henry Ogele, and Edith Battle, a veteran teacher and "Academic Interventionist," all from Westside High School (Westside), and Brad Haggerty, the District's Chief Academic Officer, and Homere Breton from the office of the District's General Counsel as well as two large binders containing a total of 66 exhibits. The Respondent testified in her own behalf and placed in evidence a single large binder with 64 exhibits. All witnesses were sworn and their testimony was recorded by a court reporter. The parties submitted post-hearing briefs on Monday, March 20, 2017, and the District requested and was granted leave to file a responsive brief by Thursday, March 13, 2017. No objection has been made to the fairness of this proceeding.

TENURE CHARGES

CHARGE ONE: INEFFICIENCY

During the period from September 2013 to the present, Respondent has demonstrated an inability to completely and responsibly execute her duties as a teacher in the following manner:

a. The Respondent has failed to implement curricular goals and objective(s).
b. The Respondent has failed to design coherent instruction.
c. The Respondent has failed to assess student learning.
d. The Respondent has failed to create an environment of respect and rapport.
e. The Respondent has failed to manage student behavior.
f. The Respondent has failed to manage classroom procedures.
g. The Respondent has failed to establish a culture of learning.
h. The Respondent has failed to communicate clearly and accurately.
i. The Respondent has failed to use questioning and discussion techniques with flexibility and responsiveness.
j. The Respondent has failed to engage students in learning.
k. The Respondent has failed to provide feedback to students.
l. The Respondent has failed to attain student achievement that meets or exceeds performance benchmarks.
m. The Respondent has failed to reflect on teaching.
n. The Respondent has failed to contribute to the School and District

o. The Respondent has failed to grow and develop professionally
p. The Respondent has failed to demonstrate promptness and attendance.
q. The Respondent has received a Partially Effective Rating for the 2013-2014 School Year in an Annual Summative Evaluation.
r. The Respondent has received a Partially Effective Rating for the 2014-2015 School Year in an Annual Summative Evaluation.
s. The Respondent has received a Partially Effective Rating for the 2015-2016School Year in an Annual Summative Evaluation.

CHARGE TWO: AND OTHER JUST CAUSE

1. The District restates the allegations contained in Charge One and re-alleges and incorporates them by reference as if fully set forth at length herein.
2. The Respondent has failed to properly adhere to the District's protocol for overseeing students and improving her teaching skills.
3. The Respondent has consistently failed to follow instructions and violated the District's policies and procedures.
4. The cumulative effect of Respondent's misconduct and inefficiency as set forth above constitutes other sufficient cause sufficient to warrant dismissal.

WHEREFORE, Respondent has shown that she is unfit to discharge the duties and functions of the position in which she holds tenure in the School District, and she should be dismissed.

FACTUAL BACKGROUND

Respondent is a tenured teacher of mathematics. She has been employed in that capacity in the District since September 1990. She holds certificates in elementary education and secondary mathematics. During her teaching years, she taught middle school math to 8th graders at Lewis Munoz Marin for 6 years; and high school mathematics at University High School for 4 years, Barringer High School for 10 years and Malcolm X/Shabazz for 2-3 years. She was released from Shabazz High School, because the school was eliminating staff positions. Starting the next year, 2011-2012, Respondent became EWPS (educator without placement site). For the 2012-13 she was placed at Westside High School. For the 2013-14 school year, Respondent remained EWPS and was assigned to Bard

Early College High School (Bard). At the end of that year, she was served with tenure charges for the preceding two years and temporarily suspended from teaching. Those charges were dismissed, and in the middle of the 2014-2015 school year she was returned to Bard, again as EWPS.[1] For the 2014-2015 school year, Respondent was assigned to a position teaching mathematics at Westside High School (Westside). The present tenure charges were served upon Respondent after the end of the 2015-2016 school year.

The District has adopted guidelines for teachers and administrators to be followed in evaluating teachers and improving instruction for Newark's students in compliance with the mandates of New Jersey education law, TEACH NJ. The guidelines for the years at issue are embodied in the Framework for Effective Teaching ("Framework"). (D. 50, 51, 53) This document is regularly updated and administrators receive training on it each August and throughout the school year. (See, e.g., Tr. 29-30) Administrators are required to review expectations with faculty as well. (Tr. 30) The document identifies four teaching "competencies" and multiple indicators within each competency. The competencies are: (1) Lesson sequence; (2) Rigor and inclusiveness; (3) Culture of achievement; and (4) Demonstration of Learning. A fifth competency, "Commitment to Personal and Collective Excellence" gets reviewed in the mid-year and year-end summary evaluations. Under the Framework, administrators must observe teachers at least three times each year, and at least four times for teachers who are under a Corrective Action Plan (CAP). The Framework specifies not only the number of

[1] The District refiled its tenure charges for the 2012-13 and 2013-14 school years under Section 8; those charges are stayed pending the outcome of an appeal in the Appellate Division about the reassignment of the charges to the same Arbitrator who heard the original case.

such observations, but the length of the observations, and that they should be a mix of long, short, announced and unannounced. The current set of charges are based upon administration's conclusion at the end of the 2015-2016 school year that Respondent had been repeatedly evaluated as only "partially effective and "failed to demonstrate adequate growth" within the Framework, even after receiving assistance through one-on-one coaching and participation in: Professional Learning Communities (PLC), school-wide professional development, and the school's improvement panel (SIP). (D. 1)

Specifically, the present tenure charges (Charge I) are based upon Respondent's teaching performance during three academic years, when she was assigned to two schools: Bard for the 2013-2014 and 2014-2015 years and Westside for the 2015-2016 year. The remaining tenure charges (Charge II) are based on "other" conduct during the same years.

2013-2014. Bard High School Early College. Respondent was notified on August 26, 2013 that she was assigned to Bard, effective September 3, 2013 as an "additional support staff member for the 2013-2014 school year." She arrived on the first day of school in time to attend the school's beginning-of-the-year faculty meetings. (Tr. 1088) While at Bard, Respondent remained in EWPS status. (R. 58) For the fall semester of that year, Respondent did not have an assignment for the first approximately two weeks. (Tr. 1093-4) She was then assigned, not to be the teacher of record for any class, but to assist and support two teachers: Ms. Nagarsheth, who taught two 10th grade algebra and geometry classes, and Dr. Schnidman, who taught one physics class. Principal Weinstein (Tr. 607-8) and VP Ween (Tr. 690, 724-5) described the assignment with Ms.

Nagarsheth as "co-teaching." However, VP Ween was not sure that anyone at the school formally advised Respondent that she was team-teaching that fall. (Tr. 736) Respondent was not the teacher of record in PowerSchool, the District's computer database, and she had no access to PowerSchool; she had no student roster; she provided no lesson plans or assessment tests; and she administered no grades. (Tr. 1105) When either teacher was absent, she did not substitute-teach the class; rather a sub was brought in. (Tr. 1101-2)

Respondent testified that her duties, as described by Principal Weinstein, consisted of supporting both teachers in the classroom and working with students. (Tr. 1095) Each of the teachers "would tell me to help certain students when they were in groups or they had independent work, then I would circulate around the class giving students some support, students that needed some reassurance on what they were doing." (Tr. 1102) Respondent also sat in the library and tutored students, some of whom were in the classes she supported, as well as others who simply signed up for assistance. (Tr. 1099-1100) Principal Weinstein was aware of her tutoring activities, because his office was also in the library, and he saw her working with students (Id.), as did VP Ween (Tr. 728).

In the spring semester, Respondent was again assigned to support Ms. Nagarsheth teaching 10th grade students in algebra and geometry and Dr. Schnidman teaching physics, and she began supporting Dr. Beridze, who taught college algebra. She also attended district-wide Math Olympics meetings. Tr. 1107-114. Both Dr. Weinstein and Dr. Ween testified that Respondent taught 4 college algebra students and was the teacher of record. (Tr. 609; Tr. 703, 731-2, 748) However, Respondent testified that in the spring, just as in the fall, she had

no roster of students, was not the teacher of record for anyone. (Tr. 114) Dr. Weinstein, in his letter recommending tenure charges, appears to agree with Respondent, because he describes her spring assignment as working with 6 students "within a larger class," only four of whom showed up. (D. 27, p. 416) One again, Respondent did not have access to PowerSchool to input grades. (Tr. 114) Dr. Ween testified that at some point Respondent did get access to PowerSchool, but could not say when that was. (Tr. 786-7) Dr. Beridze asked her to work particularly with four students, but for the most part she worked with them in Dr. Beridze's classroom. (Tr. 1112) In addition she worked with a particular student in Ms. Nagarsheth's class for one-on-one tutoring at least twice a week the whole semester. That student did pass the class. (Tr. 1109) As in the fall, Respondent did not substitute teach when the teachers she was supporting were absent. (Tr. 1117)

CAP. On October 15, 2013, Respondent met in the school library (Tr. 1121) with Dr. Dumaine Williams, one of the Vice Principals at Bard, and signed a Corrective Action Plan (CAP) (D. 31). The CAP contains no reference to any Student Growth Objectives (SGOs). Respondent testified:

- She did not prepare any part of the CAP (Tr. 1120, 1127);
- On its face, the CAP refers to a year-long "College Algebra" class (D. 31, p. 1), yet Respondent was never assigned to teach such a class; her only relationship to college algebra took place in the spring semester, when she supported Dr. Beridze, who assigned her to assist specific students. (Tr. 1163, 1112);

- The CAP was identical to the IPDPs that she worked on with other teachers in the math department (Tr. 1124, 1130);
- All of the text was drafted by the other two math teachers, based upon data provided from prior years (Tr. 1125, 1128-29);
- She never received coaching from any mentors or teachers, nor was she ever directed to observe a highly effective teacher (T. 1117-8).

Dr. Williams did not testify in this proceeding. Principal Weinstein testified:

- He does not know if Respondent wrote any part of her CAP (Tr. 835); some departments at BARD have written IPDPs and CAPs together – he does not know if that happened with the math department in 2013 (Tr. 835-7); he never met with Dr. Williams specifically about Respondent's CAP (Tr. 830); he believed that Respondent worked with Dr. Beridze on the CAP that year, even though she did not teach with Dr. Beridze until the spring (Tr. 812);
- He regarded a faculty meeting on September 20, 2013 that Respondent attended as her training on creating a CAP. (Tr. 611)
- The CAP, which was drawn up and signed in October 2013, refers only to College Algebra, but Respondent did not teach that subject until the spring; he reviewed the CAP before he performed an observation of Respondent on May 8, 2014 (Tr. 831);
- He believed that Dr. Williams had one coaching session with Respondent in the 2013-2014 school year (Tr. 821);

- He relied upon the goals contained in Respondent's CAP in his annual evaluation to rate her on Competency 4 (Student Growth) (Tr. 643); Respondent's submissions to him in terms of a portfolio of student material did not provide enough information to evaluate whether the students were achieving the goals he believed she had set (Tr. 644).

Observations and Evaluations. During the 2013-2014 school year, Respondent was observed 4 times; she received midyear and end of year evaluations.[2]

First, Long Observation by VP Lori Ween on a date in November 2013, shortly before Thanksgiving. (Tr. 689) No formal pre-observation meeting; Post-observation conference on December 23, 2013. (Tr. 757-8) Rating: Partially effective.

The lesson observed was a jeopardy-type math game. Dr. Ween approved the lesson in advance: since Respondent was not instructing students Dr. Ween told her, "Okay, I'll observe you doing that [the game] because I have to observe you" (Tr. 1149). Respondent planned the game with the two math teachers she supported. (Tr.1144) VP Ween was critical of: (a) how long it took to get the game started; (b) Respondent was late to class, and Ms. Nagarsheth had to start the class; (c) the game included both physics and math questions which confused the students; (d) Respondent did not know some of the answers and was unable to help the students recognize when the answers were correct; (e) instruction was not differentiated; and (f) not all students participated. (D. 32, Tr. 690-694) On

[2] In his recommendation for tenure charges, Dr. Weinstein states that Respondent was observed three times formally, and, in addition, was informally observed in a coaching session by the VP of Culture and Climate. (D. 27, p. 415) I cannot verify his statement.

the plus side, the students enjoyed and were engaged by the game. (D. 32, p.1589) Respondent filed a response to this observation, explaining that it was standard practice for Ms. Nagarsheth to open class by reviewing homework; and the game had been planned to use some math-related physics questions, both to challenge the students and fulfill the need for interdisciplinary teaching. (D. 32, p. 1594)

Mid-year Review by VP Ween, conference on February 14, 2014. Rating: partially effective. VP Ween testified that Respondent failed to submit a portfolio until after the deadline and it was incomplete, which affected Dr. Ween's ability to assess progress on CAP goals in the midyear review. (Tr. 697) VP Ween, quoting extensively from her long observation in the fall, was critical of Respondent's failures to show coherent planning or understanding growth of her students. Although Dr. Ween testified that she based the midyear on informal observations of Respondent in addition to the one formal observation of the Jeopardy lesson, she was unable to identify a single date or class that she had observed and she took no notes of any such informal observations. (Tr. 702-3, 53)

VP Ween also noted that Respondent's attendance and punctuality were a problem. (D. 32, p. 1575) Respondent testified that she was often tardy due to the special needs of a teenage child who lived with her. (Tr. 1157) Dr. Ween did not give a specific student growth objective score in her midyear examination of Respondent, testifying that it was not part of the review process. (Tr. 768)

Second, short observation, by VP Ween, signed on February 27, 2014. Unannounced. Rating: Effective.

VP Ween observed Respondent as she proctored an examination. She made no notations about evidence of strengths or growth. She does not remember how or why she chose to observe a proctoring session, although, as part of a teacher's duties, "it is up for evaluation." (Tr. 772) Respondent is the only teacher she has ever evaluated performing proctoring duties. Respondent testified that she was unaware she was being observed. VP Ween did not discuss the observation with her other than to inform her that it was rated "effective." (Tr. 1162-3)

Third, long Observation, by Principal Weinstein on May 8, 2014, signed May 23, 2014. (D. 39) Pre-observation conference May 7, 2014. (D. 39, p. 1519, Tr. 633-34) Rating: Partially effective.

This was an observation of Respondent teaching college algebra to the four students assigned to her for assistance. Principal Weinstein was critical of: (a) Respondent's unfamiliarity with some of her students' names; (b) the lesson could have been better connected to prior learning; (c) when students were confused, some of the adjustments she tried to make did not work; (d) not all of the students participated, indicating that some were not mastering the subject matter (Tr. 635-7); and she had the same lesson objective for three days in a row (D. 39, p. 1541).

Fourth, short observation, by VP Ween on May 12, 2014, unannounced, with the post-observation conference and signing on May 28, 2014. (D. 40) Rating: Partially effective.

VP Ween was critical of: (a) the pacing of the lesson; uneven participation by the students; not enough time for independent student work.

Annual Evaluation, by Principal Weinstein, conference with Respondent on May 14, 2014, signed May 23, 2014. Rating: Partially effective.

Principal Weinstein testified that he based the annual evaluation on "all of the observations that were done at that point." (Tr. 639)

Other issues. Bard's administration was concerned about aspects of Respondent's performance other than her teaching competence. Only two of those issues, however, resulted in any form of reprimand or memo to Respondent's file.

Attendance. In March, 2014, Respondent received a standard letter advising her that he had accumulated 5 absences. (D. 28) She received a second letter identified as a "Warning Letter" on June 3, 2014 advising her that she had by then accumulated 9 absences and that continued absenteeism could result in "further disciplinary action." (D. 41, p. 1494) The District took no further action. In his recommendation for tenure charges, Principal Weinstein mentioned Respondent's tardiness. (D. 27) However, there is no evidence that Respondent was warned or reprimanded during the year for tardiness.

Reprimands. VP Ween placed a letter in Respondent's file for improperly proctoring the ACT Explore exam on April 23, 2014 and speaking in a disrespectful way to her co-proctor. (D. 35) Dr. Weinstein placed another letter in her file for being AWOL on April 24, 2014 (D. 36, p 1557) , although Respondent in fact was attending a Math Olympics event on that day in the district. (Tr. 1166-7)

Tenure Charges. At the close of the 2013-2014 academic year, Bard notified District administration that Respondent had received a rating of partially

effective for the year and recommended the filing of Tenure Charges. (D. 27) Those charges were in fact brought in August 2014. (R. 59)

2014-2015. Bard High School Early College. Because of pending tenure charges, Respondent was put on leave before the fall semester of 2014-2015. After those charges were dismissed,[3] Respondent was informed of her return assignment to Bard via email dated January 13, 2015. (R. 3) The administration of Bard was not initially notified that she had been reassigned and was surprised when she arrived at school. (Tr. 1246) Respondent sat in the library or in Dr. Morris' tenth grade geometry class until the start of the second semester (Tr. 1247), at which time she was assigned her own tenth grade geometry class. She was also assigned to assist Mr. Bonnett with his Algebra II class and she subbed for Dr. Silverman, a chemistry teacher. (Tr. 1249, 1253) That semester her supervisor was Dr. Adair, a new Vice Principal at Bard in charge of the math department. (Tr. 1255)

CAP. Bard administrators advised Respondent that she had to have a CAP for the 2014-2015 school year. On March 27, 2015, the day before spring break, VP Adair met with Respondent and presented her with a copy of a draft CAP that he had prepared. (D. 42, Tr. 1258, Tr. 1509) He prepared the draft because he had made more than one request of Respondent to draft the document, but "I was not getting the draft or getting the response" and "I wanted to make certain that I did not interfere with the process." (Tr. 1510) VP Adair

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[3] The charges covering the 2013-14 school year that were brought in 2014 are the subject of an appeal that is pending in the Appellate Court. (R. 60) In the meantime, those proceedings are stayed. (R. 62)

believed "I was helping her in a process that was already uncomfortable for her." (Id.)

At the meeting, VP Adair asked her to review and modify the document. (Tr. 1261, TR. 1511) Respondent characterized the conversation as brief, perhaps five minutes long; there was no collaboration between them. (Tr. 1263-4) Respondent did write in one portion of the CAP after she returned from spring break (Tr. 1261), namely, the students' starting point that she obtained from their teacher in the fall semester. (D. 42, p. 1490, Tr. 1262) On May 5, 2015 Respondent met with VP Adair again. At that time he presented her with a version of the CAP that he subsequently claimed they had "drafted together;" he also claimed she had refused to sign the CAP. (R. 8) Respondent rejected that characterization of how the document had been developed, but said in an email that she was "open to a discussion resolving this matter." (Id., Tr. 1278) Respondent also discussed the matter of a CAP with Principal Weinstein in a meeting with her union representative that took place later in May. (Tr. 1271)

Sometime in April or early May Respondent sought guidance from the state Department of Education as to whether she was supposed to be on a CAP; she felt that since the previous charges against her had been dismissed, she was starting over and therefore should just have an IPDP (Individual Professional Development Plan). A Ms. Wright at the state department and her union both told her that she should not have a CAP. (Tr. 1273-1275) She conveyed that information to Principal Weinstein (Tr. 1276), but the guidance he got from the District was that she did have to have a CAP. (Tr. 939-47) The matter was not resolved, and Respondent never signed that or any other version of a CAP for the

2014-2015 academic year, although she testified that she would have signed the proposed CAP at the May meeting with Dr. Weinstein if she had been given an opportunity to do so. (Tr. 1280) Her annual evaluation took place three weeks after her meeting with Dr. Weinstein regarding the CAP. (Tr. 1280)

Observations and Evaluations. In the spring semester of 2015, the only semester that Respondent taught at Bard during that school year, she was observed three times, two short and one long observations, by two administrators and a fourth time by a peer evaluator. She received mid-year and end of year evaluations.

First, short observation, March 25, 2015 by Principal Weinstein, announced, with pre-observation conference also on March 25, 2015 and post-observation conference on April 14, 2015. Rating: Partially effective. (D. 43, R. 31) This was a 30 minute observation of her 10th grade math class. Principal Weinstein was critical of Respondent's difficulty using the SmartBoard, some unnecessary delays, tailoring instruction to meet some student needs, and joking about a student who spoke slowly. (Tr. 655-6) He referred to the CAP, although it was not completed at the time. (Tr. 658) Respondent filed a written response, objecting to comments about a CAP that had not yet been agreed upon, the short notice of a pre-conference only 35 minutes before the observation, and a post-conference so long after the observation as to be unhelpful. (R. 31, p. UW 40) Respondent also explained that she had a routine for the beginning of each class to help her students get focused; she had good rapport with her students and her students were all participating with the majority demonstrating enthusiasm toward learning. (Id.)

Second, long observation, May 5, 2015 by VP Adair, announced, pre-observation conference May 4, 2015, and post-observation conference on May 8, 2015. Rating: Effective. (R. 32) This was a lesson for her 10th grade geometry class on how to use the Inscribed Angle Theorem to develop relationships between circles, chords and arcs. It was a subject that the class had begun in a previous lesson. Adair found that most students were able to get correct answers and that the pacing and momentum seemed appropriate for most. He noted that there were opportunities to go deeper into the material. (R. 32, p. UW48)

Mid-year Review by VP Adair, dated May 15, 2015. Rating: Partially effective. (D. 45) Since Respondent only arrived and started teaching at Bard that academic year in February, the "mid-year" was actually a mid-semester review. VP Adair was critical of deficiencies in the inclusiveness and rigor of Respondent's lesson planning (Tr. 1524-5), of failing to get all of her students involved (Tr. 1526), not correcting students when their answers were not completely accurate (Tr. 1527), and not using data to determine if students were progressing toward mastery (Tr. 1527-8). Respondent asked Adair to model a lesson for her, but that never occurred, according to Adair, because Respondent never gave him the lesson she wanted him to model. (Tr. 1530) Adair acknowledged that the time spent observing Respondent was "short," but he attributed that to fact that even a draft CAP was not presented until late in the semester. (Tr. 1531)

Third, short observation, May 29, 3015 by VP Adair, unannounced, with post-observation conference on June 12, 2015. Rating: Effective. (D. 46, R. 34) This was a 25 minute observation of Respondent's 10th grade geometry class.

Respondent had completed a "Do Now" activity, but the observation itself took place when the students had relocated to the computer lab for independent work. (R. 34, p. UW64) Adair noted that Respondent made herself available to students as they requested her assistance, and she was able to assist them, tailoring strategies that reflected her knowledge of her students and that would lead to mastery. The students were enthusiastic as they worked collaboratively to solve the problems. (Id., p. UW 65) The few comments that Adair seemed to have as "growth areas" had to do with the program the students were using, The Khan Academy, rather than deficiencies in Respondent's assistance to students (Tr. 1533-36), although he observed that she was not moving around the room to see if students needed her help before they came to her. (Tr. 1538)

Peer Evaluation, June 1, 2015 by Amy Tepper. Long observation. Rating: Highly Effective. An outside teacher performed a long, peer observation of Respondent's 10th grade geometry class. She found "nearly all students demonstrated enthusiasm;" Respondent tailored her instruction and that led to success; Respondent moved around the room, providing feedback on different groups of students. (R. 35, p. UW 71, 72)

Coaching. Respondent was provided some degree of coaching during this abbreviated academic year. VP Adair held back on offering coaching until the CAP was agreed upon, or at least a proposed CAP was presented to her. (Tr. 1531) Thereafter he coached her in the context of providing feedback on his observations. (Tr. 1632) At the mid-year review meeting, Respondent asked VP Adair if he would model a lesson for her; he never did that because the opportunity never came up: "she never gave me the lesson that she wanted me to

model." (Tr. 1530) He testified that Respondent did not attend meetings of her colleagues where she could have collaborated on student growth and on her own development. (Tr. 1529)

Annual Evaluation, June 15, 2015 by VP Adair. Rating: Partially effective. On June 9, 2015, about one week after his short observation of Respondent, but before he had reviewed his findings with her, VP Adair completed an annual evaluation. (D. 47) In preparing this evaluation, he relied upon the other evaluations that had been conducted as well as any evidence that Respondent had shared with him or uploaded. (Tr. 1540) He was critical of Respondent in the areas of differentiating instruction (Tr. 1541), not modeling or demonstrating what she expected of her students (Tr. 1542), not discussing with students why they had picked correct or incorrect answers when they did so (Tr. 1543, 1544), not using data effectively to guide instruction during the semester (Tr. 1543), although he acknowledged that Respondent's students in fact performed well on their final exam with a passing rate better than 80%, which indicated that in fact the students mastered the material. (Tr. 1545) Adair noted that during both of his observations, "the lessons were standards-based and grade-level appropriate," but he faulted that there was no written lesson plan, even though he acknowledged that written lesson plans were not required at Bard. (Tr. 1626) Mr. Adair placed emphasis on Respondent's failure to draft a CAP or IPDP, although he acknowledged that she uploaded a document in which she set goals for herself. (D. 47, p. 1421) He also faulted her for not attending weekly department meetings more than once per month. (Id., Tr. 1422) He found no fault with her attendance or punctuality. (Id.)

As to his findings with regard to the portions of Competency 4 where objective, quantifiable student growth should be reported, Mr. Adair wrote the following, in relevant part:

"(4d) There is still no evidence [Respondent] is using data to help her plan instruction. ***

(4e) [Respondent] is confident she understands her students and their abilities. However, she has not been able to provide evidence to support her claims***

((4f) ***[Respondent gave her students multiple assessments that she has been using to help determine progress. She administered a district Geometry final consisting of 25 questions where the class mean was better than 80%. The challenge with data occurred throughout the semester when data was not being used to track and assess student progress. It was difficult to determine if students were mastering objectives because there was no data available that measured student progress as the data that has been shared at the end of the course.***"

Other issues. The District presented evidence that the Bard administration was concerned about aspects of Respondent's performance other than her teaching competence. None of those issues, however, resulted in any form of reprimand or memo to Respondent's file.

Failure to cooperate. According to VP Adair, Respondent did not cooperate with him in their discussions about her CAP or other matters, refusing to meet with him unless she could have a union representative present. (Tr. 1519-20) She was "not receptive" to VP Adair's coaching or comments, "she received it as my criticizing her performance, as opposed to an opportunity for us to work together to grow in her performance." (Tr. 1531) She did not upload data or provide portfolio materials to demonstrate her students' progress. (Tr. 1543-4) In addition, she did not participate in the school's professional learning community:

> [Respondent] did not involve herself in the collaboration that took place with the other employees in the department. And that was based primarily on the fact that [Respondent] was not present whenever her colleagues would meet, and that I was not aware of her meeting with any of the colleagues at any time that might have been convenient for her to collaborate on student growth and development.

(Tr. 1529)

Aftermath of 2014-2015 school year. No tenure charges were filed against Respondent at the conclusion of the 2014-2015 school year.

2015-2016. West Side High School. Over the summer of 2015, Respondent assumed she would be returning to Bard, and reported there on September 2, 2015. The administration was surprised to see her, because she wasn't on the school's budget. Later in the day, VP Ween handed Respondent a letter from the District, directing her to report on September 8, 2015 to Newark Vocational, one of the schools on the Westside campus. (R. 9, Tr. 1337-9) Respondent's principal for the 2015-2016 school year was Larry Ramkissoon; her VP and immediate supervisor was Henry Ogele.

Respondent's status at Westside was no longer that of a teacher without position (EWPS); instead she was in a regular budgeted position. (Tr. 1346) On September 10, she was given a schedule to teach three classes: two twelfth grade pre-calculus and one ninth grade Algebra 1. (TR. 1341-5) She also volunteered before and after school to tutor students, putting out a sign-up sheet. Students from her own and other classes came to her for help. (Tr. 1358-60)

The school's schedule provided for blocks of 80 minutes instruction. Respondent told VP Ogele via email dated September 13, 2015 (D. 3, p. 1405) that she had never taught an 80-minute block before, and asked for his guidance.

He met with her (Tr. 318) and arranged for her to observe a class taught by the lead math teacher, Mr. Bhatt. (Tr. 316)

Respondent initially had about 30 students in each of her pre-calculus classes and over 40 in the Algebra 1 class. (Tr. 1348) All of the students she was assigned to teach were enrolled in Newark Early College, another of the schools on the Westside campus. (Tr. 1344) In the spring, she continued to teach the same pre-calculus classes, although the number of enrolled students dropped to around 20 in each (Tr. 1354-6); she did not teach the Algebra I class in the spring. (Tr. 1352)

Respondent testified in this proceeding, and complained to the administration, of the difficulty in managing her students, particularly in the Algebra I class. Some of the students were not listed in PowerSchool, the District's computer database. (Tr. 1350) Three of the Algebra students had IEPs that required extra in-class support in the form of another teacher or an inclusion teacher (Tr. 1353). In November the administration assigned a second teacher, Mr. Douglas, to her class (Tr. 1353); he was certified in special education but not in math. (Tr. 1372) Three of the pre-calculus students in her afternoon class were also special needs students, and Mr. Douglas helped with these as well, including throughout the spring semester. (Tr. 1372-3) In addition, she had significant problems with disruptions to her class. These are discussed below.

CAP. For the academic year 2015-2016, Respondent was on a CAP. She participated in a "goal-setting conference" on October 14, 2015 with both her principal, Larry Ramkissoon, and her VP, Henry Ogele. She and Principal Ramkissoon signed the CAP on October 15, 2015. (D. 4) Principal Ramkissoon

testified that there were other meetings regarding the CAP in addition to the one on October 14, although he didn't remember how many. (Tr. 103) VP Ogele testified that the CAP was created "in collaboration with the teacher and immediate supervisor, principal" (Tr. 326); Principal Ramkissoon characterized the process as "Absolutely" collaborative (Tr. 107); and Respondent agreed that the process was collaborative (Tr. 1390).

During the goal-setting conference, her supervisors agreed with Respondent's assessment of where her students were in terms of readiness to learn the prescribed materials. They then agreed upon goals for the two pre-calculus classes Respondent was assigned to teach. Although Respondent was also assigned to teach an algebra class, the CAP was limited to the two pre-calculus classes, because, according to Principal Ramkissoon, the administration's goal "is not to make the Corrective Action Plan burdensome so it's unattainable. Quite the opposite, it tried to provide an opportunity to verify that the teacher has grown in this." (Tr. 43)

For the students in one pre-calculus class, they agreed upon the goal "By the midyear, at least 10/30 students would be able to factor polynomials where a>1 and find the root of a polynomial using the quadratic formula." (D. 4, p. 1398, Tr. 37) For the other class, they agreed upon the goal "By the midyear, at least 15/30 students would be able to factor polynomials where a>1 and find the root of a polynomial using the quadratic formula." (Id, p. 1400, Tr. 38) Principal Ramkissoon identified the goals in the CAP as the Student Growth Objectives required by Achieve NJ. (Tr. 96) Both VP Ogele and Respondent also equated student learning goals with the SGO required of a teacher. (Tr. 447, 1390)

The CAP identified specific action steps for Respondent (using assessment data to identify students needing additional support; analyzing the assessment data to develop action plans; designing lessons with a co-teacher; developing plans to work with individual students and small groups; consistently submitting planning documents) and for the administration (coaching Respondent, scheduling a teacher coach to support and co-plan with her; providing her with feedback on her planning documents). (D. 4, p. 1401)

At the mid-term evaluation, Principal Ramkissoon testified that VP Ogele determined Respondent did not meet either goal. (Tr. 111, 115, 449) VP Ogele testified, with respect to the first goal, that he based his conclusion on his January 28 observation of the class, and on student work Respondent provided to him after the class was completed, which showed that 3/13 students met the objective, rather than 10/30. (Tr. 449-51) VP Ogele was unsure whether there were still 30 students in the class at that point. (Tr. 449) With respect to the second goal, VP Ogele did not recall whether Respondent reached that goal. (Tr. 453) Respondent testified that in fact she did meet the first goal. She placed in evidence student work (R. 52, 53), including student scores on mid-term examinations on quadratic equations and trinomials, showing her students successfully passed these examinations. (R. 52, p. UW213, 214) The test scores were available to VP Ogele because they were in PowerSchool and Agile Mind. (Tr. 1715-17) Respondent also presented the documents to VP Ogele during a meeting with him, and he "kind of looked through them and then he pushed them aside." (Tr. 1713-14)

The charges drafted by Principal Ramkissoon include findings that Respondent was "not successful in getting the majority of her Algebra or Pre-'Calculus students to demonstrate mastery of the Common Core Standards for Mathematics." He goes on to cite the PowerSchool records of end-of-year testing as showing only 76% of Algebra students earned an "F" or "D," while 58% of Pre-Calculus students earned an "F" or "D". (D. 1, p. 1154)

Coaching. Respondent was provided with extensive coaching during the school year to help her improvement. Her primary coach was VP Ogele, who met with her in one-on-one sessions in September, October, January, February, March, April and May. (D. 1, p. 1152) She also received personal coaching from Edith Battle, a member of the school's SIP (School Improvement Panel) and "academic interventionist" at Westside, who, though not a math teacher, has won accolades for her teaching and is used by the school to assist teachers on such issues as planning, lesson design and sequence. (Tr. 191, 193) Ms. Battle was assigned to work with Respondent beginning in January 2016, (D. 11) as was Mr. Bhatt, the Lead Math Teacher. (D. 13, p. 1313) Ms. Battle had an initial session with Respondent, which VP Ogele also attended on January 11, 2016. She then accompanied Respondent as they observed another teacher's algebra class on January 15, 2016, after which she "debriefed" Respondent on January 19, 2016. She also observed Respondent teach an Algebra class in March; she found Respondent executed every component of the entire lesson design and focus, within the suggested time frame (Tr. 197); it was an effective lesson (Tr. 200). Although Respondent asked Ms. Battle to meet again, at the scheduled time Ms. Battle found Respondent was absent. (Tr. 202-3)

Another master teacher, Ms. Ragoo, was assigned by VP Ogele to assist Respondent, particularly with classroom management issues. This occurred in September of 2015 after Respondent reported problems with student behavior, and VP Ogele and Ms. Ragoo visited her classroom and intervened. (D. 5, p. 1379) Respondent testified that Ms. Ragoo never coached her (TR. 1402); however Respondent acknowledged turning to Ms. Ragoo for guidance after a classroom incident in February 2016. (R. 19, Tr. 1702) Respondent also went with Ms. Ragoo to observe a class taught by Mr. Bhatt on September 17, 2015, after Respondent asked VP Ogele for assistance since she had never taught an 80 minute block. (D 3, p. 1405-7) In addition, Respondent worked with Mr. Bhatt in January and attended a workshop he gave on instruction. (Tr. 1412-3)

All of these coaching activities were coordinated through the formal work of the School Improvement Panel (SIP), whose members (Ogele, Battle) met with Respondent three times in January 2016. (D. 11)

Observations and Evaluations. In the 2015-2016 school year, Respondent was observed five times, three short and two long observations, by two administrators. Only one of the five, in the fall semester, was announced, and preceded by a pre-conference. She received mid-year and end of year evaluations. Feedback for her last two observations took place the day before and the same day as her year-end evaluation.

First Short Observation, November 13, 2015 by VP Ogele, unannounced, post observation conference on November 12 or 13, 2015. (Tr. 1426, cf. 506) Both parties signed the document on November 13, 2015. (D. 7, p. 1360) Rating: partially effective. This was an hour and 19-minute observation of

Respondent's morning pre-calculus class. VP Ogele was critical of Respondent's organization of the lesson, its pacing and momentum, lack of tailored instruction; several times the students were confused about what she expected of them. (D. 7)

Second, Long Observation, January 28, 2016 by VP Ogele, announced, with pre-conferences on January 20 and 27, 2016, and post-conference on February 2, 2016. (D. 15) Both parties signed the document on February 4, 2016. (D. 15, p. 1276) Rating: Partially effective. This was an hour and a half observation of Respondent's twelfth grade morning pre-calculus class. VP Ogele praised Respondent for the clarity of her instruction, her positive interactions with her students and the enthusiasm her students demonstrated, but was critical of the lesson sequence, her modeling of the methodology, the pacing and momentum of the lesson, insufficient tailoring of instruction, insufficient checking to be sure her students, most of whom were somewhat confused, understood the material. (D. 15)

Respondent submitted a detailed six-page response to this observation. (R. 40) She countered specific observations with a detailed explanation of how she had in fact demonstrated the competencies questioned. Rather than post the rebuttal on BloomBoard, because it was too long to fit in that format, she informed her principal that she was submitting a rebuttal and sent it to the Evaluation Committee. (Tr. 1435-6)

Mid-Year Review, February 9, 2016 by VP Ogele. Rating: Ineffective. (D. 16) Although VP Ogele had rated Respondent "partially effective" on each of his two observations of her work in the classroom, in this review, he rated her as "ineffective." He noted only one strength: communicating content more

effectively. (D. 16, p. 1255) He reported on actions she had taken to respond to her CAP, steps she would need to continue to take, and the steps taken by administration. (Id., p. 1259) In the review, he criticized her, inter alia, for not consistently submitting planning documents, for the pacing and momentum of her lessons, for not collaborating sufficiently with her colleagues, for insufficiently tailoring instruction, for lack of precision in what she required from students, for not having high enough expectations from her students and not submitting sufficient assessment data.

With respect to the section on Competency 4, where the administration is supposed to enter its findings on Student Growth Objectives, VP Ogele entered the following comments, among others:

4c. "Demonstration of learning: There is inconsistent or no evidence that students master the objective as evidenced from formal observations on 11/9 and 1/28. The most recent observation indicates that students were helping each other during independent practice which compromised the integrity of the artifacts. As a result, there is no evidence to support if students mastered lesson objective."

4d. "Teacher has not submitted any assessment data or corrective action plan as requested; that help provide insight as to each student's progress toward mastery as evidenced from write-up on 10/20 and 1/5. As a result, teacher does not have any baseline data to help guide planning an instruction."

4e. "Understanding of Growth: Teacher's failure to create assessment data results in her inability to articulate whether students has internalized grade-level standards. As a result, teacher is unable to provide differentiated assignments that will move each students [sic] toward grade-level standards."

4f. "Progress Toward Goals: There is no assessment data created by teacher. As a result, there is no evidence that students are progressing towards goals."

(Ex. 16, p. 1257)

In answer to the question whether the teacher is on track to meet the goals that were set, VP Ogele wrote

> The teacher is not on track.
> The teacher must submit planning documents on time.
> Create assessment data and corrective action plan for each unit and use it to guide instruction.
> Regularly attend weekly coaching session.
> Continue working with SIP Panel.

In response, Respondent gathered together a large number of documents that she felt refuted his conclusions. She offered the documents (R. 53) to VP Ogele at a meeting in the principal's office, but he "ignored it." (Tr. 1442) She also made sure VP Ogele saw documents in the nature of journaling that she had her students prepare to track their progress. (R. 52, Tr. 1444)

Third Short Observation, March 30, 2016 by VP Ogele, unannounced, with post-observation conference on April 1, 2016. Rating: Partially effective. (D. 19) This was a 32 minute observation of one of Respondent's twelfth grade pre-calculus classes. VP Ogele noted as positives that Respondent connected the lesson to previous learning, unit objectives and long-term goals, so that the students understood why the skill they were learning was beneficial. He also noted that she required her students to provide a well-structured rationale for their responses, and most students read mathematical terms fluently and accurately. On the negative side, VP Ogele was critical of the pacing and momentum of the lesson, lack of preparation, inadequate planning and tailoring

instruction, inadequate feedback, leading to student confusion. He noted that only 5 students out of 12 were able to complete assigned work.[4]

Respondent prepared a detailed rebuttal to this observation. (R. 42) Noting that even VP Ogele had observed the connection of the lesson to prior learning, unit objectives and long-term goals, Respondent stated she should have been given a highly effective rating since that she had met the framework's requirements. (Id., p. UW 115) She noted in other sections that she was moving her students toward mastery, actively circulating through the class, and celebrating with students who mastered difficult challenges. To Ogele's criticism that a student did not have a calculator, she answered that no calculator was needed for the given activity. (Id, p. UW 116) As before, she did not give VP Ogele a copy of the rebuttal, but sent it to the Evaluation Committee as specified in the Framework. (Tr. 1460)

Fourth Short Observation, May 5, 2016, unannounced, by Principal Ramkissoon. There was a post-observation conference that is recorded on the District form as taking place on May 11, 2016, but which Respondent testified took place on May 12, 2016 (Tr. 1486), the day they both signed the form. (D. 23, p. 1180) Rating: Partially effective. This was a thirty-five minute observation of one of Respondent's pre-calculus classes. On the positive side, Principal Ramkissoon observed that the lesson was organized and students were working productively, participating in the "we do" part of the lesson, some in collaboration with their peers. He also noted that Respondent had appropriately

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[4] In another section of the observation write-up, VP Ogele noted that 5 out of 17 students were able to successfully solve logarithmic functions. There is no explanation for this discrepancy.

tailored strategies to help her students move to mastery, and the students were enthusiastic about learning, with an overall positive atmosphere in the classroom. Nonetheless he found that sometimes her instructions were unclear; she did not challenge students to explain their solutions, be precise, or present supporting evidence; she did not verify student understanding or give adequate feedback to her students. (D. 23)

Respondent prepared a detailed rebuttal to this observation (R. 44), which she sent to the Evaluation Committee. (Tr. 1487) Respondent testified that she asked Principal Ramkissoon to reevaluate her, and that he said he would come and observe her once more, but that never happened. (Id.)

Fifth Long Observation, May 10, 2016 by VP Ogele, unannounced, with post-observation conference on May 11, 2016. Rating: Partially effective. (D. 22) This was an observation of one of Respondent's twelfth grade pre-calculus classes; it lasted an hour and 14 minutes. VP Ogele praised Respondent's lesson for her pacing, spending an appropriate length of time on each lesson component. He also praised the fact that she challenged her students and they showed enthusiasm for learning and supported community values and norms. He observed that she could have done a better job of using questions to guide the students toward mastery and to avoid confusion, and he criticized her for not adequately addressing student questions so they left class without adequate knowledge, and she had difficulty keeping students on task. (D. 22)

Respondent did not agree with VP Ogele's conclusions and prepared a lengthy and detailed rebuttal (R. 46), which she provided to the Evaluation Committee (Tr. 1488-9).

Annual Evaluation, May 12, 2016. (D. 24) This evaluation was prepared by VP Ogele and delivered to Respondent on the afternoon of May 12, 2016, the same day that Principal Ramkissoon held a post-observation conference with her for the observation he conducted on May 5, 2012 and the day after VP Ogele held a post-observation conference with her for the observation he conducted on May 10, 2016 (Tr. 1490-1) Rating: Partially effective.

VP Ogele recorded positive comments in only two areas: competency 5, where he noted Respondent collaborated with her peers and met expectations for attendance and competency 3 (D. 24, p. 1165), for fostering enthusiasm for learning and a positive learning community (Id., p. 1164). He was critical of her performance in connecting lessons to objectives (Id., p. 1162); in pacing, momentum, clarity of instruction, tailoring instruction, demanding precision from her students (Id., p. 1163); in guiding her students to be persistent and strive to meet high expectations, in using data to asset and adjust her lesson planning (Id., p. 1164); and for failing to submit diagnostic assessment data to the administration and inconsistently reporting on student progress (Id., Tr. 1165).

In the sections devoted to assessing student growth, VP Ogele, made the following comments:

4.c. "Demonstration of learning: Evidence from formal observations on 11/9 1/28, 3/30, 5/5 & 5/10 indicates that over the course of the year, there is inconsistent or no evidence that students master lesson objective. As a result, most students are not moved to grade-level standards."

4.d. "Using data: Teacher sometimes submits 'End of Unit' assessment analysis spreadsheet and corrective action plan as required; as evidenced from write-up on 10/20 & 1/15. As a result, teacher is unable to track each student's progress toward mastery and to adjust planning and instruction

– Teacher did not submit correction action plan/intervention plan for Unit 3: Rational Functions as requested from email sent to all math teachers on November 9th 2015.
-- Teacher submitted analysis sheet (Unit 4) on 4/11. However, teacher did not submit corrective action plan for Unit 4.

As a result of inconsistent submission of assessment analysis spreadsheet and corrective action plan, there is no evidence of teacher using data to guide planning and instruction."

4e. "Understanding of Growth: Teacher can sometimes articulate whether or not each student has internalized grade-level standards. As a result of teacher's inconsistent submission of end of unit assessment analysis spreadsheet, there is little evidence to demonstrate student growth."

4f. "Progress Toward Goals: Data reflect that sometimes students are mastering the objectives of the focus areas.

- Evidence from End of Unit assessment (Unit 3-Ratoinal Functions) indicates that most students did not master grade-level standards. Class mean indicates that 37% mastered grade-level standards.
- Evidence from End of Unit assessment, Block 1, (Unit 4 – Exponential/log functions indicates that 45% mastered grade-level standards.
- Evidence from end of Unit assessment, Block 3, (Unit 4 – Exponential/log functions) indicates that 57% mastered grade-level standards."

(Ex. 24, p. 1164)

In a later section, VP Ogele repeated one of the two goals Respondent had set in her CAP, namely that at least 10/30 students would be able to factor polynomials where a>1 and find the root of a polynomial using the quadratic formula. In response to the question of what progress students demonstrated around these learning goals, he wrote:

"Observation conducted on 1/28 indicates that most students were not able to factor polynomials/factor trinomials; and as a result could not complete assigned task of finding the vertical asymptote of a function."

(Ex. 24, p. 1165)

Other Issues. Throughout the school year, Principal Ramkissoon was made aware of complaints from students about Respondent's teaching and conduct in the classroom. Sometimes complaints came directly to him, while

others were brought to his attention by guidance counselors, parents, and other school personnel. In early October, for example he received a complaint from a senior in Respondent's pre-calculus class, written ostensibly on behalf of other classmates, complaining that Respondent is always late for class; was "holding us back from our learning in various ways;" jumps from one subject to another before the students can understanding the previous topic; lacks control of the class; and does not treat the class with respect." (D. 6, p. 1366) This complaint was followed by six others that same month, complaining variously about Respondent ignoring some of the students, while focusing all her attention on a small group (D. 6, p. 1371) ; yelling at and arguing with students (D. 6, p. 1367-8, 1374); and continuing to jump from one topic to another without helping her students reach understanding (D. 6, p. 1376, 1375, 1373). Principal Ramkissoon met with some of the students and their guidance counselors, and had VP Ogele to follow up with visits to the classroom. (Tr. 57) He told the students that he was not going to replace their teacher, and that they needed sometimes to work out answers to math problems by themselves. (Tr. 56)

In December 2015, Principal Ramkissoon received more student complaints, this time from Respondent's algebra class as well as her pre-calculus class. The gist of these complaints was that Respondent ignored students and did not help them learn (D. 9, p. 1335, 1336, 1339), or wastes student time by teaching below the level of the class (D. 9, p. 1342). (Tr. 58) Principal Ramkissoon and VP Ogele met with Respondent about these student concerns. (D. 10, p. 1332)

In January 2016, the administration received yet another complaint about Respondent, this time from a parent whom respondent had informed that her son was failing math. The parent wrote to the Principal, after she found Respondent to be unprepared for their meeting together, unresponsive to the mother's concerns, and unable to justify the student's poor grade. (D. 12, p. 1320-1 Tr. 59-60)

Finally, on May 5, 2016, Respondent had a confrontation with a student who walked into her classroom without permission and took a friend's phone. Respondent told the student, in effect, "You don't just walk into my classroom." There is dispute about exactly what was said next, but four students wrote statements about the incident. (D. 20) At least three students reported that Respondent told the student, "I'll break your face;" (D. 20, p. 1203, 1205,1206) while another said Respondent exchanged "fighting words" with the student. (D. 20, p. 1204) Principal Ramkissoon had a social worker investigate the incident and interview students. (Tr. 63) He did not necessarily believe the students who complained, since they were friends with one another. (Tr. 66) He suspended the student, because he believed she had been wrong to walk into the classroom and had used disrespectful language to Respondent. He imposed no formal discipline upon Respondent (Tr. 63-64), although VP Ogele sent her an admonishing email referring to her having used "fighting words" about "breaking" the student's face. (D. 25, Tr. 402)

Recommendation for tenure charges. Toward the end of the academic year, on June 3, 2016, Principal Ramkissoon wrote a memorandum to the District Superintendent recommending that tenure charges be brought

against Respondent. He discussed at some length Respondent's deficits in teaching, and her failure to make improvements in the areas identified in Respondent's CAP, noting these same areas had been identified by administrators during the immediate two prior teaching years. Principal Ramkissoon made no recommendation based upon any of the other issues referred to above.

POSITIONS OF THE PARTIES

The District argues that it has met its burden to prove the charges against the Respondent warranting dismissal, in that:

1. The role of the arbitrator in this tenure proceeding is limited by law to determining whether: the District's evaluation failed to adhere substantially to the evaluation process, including by providing a corrective action plan; or if there is a mistake of fact in the evaluation; or the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination or other prohibited conduct; or if the District's actions were arbitrary and capricious.

2. The evidence proves that during each of the three years in question, Respondent was provided with a Corrective Action Plan, the proper number of observations by appropriate administrators, mid-year and annual summative evaluations, and extensive professional development and personal coaching, both on a one-on-one basis and in a group or collaborative setting. Nevertheless, she failed to make any significant improvement. The District properly determined that Respondent had not met her established Student Growth Objectives in mid-year and end of year evaluations of Competency 4, using the method approved by

the Department of Education through the granting of the District's application for waivers.

3. Respondent has offered no evidence of any kind, of any of the defenses provided by law, such as discrimination or bias. Accordingly, the arbitrator must uphold the educational decision made by Respondent's supervisors as to her inefficiency as a teacher.

4. The District has also proven the charges in Charge II of other just cause, having produced credible evidence that Respondent neglected her duty as a tenured teacher and had a pattern of poor classroom management and insubordination toward her supervisors. Over the past three years, she was reprimanded several times for failing to abide by District policies when she was insubordinate to her VP during the proctoring of an exam; when she was AWOL to attend a Math Olympics event; for failing to collaborate with her departmental colleagues; for her frequent tardiness; for ignoring students, improperly grading them, and displaying temper and insulting comments toward them.

For these reasons, the District's decision to revoke Respondent's tenure and terminate her employment within the District should be upheld.

The Respondent, on the other hand, argues that the charges against the Respondent must be dismissed and Respondent must be restored to her teaching position with full benefits and seniority, for the following reasons:

1. The evaluations in each of the three years at issue failed to include statutorily mandated Student Growth Objectives (SGO); SGOs form the core of the new data-driven approach to evaluating teachers on student progress; by ignoring the need for SGOs and substituting subjective criteria for objective data,

the District has failed to adhere substantially to the evaluation process and acted arbitrarily and capriciously;

2. No growth objectives were identified at all in year 2013-14 or 2014-15 and the administrators responsible for evaluating Respondent appeared to have no understanding of that component of the evaluation process; the next year, there were two growth objectives identified by Respondent and the District, but the mid-year evaluation made reference to only one of those, and that reference was factually erroneous; the annual evaluation made no reference to objectives at all; for those reasons, all of the annual evaluations of Respondent are void substantively as well as procedurally;

3. To the extent that Respondent had what may be considered goals in 2015-2016, her supervisors ignored evidence that Respondent, in fact met those goals;

4. The District's evaluations of Respondent failed to adhere substantially to the evaluation process in other ways, notably, (a) each of the three years, administrators conducted observations late in the school year, often just before the final evaluation, with post-observation feedback in some cases the same day as the final evaluation, so that Respondent had no meaningful opportunity to digest the feedback and improve, which is, after all, the purpose of observations; (b) a CAP was imposed on Respondent for 2013-2014 for which she had no input, and referenced a class she did not teach; a proposed CAP was imposed on Respondent for 2014-2015 long after the deadline for developing CAPs, and despite advice she received from the Department of Education that she should not have been on a CAP at all; Respondent understandably resisted signing the CAP;

5. All charges related to the 2013-2014 school year were disposed of in a prior decision by Arbitrator Simmelkjaer in an order dated January 5, 2015, which is the law of the case; the District refiled those charges and they are currently being held in abeyance by Arbitrator Simmelkjaer pending the outcome of an appeal; accordingly all charges regarding that year should be held in abeyance until the appellate division and Arbitrator Simmelkjaer can consider the matter.

6. The "catch all" pleading in Charge Two of "Other Just Cause" should be dismissed, as Respondent requested at this hearing, because (a) it is vague and unspecific; (b) to the extent it repeats allegations about inefficiency in teaching, it is duplicative of Charge One; and (c) the few incidents raised by the District were either factually refuted, or had been handled at the time with either no discipline or in one case, a note to file; certainly these incidents do not amount to cause for removal of tenure.

DISCUSSION

Both parties were represented by counsel in this proceeding and had full opportunity to present evidence and make arguments in support of their respective positions. In the preparation of this Opinion and Award, I have given careful consideration to the testimonial and documentary evidence, the legal authorities cited, and the positions and arguments set forth by the parties. I find the District has proven Charge I of inefficiency against the Respondent for the years 2014-2015 and 2015-2016 for the reasons set forth below. I find the District has failed to prove Charge I of inefficiency for the year 2013-2014. With respect to Charge II, I find the charges must be dismissed.

My authority in this matter is limited. As set forth by statute, my purview is to determine whether the District has substantially followed the legal framework for evaluating a tenured teacher. I must also consider whether the District was motivated to bring these charges due to considerations of political affiliation, nepotism, union activity, unlawful discrimination or any other unlawful conduct. Finally, I must consider whether the District's actions were arbitrary and capricious.

PROCEDURAL ISSUES

Both sides, at different times and for different reasons, have requested me to stay the issuance of my decision and order in this matter.

Charges for the 2013-2014 academic year were dismissed by Arbitrator Simmelkjaer on January 5, 2015. (R. 60) The District refiled, and the case was reassigned to Arbitrator Simmelkjaer. Respondent has appealed the assignment of the case to the same arbitrator who heard it earlier, and it is that issue that is the subject of an appeal pending in the appellate court. In the meantime, Arbitrator Simmelkjaer has stayed the proceedings before him. Respondent urges me to regard Arbitrator Simmelkjaer's decision as *res judicata* and dismiss these charges. In the alternative, Respondent urges me to stay my findings for that year until the pending proceedings in the appellate court and before Arbitrator Simmelkjaer are resolved.

On Friday, March 24, 2017, the District filed a request for stay because it had learned of a pending court challenge to one of the arbitral decisions relied upon by the Respondent that deals with the issue of the District's obligations

under statute to evaluate teachers on Student Growth Objectives. No date is currently set for the disposition of that court case.

For reasons of judicial economy, I decline to grant either request. The parties expended considerable time and resources to place the facts before me and make legal arguments based upon them. And I have used considerable time to review and reflect upon the record. It seems expedient to me to share my findings and conclusions with the parties at this time. To the extent that my decision touches on either of the issues noted above, I discuss those in the appropriate sections of my Discussion. Naturally, the parties are entitled to pursue whatever appeals or stays of my decision they deem appropriate after it has been issued.

GENERAL OBSERVATIONS

As a preliminary matter, I note that there was absolutely no evidence presented, nor argument made by Respondent that these charges were due to any prohibited motivation. Indeed, throughout these proceedings, I observed polite, even at times cordial, relations between the administrators and the Respondent. I therefore limit my review of the evidence to issues of process – whether the administrators in each charged year substantially followed the District's mandated evaluation system. My review, however, necessarily includes not only what administrators did each year, but what Respondent did as well. Respondent has been on notice for the past four years that her supervisors found her only partially effective as a teacher. The District had the obligation to offer her professional development, mentoring, guidance, and fair and timely observations

and evaluations; she, in turn, had the obligation to work with her appointed supervisors and mentors and try to improve her teaching.

In the first year I am asked to review, 2013-2014, I find, as set forth in detail below, that the District did not substantially adhere to the required protocol for observing and evaluating a tenured teacher. Its actions that year were arbitrary and capricious and cannot be the basis for any adverse ruling on tenure. During the two subsequent years, however, the administrators supervising Respondent did substantially follow protocols. As set forth below, they met the requirements for observing, mentoring and evaluating a teacher in danger of losing tenure due to multiple "partially-effective" ratings. Respondent, however, did not cooperate with her supervisors: she did not do her part. Among other failings, she resisted and ultimately declined to sign a corrective action plan during 2014-2015; she resisted meeting with her supervisors; and she failed to submit data and artifacts both years to show that her students might be progressing to meet the growth objectives established in one year by the administrators alone and the final year by Respondent in collaboration with her supervisors.

CHARGE ONE: INEFFICIENCY

2013-2014 School Year. Bard High School Early College. The District failed to comply substantially with its own established evaluation framework. I find the following irregularities nullify Charge I for that year:

Teaching assignment. Respondent was never assigned a class to teach during the entire academic year. She was, instead, assigned to assist other teachers in various classes, and to mentor and tutor students both in the

classroom and in the library. Although school administrators testified that Respondent was assigned to "co-teach" that year, I find otherwise. There is simply no evidence that she was in any way a partner with the classroom teachers of record. Yet she was evaluated and rated as if she were.

CAP. On October 15, 2013, the day established in the Framework for completing a CAP (D. 50, p. 246), Bard's VP Williams met with her and presented her with a draft CAP, which she signed the same day. This CAP was fatally defective because it was built around a class that Respondent never taught, namely, college algebra. Respondent was never the teacher of record for such a class. In fact, Respondent had nothing to do, either in a teaching or supportive role, with college algebra for the entire fall semester. It was only in the spring that she met with some college algebra students and that was solely for tutoring/support purposes. Additionally, it is undisputed that Respondent had nothing to do with drafting any portion of the CAP.

Observations. Bard's administrators conducted the necessary number of observations for a teacher on a CAP – namely, four – and two different administrators observed her, as required. Nevertheless, the observations were fatally defective both in timing and in the choice of lessons to observe. The only observation before the mid-year review was of the game of "Math Jeopardy" on the day before Thanksgiving. While Respondent participated in the planning of this game and led the game during the observation, the activity was planned as well, by the class teachers; it was not a normal instructional period; and Respondent was not the teacher for those students. The post-observation

conference took place on December 23rd, a month after the observation, rather than within 10 days as required in the Framework.

Of the three observations after the mid-year, one was of Respondent proctoring an exam – not teaching. The other two – the only two that can be considered observations of Respondent instructing students – took place on May 8 and May 12, at the end of the second semester and far too late in the term to have any benefit to Respondent as guides for improvement. Indeed, the post-observation conferences for those conferences took place *after* her annual evaluation, which was held on May 14. The point of observations and post-observation conferences, obviously, is to give the struggling teacher feedback on what she is doing well, what needs to be improved, and to give suggestions in time for the teacher to work on improving her instruction. Clearly, the timing of these observations was such that the District gave no meaningful guidance to Respondent throughout the entire year.

Mentoring and Coaching. The only evidence that Respondent received one-on-one mentoring and coaching was Principal Weinstein's testimony that he thought VP Williams had one coaching session with her that year. Principal Weinstein also testified to group sessions held by the School Improvement Panel, weekly faculty meetings and professional development. None of these group sessions comes close to satisfying the District's obligation to provide "specific support and periodic feedback." (C. 26, 18A-6-119 (3))

2014-2015 School Year. Bard High School and Early College. As Respondent points out, this year was shortened: Respondent was suspended from teaching for the entire fall semester because of the tenure charges referred

to above that were ultimately dismissed. However, Respondent was returned to Bard in time to teach the entire spring semester and at that time, unlike the prior year, she was given her own class. She also had a new supervisor, VP Adair, who not only supervised her, but also offered her support, as mandated by the Framework.

The law and regulations clearly anticipate that in some circumstances a teacher may not be in the classroom for the entire year; nevertheless, the evaluation and other protocols apply, on a *pro-rated* basis. See, for example, N.J.A.C. 6A: 10- 4.4 (e) l, which provides:

> If a teacher is present for less than 40 percent of the total student school days in an academic year, he or she shall receive at least two observations to earn a teacher practice score.

See also, Framework (D. 50, p. D. 243):

> If a teacher hasn't been in your school for the entire year, the number of evaluations can be reduced proportionally based on the amount of time the teacher has been in your school. This is true for teachers new to the district and/or new to the school, as well as teachers who have been out on an extended leave.

I find that the District did effectively and substantially meet the requirements for evaluating Respondent during the spring semester. To be sure, there were aspects of the evaluation process that were not completed. However, I find Respondent, rather than the District, responsible for those failings. The evaluation and review process requires input and work on the part of the teacher as well as her supervisors. Where a teacher fails to cooperate, for example, in the drafting of a CAP or the submission of evidence of student progress, as I review below, she cannot fault the District.

CAP. Relatively early in the spring semester, VP Adair requested, more than once, that Respondent draft a CAP, but she did not respond. So he drafted a proposed CAP and discussed it with her on March 26. Eventually, Respondent did write in one portion of the document (D. 1489), but despite many meetings, emails, and cautions from Principal Weinstein and VP Adair, Respondent never signed the document. She testified that she relied on advice she obtained from the Department of Education in April or early May that she was not required to be on a CAP, and said in this proceeding that she would have signed the CAP in May when she met with Principal Weinstein, but was not given that opportunity. This dispute about the CAP, then, consumed at least two months out of the spring semester.

Notwithstanding Respondent's resistance to the CAP, VP Adair did his best to work with Respondent throughout the year, offering her coaching and being sensitive, for example, by approaching her when she was by herself, not in front of students or colleagues, in the hope that she would not feel he was being antagonistic. (Tr. 1519) Her supervisors ended up treating the proposed CAP that Adair had drafted as Respondent's CAP for the year.

Respondent argues forcefully that because she did not sign the CAP, and should not have been required to do so, the entire evaluation process for the academic year should be void. I cannot agree. She knew that she was obligated to cooperate in the preparation of some kind of action plan for the year, whether an IPDP or a CAP. Instead, she spent months resisting the finalization of any kind of action plan. I cannot fault the administration for proceeding, as best it

could, on the basis of a CAP that it proposed to Respondent, especially when it gave her two months in which to engage and make modifications.

Observations. Respondent has challenged the schedule of observations in this, as in the other years at issue. In this year, the observations took place in the compressed time frame of a single semester, but they were, nevertheless, spaced to provide Respondent with feedback in time for her to make improvements, if she chose to do so. There were three observations by two administrators within the shortened time available, more than sufficient, since the Framework mandates only two if a teacher teaches for less than 40% of the school year.

Before the mid-year (which in this case was a mid-term) review, which took place on May 15th, there were two observations of Respondent teaching her 10th grade math class. The first, on March 25th, was a short, 30-minute observation, conducted by Principal Weinstein, with pre-observation and post-observation conferences; the second, on May 5th, was a long observation by VP Adair, also announced, with pre and post observation conferences. Respondent objected to the first because the pre-observation conference was immediately prior to the observation itself, and because the post-observation conference was 17 calendar days after the observation. Under the Framework, however, those dates are not necessarily non-compliant: a pre-observation conference "should occur within the seven days before the observation" (D. 51, p. 1060), which this did; the post-observation conference "must" follow an observation "within 10 calendar days;" however the 10 days may be extended by the number of days that either party is absent. (D. 51, p. 1061) The record is unclear about whether either

party was absent due to a school break or other cause. In any event, I find the timing of those conferences to be substantially compliant with the Framework and spaced in a fair way to give Respondent time to reflect upon the observations and make adjustments in her teaching. And, it is clear that these observations were thoughtful, and fair. Indeed, VP Adair gave Respondent a rating of "Effective" on his evaluation of the lesson on May 5th.

Before the final evaluation, which took place on June 15th, there was one more observation by VP Adair that was unannounced on May 29, with a post-observation conference on June 12. This, too, resulted in a rating of "effective." In addition, there was a peer evaluation by an outsider on June 1, 2015 that was rated highly effective.

In sum, I find no basis to fault the number or timing of the observations during the academic term. I note that the District did not press tenure charges after the conclusion of the 2014-2015 school year, but gave Respondent a fresh chance, at a new school, with a real teaching assignment the following year, to continue work on improving her performance.

Evaluations. Respondent has challenged the year-end rating of partially effective that she received for the 2014-2015 school year. In addition to the objections noted above, she objected to the scoring of the ratings. The crux of her objection appears to be that she should not have received a partially effective overall rating when she had received two effective observations out of three in the spring term: she is being unfairly penalized for her failure to execute a CAP.

I find that the administration properly considered Respondent's lack of cooperation – on the CAP and in other respects – in rendering a final evaluation

for the academic year. VP Adair included in his year-end comments on Competency 5 that Respondent "has not seemed comfortable receiving constructive feedback during evaluation conferences. This has made it difficult to assist her as desired with her professional development." Further, he noted that she does not attend math department meetings more often than once a month, although the meetings are held weekly, and there was no evidence that she was collaborating with her colleagues. (D. 47, p. 1422) These, too, are valid considerations supporting a rating of "partially effective."

2015-2016 School Year. Westside High School. I find that throughout this academic year, the administration was in substantial compliance with the District's evaluation protocol.

CAP. In this year, Respondent was placed in a budgeted position and assigned her own classes to teach. She collaborated with her supervisors, VP Ogele and Principal Ramkissoon, to draft a CAP that included two specific and quantifiable student growth objectives, after she obtained baseline assessment data on her students. The CAP included specific action steps for Respondent to take and for the administration to support her. It was signed on October 15, 2015, the last day set aside for completing CAPs in the Framework. In short, the CAP contained all required elements.

Observations. During the year, Respondent was observed five times by two administrators. The observations were spaced throughout the year, with two occurring before the mid-year review, and three before the year-end evaluation. The last two observations took place shortly before the year-end summative evaluation, with the fourth post-observation conference taking place the day

before and the last post-observation conference on the same day as the annual evaluation. While the timing of feedback for the last observation, in particular, was less than ideal, it also represented the fifth observation of the year: by that time, the administration had given Respondent a great deal of timely feedback so that she knew where she was falling short and what she had to do to improve.

Coaching. During this academic year, Respondent received extensive personal coaching. VP Ogele, a careful and conscientious supervisor, met with her one-on-one every month and the school's "academic interventionist," Edith Battle, an award-winning educator, worked with her beginning in January. Respondent also worked with both Ms. Ragoo, a teacher coach on issues of classroom management, and Mr. Bhatt, the Lead Mathematics teacher. Her development was overseen by the School Improvement Panel, as required by the Framework. In short the District met its obligation to provide "specific support and periodic feedback." (C. 26, 18A-6-119 (3))

Evaluations. Respondent has urged me to find the entire evaluation process defective for the academic year 2015-2016 because the District failed to calculate an SGO score and include that in the mid-year review or year-end summative evaluation. She cites other arbitrators who found evaluations fatally deficient for lack of a quantitative SGO score. I cannot agree with Respondent for several reasons.

I have reviewed the decisions by Arbitrator Simmelkjaer in the *Carroll* case and Arbitrator Bluth in the *Dawkins* case. Both of those cases are factually inapposite in a number of ways. Both concern teachers of the elementary grades

where the rules require calculation of a Student Growth Percentile (SGP) rather than the SGO required in high schools. But that is not the only difference.

In *Dawkins*, there were many deficiencies in the evaluation process, not only the lack of SGOs. To name a few of those deficiencies: much of one year Mr. Dawkins was out due to injuries; he had only 3 months of teaching; all observations and few evaluations were compressed into a two-month period, with two observations occurring on consecutive days, and another year, twice on the same day, so that he had no opportunity to learn from whatever feedback the administration had to give him. In addition, the goal that was set was not a "growth" goal – there was no attempt to obtain base-line data against which to measure achievement – but a "mastery goal." In other words, the administration did not attempt to measure "growth" or progress.

In *Carroll*, the administration made a "terse statement" that the teacher had not met student learning goals; there was no effort to review metrics as against the baseline data she and the administration had agreed upon. In one of the years at issue, the administration made its annual summative evaluation in April – at least one month earlier than the Framework recommends.

In other words, there were multiple errors in both cases that led the Arbitrators to conclude the District had not followed mandated protocols for teacher evaluation.

The other concern is *how* the District must include quantitative student progress data in the evaluation. The District applied for and was granted a waiver for the years 2014-2015, 2015-2016 and 2016-2017 to "combine the CAP setting conference with the process for developing student growth objectives."

(D. 52, p. D. 1093) The District's approved application for that waiver specifically considered SGOs and SGP as "additional evidence while calculating the rating for Competency 4 (Student Progress toward Mastery)." (Id., p. 1095) Progress on goals, then, is to be included in the scoring of Competency 4. And, as the District explained to the State, Competency 4 counts for 6 out of 19 points or 32% of the rating, and thus is in compliance with TEACH NJ's requirement that growth be 20% of a teacher's evaluation score. (Id., p. 1096)

Since the State has granted the District a waiver to consider SGOs within the context of observing and evaluating Competency 4, I do not find the failure to separately calculate and score SGO to be a fatal defect in the evaluation process. The District may not ignore student growth measurements, however: the State and District have mandated inclusion of quantitative information about student progress on specific growth objectives chosen by the Respondent in collaboration with her supervisors. That information must be included in Competency 4. The question remains whether the analysis undertaken by the District in 2015-2016 regarding Respondent's work with her students was substantially compliant with that mandate.

In the fall of 2015, Respondent developed two specific and quantifiable growth objectives for two classes, building on base-line data concerning those students. In the mid-term review, VP Ogele noted that Respondent had not provided assessment data. "As a result, there is no evidence that students are progressing toward goals." In the year-end VP Ogele made reference to only one of the two goals. He also noted, in pertinent part:

- "...over the course of the year, there is inconsistent or no evidence that students master lesson objective." (4c)
- "...over the course of the year, there is inconsistent or no evidence that students master lesson objective. As a result, most students are not moved to grade-level standards." (4.c.)
- "As a result of teacher's inconsistent submission of end of unit assessment analysis spreadsheet, there is little evidence to demonstrate student growth." (4.e.)
- "Evidence from End of Unit assessment...indicates that most students did not master grade-level standards. (4f)

In other words, Respondent did not provide the data necessary for the administration to calculate progress on CAP goals. This conclusion was repeated in a number of places in the documents and in the testimony.

Yes, the District must set goals and objectively and fairly observe and evaluate Respondent and calculate student progress. The District must also offer Respondent meaningful, one-on-one support. But, as I noted above with respect to the prior year, Respondent also must cooperate and submit data to prove her students are meeting the goals set in her CAP. Respondent presented testimony and documents in the form of sheaves of paper to show that her students were doing well, and she presented evidence that over 80% passed her final exam. I am not an educator; I cannot look at those test sheets or scores and conclude that the students did meet the CAP goals. Nor is that my role. The educators entrusted with that role were Principal Ramkissoon and VP Ogele. They looked at the data presented and the data that was absent and concluded that

Respondent had not demonstrated progress toward the SGOs. Their conclusions were reflected in their assignment of numerical values to Competency 4. In so rating the Respondent, they met their obligation to incorporate an objective, quantitative measurement into their evaluation of her efficiency as a teacher.

Conclusion. I find the District has proven the charge of inefficiency against Respondent for the school years 2014-2015 and 2015-2016. I decline to make findings with regard to each and every subparagraph (a) through (s). Instead, I have reviewed the evidence as weighed against the key components of the state's mandated protocols for reviewing tenured teachers. The District met its responsibility with respect to those protocols and has proven the charges. As to the charge of inefficiency for the year 2013-2014, that charge is not proven and is dismissed for the reasons set forth above.

CHARGE TWO: AND OTHER JUST CAUSE

To the extent that Charge Two, Paragraph 1 "restates" and "re-alleges" the allegations in Charge One, those allegations have been addressed. Paragraph 2, which alleges Respondent has failed to adhere properly to District protocols for "overseeing students and improving her teaching skills," similarly is a restatement of matters covered in Charge One. Accordingly, both Paragraphs 1 and 2 of Charge Two are stricken as duplicative.

As to the charges in Paragraph 3 of failure to "follow instructions" and violation of District policies and procedures, the District has not pled with any specificity what conduct it considers as under that umbrella. During the course of this lengthy proceeding, the Department introduced testimonial and documentary evidence regarding such matters as unprofessional conduct toward

students, tardiness and absence on one occasion without leave. It is not up to the arbitrator to parse the evidence and tease out what particular actions the District regards as failing to follow instructions or violating policies and procedures; that is the District's duty in its pleadings. Paragraph 3 is dismissed as vague.

Finally, Paragraph 4 charges "The cumulative effect of Respondent's misconduct and inefficiency as set forth above constitutes other sufficient cause sufficient [sic] to warrant dismissal." This is nothing more than an effort to sweep up an unidentified quantity of evidence to fill the bucket of "sufficient cause to warrant dismissal." The reference to "inefficiency," as noted above, is duplicative of Charge One, while the District has not identified what it considers "misconduct." Such vague pleadings are manifestly unfair to the Respondent and must be stricken.

In sum, the entirety of Charge Two is dismissed.

AWARD

The District has established Charge I with respect to academic years 2014-2015 and 2015-2016. Accordingly, Respondent's dismissal for inefficiency is upheld. The remaining charges are dismissed.

Ruth Moscovitch

Ruth Moscovitch, Arbitrator

Date: March 30, 2017

ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On March 30 2017, RUTH MOSCOVITCH, whom I know, came before me and acknowledged that she executed the foregoing as and for her Opinion and Award in the above-captioned matter.

John P. Anderson

Notary Public
My Commission expires 1/7/20

JOHN P. ANDERSON
Notary Public, State of New York
No. 01AN6180053
Qualified in New York County
Commission Expires January 7, 2020

101-17

IN THE MATTER OF THE SUSPENSION OF THE	:	
CERTIFICATE(S) OF CHAE HYUK IM,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP OF	:	DECISION
WAYNE, PASSAIC COUNTY.	:	

SYNOPSIS

Petitioning Board sought an order suspending respondent's teaching certificate for a period of one year pursuant to *N.J.S.A.* 18A:28-8 for voluntarily leaving his tenured position as a high school chemistry teacher with less than a 60-day notice to pursue a career with the Federal Bureau of Investigation (FBI). The ALJ issued a Partial Order on Summary Decision in May 2016 finding the respondent guilty of unprofessional conduct, which Order was adopted by the Commissioner in a decision dated June 30, 2016. The matter herein involves a determination on the penalty for such conduct. Respondent contended that the Board denied his request for a leave of absence to complete his FBI training, and he therefore had no alternative but to resign immediately because he could not delay the start of training. Respondent argued that an unprofessional conduct finding and any resulting action suspending his certificate would have an adverse effect on his ability to carry out his duties as an FBI agent because the Department of Justice's stated policy of disclosure to prosecutors of potential impeachment information could preclude his future ability to function as a witness.

The ALJ found, *inter alia*, that: respondent is currently employed as a special agent by the FBI; initially, respondent had requested and been approved for a one year leave of absence for the 2014-2015 school year to enable him to pursue training as an FBI agent; however, respondent failed the required physical fitness test prior to the start of the school year and informed the Board that he would be starting the 2014-2015 school year as usual; subsequently, respondent was unexpectedly offered opportunities to enter later training classes, contingent on passing the fitness test; respondent opted to take the fitness test again in October 2014, passed it, and was accepted to begin FBI training on October 19, 2014; respondent again requested a one year leave of absence from the Board, which was denied because the school year was already in session and respondent was teaching four high school chemistry classes; respondent submitted a letter of resignation and informed fellow staff that he was leaving behind his teaching materials for use by whoever was assigned to take over his classes, and left his teaching assignment on incredibly short notice; respondent made his decision based on his own self-interest; the school district did not suffer financial harm due to respondent's departure, but the continuity of teaching was disrupted; and that disruption was somewhat mitigated by the fact that seasoned teachers in the Board's employ were able to take over many of respondent's responsibilities until a permanent replacement could be found. The ALJ concluded that, given the mitigating factors, a six-month suspension of respondent's certificate was warranted. Accordingly, the ALJ ordered Mr. Im's certificate suspended for a period of six months.

Upon review, the Commissioner found that the circumstances herein do not dictate a penalty less than the general imposition of a one-year suspension of respondent's teaching certificate. Accordingly, the Commissioner rejected the ALJ's conclusion that a lesser penalty is appropriate, and ordered the suspension of respondent's certificate for the period of one year from the date of this decision – a copy of which has been forwarded to the State Board of Examiners for the purpose of effectuating same.

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

Issued 4/06/17

suspend the teaching staff member's certificate for a period of up to one year for failure to comply with its provisions.[2] It is well recognized that "[t]he obvious purpose of *N.J.S.A.* 18A:26-10 [and *N.J.S.A.* 18A:28-8] is to provide notice to the school so that a suitable replacement can be hired without adversely impacting students." *Penns Grove-Carneys Point Board of Education v. Regina Leinen*, 94 *N.J.A.R.* 2d (EDU) 405, 407 (citations omitted). In the instant matter, it is undisputed that respondent resigned without providing the requisite notice to the Board. It is similarly uncontroverted that the Board refused to release respondent from his 60-day obligation.

The decision to suspend a teaching certificate pursuant to *N.J.S.A.* 18A:28-8 is discretionary and the Commissioner has historically evaluated all attendant circumstances on a case-by-case basis. As a general rule, however, given the underlying purpose of the statute, teachers who have been found guilty of unprofessional conduct for failing to provide the requisite 60-day notice receive a one-year certificate suspension. The one year suspension is routinely issued where the facts demonstrate that individuals have violated the 60-day notice requirement for strictly personal reasons, putting their own self-interest above the interests of students and their professional obligation to provide adequate notice to the board. *See, e.g. East Amwell Township Board of Education v. Patricia Acken*, 1986 *S.L.D.* 2803; *In the Matter of the Suspension of the Teaching Certificate of Vincent Montalbano, School District of Ridgefield Park Township, Bergen County*, Commissioner Decision No. 186-01, decided June 11, 2001; *In the Matter of the Suspension of the Teaching Certificate of Mary Elizabeth Farran, School District of the Chathams, Morris County*, Commissioner Decision No. 308-05, decided March 29, 2005; *In the Matter of the Suspension of the Teaching Certificate of Mary Savino, Rahway Board of Education, Union County*, Commissioner Decision No. 305-05, decided August 30, 2005; *In the Matter of the Suspension of the Teaching Certificate of Maximilian Capshaw, Upper Freehold Regional School District, Monmouth County*, Commissioner Decision No. 225-07, decided June 12, 2007.

[2] It is noted that *N.J.S.A.* 18A:26-10 is a companion statute applicable to non-tenured teaching staff members.

July 2014 to pursue a position with the FBI, however – because the respondent failed his physical fitness test in August – he could not start the FBI training that was scheduled for September 2014.

Shortly thereafter, and before the school year commenced, the respondent was offered a chance to begin a FBI training class in October 2014 – on the condition that he pass the September 2014 fitness test. This time, the respondent choose not to take the test for personal reasons and instead began teaching as usual at the beginning of the 2014-2015 school year. The respondent ultimately passed the fitness test in October 2014, at which point he again requested a one-year leave of absence; the Board denied this request on October 17, 2014. The respondent then submitted his resignation, dated October 15, 2014. All of respondent's decisions in connection with his effort to secure a position with the FBI were made for the respondent's own personal gain, and with his own best interests in mind – without consideration for his professional obligation to the Board and to his students.

The Commissioner recognizes the respondent's goal of becoming an FBI agent and his concern that if he did not begin training in October 2014, he may have missed out on his opportunity. However, there is no question that respondent violated the statute, and his departure resulted in a disruption to his classes – which is the very consequence that the statute seeks to minimize when a teacher resigns from a school district. Nor should it be overlooked that the Board originally granted the respondent a one-year leave of absence when he made the request prior to the start of the 2014-2015 school year; it was only because of respondent's own actions, *i.e.* failing the August 2014 physical fitness test and deciding not to take the test again in September 2014, that respondent declined the proffered leave of absence and began teaching at the beginning of the 2014-2015 school year. Further, the circumstances here are not analogous to several cases where a lesser penalty was imposed, because in this case there was not a replacement teacher available to ensure a smooth transition and to minimize the impact on students. *See, e.g. Mooney, supra,*; *Rogers*, *supra*, and *Burgess*, *supra.* Additionally, resigning without providing the requisite notice to seek an alternate career is not akin to resigning without the requisite notice because of a debilitating heath issue. *See, Borden*, *supra.*

were suspended because of his unprofessional conduct is not a compelling mitigating circumstance, especially coupled with the fact that his unprofessional conduct was self-serving and adversely impacted his students. Therefore, the Commissioner is not compelled to exercise her discretion by ordering an exception to the customary one-year suspension.

Accordingly, pursuant to *N.J.S.A.* 18A:28-8, the respondent's teaching certificates are hereby suspended for a period of one year, effective upon the date of this decision. A copy of this decision is being forwarded to the State Board of Examiners for the purpose of effectuating this decision.

IT IS SO ORDERED.[8]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/06/17

Date of Mailing: 4/06/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01019-15
AGENCY DKT. NO. 357-12/14

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF CHAE HYUK IM, SCHOOL DISTRICT OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY.

Christine Bernacki Smith, Esq., for petitioner Wayne Board of Education (Machado Law Group, attorneys)

Louis P. Bucceri, Esq., for respondent Chae Hyuk Im (Bucceri & Pincus, Esqs., attorneys)

Record Closed: December 6, 2016 Decided: February 24, 2017

BEFORE **CAROL I. COHEN**, ALJ:

STATEMENT OF THE CASE

Petitioner, the Board of Education of the Township of Wayne (the Board), seeks an order suspending the respondent's teaching certificate for a period of one year, contending that he resigned from his teaching position with inadequate notice. Respondent, Chae Hyuk Im, replies that he resigned because he was appointed as a Federal Bureau of Investigation (FBI) agent and had to begin his training immediately.

When he asked the Board for a leave of absence, it denied his request. He therefore had no alternative but to resign immediately.

PROCEDURAL HISTORY

On December 1, 2014, at the request of the Board, the Commissioner of Education (the Commissioner) entered an Order directing Im to show cause why his teaching certificate should not be suspended for unprofessional conduct, pursuant to N.J.S.A. 18A:28-8. Im filed a pro se answer on December 29, 2014. On January 21, 2015, the Commissioner transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On February 6, 2015, the matter was assigned to Judge Irene Jones. On August 13, 2015, the petitioner filed a motion for summary decision. On September 3, 2015, the respondent filed his responsive brief. On September 10, 2015, the petitioner filed a reply brief. On April 4, 2016, this matter was transferred to the undersigned. On May 11, 2016, I issued an oral decision from the bench granting partial summary decision to petitioner on the issue of unprofessional conduct. Questions of fact remained that required testimony on the issue of mitigation. On May 18, 2016, I issued Partial Summary Decision.

On May 17, 2016, Im filed a request for interlocutory review of the oral decision. On May 27, 2016, the Commissioner declined to hear an application for interlocutory review of the partial summary decision Order. On June 30, 2016, the Commissioner issued a decision in which he concurred with the administrative law judge that the respondent was guilty of unprofessional conduct pursuant to N.J.S.A. 18A:28-8. On July 15, 2016, Im filed a Notice of Appeal with the New Jersey Superior Court, Appellate Division. On September 2, 2016, the Appellate Division declined to hear the interlocutory appeal. Testimony on the issue of penalty was heard at the OAL on November 17, 2016, and counsel submitted their summation briefs on December 6, 2016. The record closed that day.

Due to unforeseen family medical reasons, the undersigned submitted to Acting Director Laura Sanders a request to extend the time to file the initial decision. The

Extension was granted allowing for the initial decision to be extended until March 6, 2017.

ISSUE

What penalty should be imposed for Im's failure to give sixty days' notice prior to his leaving his teaching position?

TESTIMONY

For the Board

Two witnesses testified for the Board, Mark Toback, the superintendent of schools, and Kenneth Palczewski, the principal of Wayne Valley High School, where Mr. Im had taught prior to his departure.

Mark Toback testified that he had become Superintendent in August 2014. He was aware that Mr. Im had made a request for leave prior to the Superintendent's arrival in the District. The request had been discussed at the committee level, but then was withdrawn. J-8 was the Board Committee report dated August 5, 2014. It stated that Mr. Im was requesting leave in order to go to the FBI, but he was not sure if he could successfully complete the program. Therefore, he wanted to take a leave of absence from his teaching position. The Report said that it was agreed that Mr. Im was an excellent teacher and it would be prudent to allow him the year to determine if he wanted to make the career change. The Superintendent said that he was aware of the prior request. Mr. Toback said that he had a meeting with Mr. Im in mid-October 2014, at which time respondent wanted to discuss requesting a leave in order to take a position with the FBI. Mr. Toback said that he advised Mr. Im of the sixty-day requirement under the statute, but Im said that he would be leaving the District under any circumstance. Mr. Im did not volunteer to find a replacement and he did not say that he was leaving materials for a replacement teacher, or that he would notify his fellow teachers that he was leaving. Also, Im did not discuss any student issues with

Mr. Toback. However, Mr. Toback said that these issues were usually dealt with by the school principal.

The superintendent said that the second leave request was discussed by the Board but denied because of concerns about finding a replacement for a chemistry teacher and the fact that they would be setting a pattern if other teachers sought leave in order to explore other career options. Superintendent Toback stated that it was especially difficult to find chemistry teachers because there was a lot of competition from private industry. It was even harder to find a quality replacement mid-year because a permanent position was uncertain and tenure could not accrue right away. When questioned why he had referred the matter to the Department of Education, he said that he was not sending a message of punishment, but rather was just following the law.

Kenneth Palczewski was the principal of Wayne Valley High School for four years. He said that prior to his October 2014 request for leave, Mr. Im had discussed the fact that he might have an opportunity to join the FBI, and if he got it, he would take it. Mr. Palczewski told Im that if he did leave, it would be the principal's responsibility to cover the classes,[1] and Mr. Im should follow the career path for which he had a passion. Mr. Palczewski said that he did not advertise for a replacement for Mr. Im in August, because the District did not advertise for positions until they were actually available. The principal said that after Mr. Im left he looked for opportunities to cover his classes. He used in-house staff and a substitute teacher, who was a retired science teacher, whom he knew.[2] Mr. Palczewski did not recall Mr. Im offering to find a replacement teacher for him. Nor did he recall Mr. Im telling him that he had left materials for the classes. He also did not think that Mr. Im talked to him about any concerns he had with any students. The District advertised for a replacement for Im in October and hired someone, who was a friend of another teacher, in November. However, this teacher could not begin teaching the chemistry classes until January, because he had to give his district sufficient notice.

[1] According to Mr. Palczewski, Mr. Im taught four classes, with approximately twenty to twenty-four students per class.

[2] He did not know if the substitute was specifically trained in chemistry.

Mr. Palczewski said that it is hard to find chemistry replacements because people trained in this field often work in non-educational settings. Also, it is hard to find substitute teachers who have the proper certification. When asked if there were any problems caused as a result of Mr. Im's leaving, he said that some parents complained that the level of instruction of the substitute teacher was not equal to that of the regular teachers, who took on extra classes to cover Mr. Im's classes. He said that he had to speak to the substitute teacher about the situation, and he made sure that the substitute spoke to other staff members to improve his teaching methods. In addition, Mr. Palczewski said that while they were able to cover all the classes with in-house staff and a substitute, because of the schedule conflicts for the chemistry labs, the students might have had three to four different teachers during the period from October through December 2014.

For Im

Chae Hyuk Im testified that he always wanted to help people. In college he looked into a number of science-oriented courses and then decided to become a teacher. He worked in the Wayne school system and became tenured. In 2011 a college friend said he had applied for a position at the FBI, and Im began thinking about pursuing a new career. He described a rigorous FBI application process, which he was initially able to pass. He stated that he had informed his immediate supervisors and the local union president of the progress of the application process. However, in 2011 he suffered two herniated discs that sidelined him from taking the physical-fitness portion of his testing. Then, as a result of government sequestration, there was a freeze on all job hiring. This remained in effect until 2014, when his application was reactivated. Mr. Im was informed that he would be considered for the July 2014 entry class. It was at that time that he submitted his leave request. He stated that he asked for leave because he did not know if the career change would suit him and if he would complete the training process. He wanted to leave his options open. In August 2014 he was informed that he had failed the physical portion of the job requirement. That is when he told the Board of Education that he would not be taking a leave. The next physical test was scheduled for September 11, 2014. However, he decided not to take that test, because he did not

think that his body would be in the proper condition to pass the test. If he did not pass, he would have had to wait one full year to take another physical exam. Then, in September 2014 he was informed that another physical-fitness exam would be conducted in October. Mr. Im explained the situation to the building principal, the science supervisor, and someone in Human Resources (HR). He said that they wished him good luck and asked that he keep them abreast of the situation. Mr. Im took the physical and was told that he had passed on October 9, 2014. He was told that he had to arrive for training at Quantico on October 19, 2014. He said that on October 9 he informed the principal, someone from HR, and the science vice principal of the results of the test and that he would be leaving to start training. He said that he asked how his classes would be handled, and that Mr. Palczewski wished him good luck and told him that he should not worry, because it was the principal's job to find a teacher replacement, and that he should get his personal life in order. He got the same reaction from HR and the science vice principal. Mr. Im's last day of teaching was October 17, 2014. Mr. Im was informed by either the HR person or his union president that his leave request was denied by the Board.

Mr. Im said that he spoke to his FBI mentor to question him about whether he could wait to start at the Academy. His mentor said that he should not decline the appointment because there was no guarantee that he would get another entry date, and that his failure to begin the Academy at once could be taken as a sign of lack of dedication.

Mr. Im testified as to how he felt he had mitigated the harm done to the students by his leaving early. He said that it was the practice of the Chemistry Department to have weekly meetings. The people in the department knew how to proceed if an emergency developed. The teachers would take over for each other. He said that over the course of his teaching career he had compiled worksheets for his students and had teacher notes. In 2008 he put these notes into binders. During the weekly meetings he would discuss the information in the binders. Since he did not have a classroom of his own, he would bring the binders to the different rooms he taught in. Therefore, the other chemistry teachers were aware of the binders. He explained that the CD of his notes for class (J-15) was organized by chapter. Mr. Im left all of his teaching notes.

Presumably he would not need them because he would be following a different career path. Before he left he spoke to Linda Wills, who had been his in-class support teacher, about these notes.[3] He said that sometime before he left, he mentioned to Ms. Potts, a biology teacher, that he had left chemistry binders in the office for use by the teachers. He also talked to Diane Marturano, a primary chemistry teacher, about the notes. However, neither Ms. Wills nor Ms. Potts was teaching the same chemistry courses as Mr. Im was teaching at the time of his departure. Mr. Im stated that he did not know who was going to be replacing him when he left. However, he knew that three of the teachers who filled in for him had many years of experience and had taught the same or different levels of the classes that he had been teaching, and the substitute teacher was a retired science teacher. He stated on cross-examination that he had proposed a potential replacement teacher, but she was not hired.[4]

Mr. Im stated that he did have contact with some of the students after he left because they had asked him to write letters of recommendation for college, which he did provide.

Mr. Im testified that in his present position as a special agent for the FBI, he earned $55,000 during his first year of employment. Now that he is working in the New York area, there has been a salary adjustment and he earns $62,000 per year. Before he joined the FBI he was a tenured teacher in Wayne and earned about the same as what he is earning now. However, the salary at the school district included health benefits, which were not included at the FBI.

Mr. Im said that he informed the FBI that charges had been filed against him by the District. They said that he should keep them informed, and that if the ruling of unprofessional conduct were sustained, then any time he was working on a case that went to trial he would have to notify the assistant U.S. attorney, so that they could disclose the information to the defense. Mr. Im said that the people he spoke to at the FBI did not know of the specific unprofessional conduct, but if he were unable to testify

[3] At the time of Im's departure, Ms. Wills was teaching lower-level chemistry courses.

[4] It was pointed out that prior to this testimony, Mr. Im had never mentioned in discovery that he had proposed a potential replacement.

as a criminal investigator, then he would be switched to an analyst role as a special agent. Mr. Im said that the people he spoke to at the FBI referred him to the policy annunciated in Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

Diane Marturano was a longtime chemistry teacher in the District. She said that she knew Mr. Im since 2005. She stated that chemistry teachers were a close-knit group, who met at least one time per week to discuss issues and curriculum. They gave common mid-terms and finals. The teachers agreed on the same labs that would be done by each of the classes. She said that she learned a few days before his departure that Mr. Im would be leaving. Mr. Im was teaching high-level chemistry classes that year, and she was also teaching high-level and AP chemistry. She said she knew that all of Mr. Im's notes had always been kept and were available in the chemistry office. She did not use his materials because she had been a teacher for a long time and actually had given him some of her materials. She recalled telling the other teachers that Mr. Im had left his binders in the chemistry office. She stated that Mr. Im's leaving was not a problem because there was a common curriculum for chemistry and the teachers had access to Mr. Im's materials. When the new teacher came in to replace Mr. Im in January, she did not hear any complaints that the children from Mr. Im's class were behind. She was the senior teacher, and no one came to her with concerns about the students or their learning after Mr. Im left. When asked whether she felt that it was disruptive to have a teacher leave mid-term, she said that there are adjustments when there is a new relationship, but if you spend a day or two and have the students express their concerns and reassure them that even though there is a different teacher they will get the same education, this will allay their fears and they can move on. She felt that, in fact, it would have been more difficult for the students if Mr. Im had waited the sixty days and then left, because they would have established a stronger relationship with him.

FINDINGS OF FACT

The parties stipulated to the following **FACTS**:

1. Im was employed by the Board from September 2005 into October 2014 as a chemistry teacher. He has standard teaching certifications in physical science and biological science. (J-1.) He was recommended for tenure as a teacher (J-2) and became tenured in September 2008. His individual contracts for 2006–07, 2007–08 and 2008–09 are attached as J-3, J-4 and J-5.

2. Im is currently employed as a special agent by the FBI.

3. Im is a naturalized citizen who has resided in this country since the age of three. His application to the FBI was first submitted in 2011. The application was inactive for several years during a period of federal hiring freezes. On May 15, 2014, Im received a letter from the Board stating his salary for the 2014–15 school year. In that letter he was also informed that if he should have reason to believe he would be unable to serve for the 2014–15 school year he should inform the District immediately. (J-6.)

4. Part of the FBI application process involved a background investigation and a physical fitness test (PFT). Around May 2014, agents of the FBI contacted both his high school (Wayne Valley High School) and the District (Wayne Board of Education) as part of his background investigation. The administration at building level and district level were aware of the application process at that time. At that time there was a different superintendent of schools. The new superintendent, Dr. Mark Toback, took over on or about August 11, 2014.

5. In July 2014 Im was informed that he was listed for a September 2014 training start date—the last such date in the federal fiscal year (October–September). In anticipation of entering the Academy he wrote a letter to the Board on July 23, 2014, requesting a one-year leave of absence. (J-7.) The Board and superintendent agreed to grant the leave, if it was needed. (J-8.)

6. On August 7, 2014, Im had his pre-training PFT. If he had passed, he would have begun to serve in September 2014, the September FBI class training date.

7. Im did not pass the PFT, and was removed from the September training start date.

8. As a result of the test failure, Im advised the Board's administration that he would be starting the 2014–15 school year as usual.

9. Later in August 2014, Im was informed that he was unexpectedly added to the roster for the first training class of the new fiscal year (October 2014), but this was contingent on retaking and passing the PFT.

10. Failing the PFT a second time requires a mandatory one-year wait time before a new application can be processed. (J-9.) Im decided not to take the September PFT and to wait for the October PFT because he did not have time to train sufficiently to pass the September fitness test. (J-10; J-11.)

11. In or about September 2014 Im informed his building administrators and the HR department of the District that there was a new possibility of his entering the FBI Academy for training in October 2014. He approached the superintendent about seeking a one-year leave because he wanted to preserve the opportunity to return to Wayne Valley High School in 2015–16 if he failed to qualify for the FBI. The new superintendent said that it would not be likely that a one-year leave would be granted since the school year had already started.

12. On October 9, 2014, Im again took the pre-training PFT and was told that day that he had passed. This was later confirmed in writing under date of October 10, 2014. (J-12.) On the afternoon of October 9 Im drove from the PFT to Wayne Valley High School and the Wayne Board office to inform them that, with the passing of the PFT, he was expected at the Academy on October 19. Mr. Im was given a "Rice" notice on October 9, 2014, stating that the terms of his employment might be discussed in

executive session at the Board meeting on October 16, 2014. (J-13.) The Board of Education had its meeting on October 16, 2014.

13. Mr. Im learned the next day, October 17, 2014, that he was definitively denied a one-year leave by the Board. Im submitted his letter of resignation, which he had prepared and signed on October 15, 2014. (J-14.)

14. At the time of his resignation Im was teaching four sections of high-school chemistry.

15. As part of his teaching process throughout his employment at Wayne Valley High School he had been compiling binders of documents which included class-procedure lists, chemistry worksheets and handouts for student use, quizzes linked to textbook chapters, lab-equipment sign-out sheets, and other materials. These items had been collected and supplemented and updated by Im, with contributions from other teachers, continuously since approximately 2006. (J-15.)

16. At the time of his departure from the District on October 17, 2014, Im was not aware of which teachers would take over his classes. He advised Diane Marturano of the fact that his materials in the binders and on a thumb drive would be left behind for use by whoever was assigned.

17. The classes taught by Im were taken over by currently employed staff members in the Wayne School District's science department, namely, Diane Marturano, Katherine Cofer, Katie Poremba, and Fred Vafaie, who were paid a contractually specified stipend for accepting an extra period in addition to their current class schedule. Al Ruffini, a per-diem substitute, was also hired to cover Mr. Im's classes. This form of coverage continued until a replacement teacher, Thomas Villa, began teaching in January 2015. (J-16.)

18. Due to their work covering Mr. Im's classes, Katherine Cofer was paid $456.08; Diane Marturano was paid $2,280.32; Katie Poremba was paid $2,487.89; and Fred Vafaie was paid $310.95. Al Ruffini was paid $100.00 per day to teach one of

respondent's classes. For forty days of coverage, the cost of the per-diem substitute was $4,000.00 before taxes.

19. Had Mr. Im given the District sixty days' notice prior to his resignation, that notice period would have expired on December 20, 2014. The costs expended by the Board to replace him during the sixty-day period were less than the amount the Board would have expended in providing salary and benefits to Mr. Im if he had worked during that same period.

20. At the next Board meeting, November 13, 2014, Mr. Im's resignation was formally accepted for the effective date of October 17, 2014. The teachers covering his classes were also approved for their additional stipend with an effective date of October 20, 2014. Further, at that meeting, Mr. Im's replacement, Thomas Villa, was approved for hire, with a start date of January 19, 2015, or sooner. (J-17.)

21. Attached are true copies of Im's annual teaching evaluations from the Wayne School District from 2007–08 through 2012–13, and two 2013 observations. (J-18 through J-23; J-24; J-25.)

22. Attached is a true copy of Wayne District Policy #3141, "Resignation." (J-26.)

LEGAL ARGUMENTS

Arguments of the Board

Wayne argued that Mr. Im should receive a penalty of a full year's suspension. It cited the decision in In re Teaching Certificate of Capshaw, EDU 12318-06, Comm'r (June 12, 2007), <http://njlaw.rutgers.edu/collections/oal/>, in which the Commissioner stated:

> the Commissioner has historically evaluated all attendant circumstances specific to each case. As a general rule,

> however, given the underlying purpose of the statute, this evaluation—with *rare* exception—has resulted in suspension of any and all certificates for the maximum one-year period, particularly where the facts demonstrate that individuals have violated the 60-day notice requirement for strictly personal reasons, putting their own self interest above the interests of students and their professional obligation to provide adequate notice to the Board.

The District pointed out that Im had been looking for other employment since 2011, but had not given the Board notice until 2014. It argued that to decide that certain jobs are more worthy of exemption from the statute (i.e., FBI agent) than others is a slippery slope. Not to impose a suspension would remove any power or security of the District to maintain teaching operations and would render the statute on sixty days' notice meaningless. It would eviscerate any ability of the Board to ensure that teachers give the requisite notice. The statute was designed to protect students from unnecessary disruption caused by an abrupt resignation and departure. Wayne pointed out that in In re Certificate of Montalbano, EDU 3588-00, Initial Decision (April 24, 2001), adopted, Comm'r (June 11, 2001), <http://njlaw.rutgers.edu/collections/oal/>, a one-year suspension was imposed on a teacher who left after twelve days' notice to become a police officer. The teacher tried to make a schedule of coverage and discussed classroom duties with the replacement teachers; he completed the marking-period grades; and he sent notice of an opening to surrounding colleges. Still, the Commissioner saw fit to impose the full penalty. This was based on the disruption to the students caused by his departure.

The Board distinguished Board of Education of Clinton v. Burgess, 1983 S.L.D. 183, by pointing out that in that matter, the board failed to fulfill its promise to hire an immediate replacement when there was one available. It also distinguished Board of Education of Black Horse Pike Regional v. Mooney, 1984 S.L.D. 810, where the Board had secured a replacement at the time of the respondent's departure from the district.

The District asserted that it was the District, rather than the respondent, who mitigated the damages. The respondent chose to start the school year because he failed the FBI physical. Mr. Im chose to wait until October to retake the physical, rather

than September, because he thought he would be more physically ready to pass. The assertion that he left his teaching materials was of no moment, since he had no need for them, having left the profession. He did not find a replacement for himself, nor is it clear that he talked to the replacement teachers before he left. His assertion that the Board was on notice because of his prior request for leave was of no consequence, since he did not leave at that time. The District argued that it was the District that mitigated the damages by having the remaining teachers teach an extra course and hiring a retired substitute teacher to teach one of the chemistry sections. It was the high-school principal who managed to find a replacement for Mr. Im. However, because of the sixty-day requirement, he could not begin until January. As a result of Mr. Im's departure, the students had three to four different teachers during the period from October to January. Even the respondent's witness, Ms. Marturano, conceded that the departure of a teacher always has an impact on students.

As to the admissibility of the computer printout from the U.S. Department of Justice website that Im has sought to introduce into evidence, "9-5.100—Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ('Giglio Policy')," the District puts forth several arguments. The District asserts that introduction of the printout would cause undue prejudice and confusion, as it is entirely irrelevant to the issue of mitigation, which is the subject of the hearing. Further, Wayne asserts that the "[r]espondent had two years to produce a case, a witness, testimony, anything to support the allegation that an adverse finding would impact his potential ability to testify on behalf of the FBI," but all it has done is to produce this printout, which is pure hearsay and irrelevant to the issue of penalty. The District distinguished Giglio v. United States, supra, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104, which was relied upon by the respondent. It pointed out that Giglio dealt with a criminal matter in which it was determined that the credibility of a witness was in question. The Government's case depended entirely on the co-conspirator's testimony and, therefore, his credibility was at issue. The printout cited by respondent states that a Government witness would have to reveal, for possible impeachment purposes:

> (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness;
>
> (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness;
>
> (c) prior inconsistent statements; and
>
> (d) information that may be used to suggest that a witness is biased.

The printout also states, "[t]his policy is not intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It is also not intended to have the force of law. United States v. Caceres, 440 U.S. 741[, 99 S. Ct. 1465, 59 L. Ed. 2d 733] (1979)."

The District argues that the only effect of the statement in the printout is that the respondent would have to disclose to the prosecutor in a case that he had failed to give appropriate notice to his prior employer when he joined the FBI. It would be pure speculation to deduce from this document that revelation of his failure to give sixty days' notice would affect Mr. Im's ability to testify.

Further, the District argued that the document should be excluded under the residuum rule. Under N.J.A.C. 1:1-15.5(b), hearsay is admissible only if there is some legally competent evidence to support each ultimate finding of fact. According to the District, the respondent has provided absolutely nothing to support his allegation that imposing a penalty on him will have any impact on his ability to perform his job as an FBI agent.

Arguments of the Respondent

The respondent countered the District's argument on the admissibility of the website printout by saying that its objection to admissibility on hearsay grounds was completely baseless. According to the respondent, the residuum rule has nothing to do with the admissibility of evidence. Rather, it relates to the circumstances under which admitted evidence can support an ultimate finding of fact. N.J.A.C. 1:1-15.5(a) gives

the judge the right to exclude hearsay evidence, it does not authorize exclusion of hearsay evidence pursuant to the residuum rule, N.J.A.C. 1:1-15.5(b). Instead a judge may exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either necessitate undue consumption of time, or create substantial danger of undue prejudice or confusion. N.J.A.C. 1:1-15-1(c). The respondent argued that since neither of these circumstances exists, the document is admissible. In addition, since the respondent testified as to the existence of the "Giglio Policy" and its impact on his ability to function in his job, the testimony serves to satisfy the residuum rule.

Further, Mr. Im argued that the policy sought to be admitted is publicly published on the Justice Department's website. As such, it would be admissible in a Superior Court proceeding because it falls within an exception to the hearsay rule. N.J.R.E. 803(c)(8) "prevents the exclusion of public records from evidence based on the Hearsay Rule." There can be no argument that the document generated from the website is not a public record. In addition, the respondent argued that the exhibit qualifies as a business record under N.J.R.E. 803(c)(6) and 801(d) and is therefore admissible under those rules as well.

Mr. Im made a number of arguments to demonstrate that it would be inappropriate to impose a penalty on him. The respondent asserted that

> the issue before this agency is NOT whether Mr. Im's mid-year departure can be shown to have caused some harm which cannot be mitigated by the circumstances of his leaving. The only issue is whether his leaving **with less than 60 days' notice** caused more harm than if he had left after 60 days, and if so, whether that harm is mitigated by the circumstances of his leaving.

Mr. Im pointed out that, contrary to the District's initial position, Wayne did not lose any money as a result of Im's departure. In fact, if one compared the cost of paying Mr. Im his salary and benefits versus paying the permanent teachers for one additional class per day and hiring one substitute, the District suffered no financial loss.

Further, the students did not suffer any detriment by the respondent leaving before sixty days, as opposed to his staying until the statutory deadline. Mr. Im asserted that there was only one complaint from a parent, and that student would have suffered more had he developed a stronger bond with the resigning teacher. Mr. Im pointed out that he left all of his teaching materials in good order, and in fact almost all the teachers did not even need the materials, since they were using their own materials to teach the chemistry courses.

As for Mr. Im, he actually lost financially by taking the position with the FBI. He also pointed out that the administrators at the school and fellow teachers supported his decision to join the FBI. The respondent questioned the superintendent's position that it was necessary to enforce the sixty-day rule because of his concern that other teachers might also leave early if there were no consequences. He asserted that leaving by teachers mid-year is rare, and that the decision to pursue charges was an unreasonable punishment by a new superintendent bent on intimidation.

Im cited Burgess, supra, 1983 S.L.D. 183, and Mooney, supra, 1984 S.L.D. 810, to support his position that sanctions should not be imposed. In Burgess no penalty was imposed even though Burgess left his teaching position to earn more money in private industry. The only distinction was that Mr. Im, because he was at Quantico, could not be available to consult with the teachers who took over for him. Im sought to distinguish Montalbano, supra, EDU 3588-00, Initial Decision (April 24, 2001), adopted, Comm'r (June 11, 2001), <http://njlaw.rutgers.edu/collections/oal/>, by saying that Montalbano could have waited until another position at the police department became available, rather than leaving without proper notice. Here, Mr. Im argued, he would have jeopardized his chance of entering any future class at the FBI training center, or sequestration could have occurred again before he got an opportunity to begin his training.

LEGAL ANALYSIS

The evidentiary rules applicable to hearings before the Office of Administrative Law are outlined at N.J.A.C. 1:1-15.1 to -15.12. N.J.A.C. 1:1-15.1, entitled "General rules," provides in pertinent part:

> (b) Evidence rulings shall be made to promote fundamental principles of fairness and justice and to aid in the ascertainment of truth.
>
> (c) Parties in contested cases shall not be bound by statutory or common law rules of evidence or any formally adopted in the New Jersey Rules of Evidence except as specifically provided in these rules. All relevant evidence is admissible except as otherwise provided herein. A judge may, in his or her discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either:
>
> 1. Necessitate undue consumption of time; or
>
> 2. Create substantial danger of undue prejudice or confusion.

N.J.A.C. 1:1-15.5, entitled "Hearsay evidence; residuum rule" provides:

> a. Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.
>
> b. Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

Therefore, the initial criterion for the admission of evidence before the Office of Administrative Law is a determination of the relevancy of the proposed evidence.

Relevant evidence is defined in the rules as meaning "evidence having any tendency in reason to prove any material fact." N.J.A.C. 1:1-2.1. "To determine relevancy, a judge must focus 'on the logical connection between the proffered evidence and a fact in issue. If the evidence offered makes the inference to be drawn more logical, then the evidence should be admitted unless otherwise excludable by a rule of law.'" State v. Goodman, 415 N.J. Super. 210, 225 (App. Div. 2010) (citation omitted). However, although all relevant evidence is admissible, relevant evidence may be excluded if its probative value is substantially outweighed by the risk that its admission will either (1) necessitate undue consumption of time or (2) create the danger of undue prejudice or confusion. N.J.A.C. 1:1-15.1(c). Moreover, although hearsay evidence is admissible before the Office of Administrative Law, there must be some legally competent evidence to support each ultimate finding of fact. N.J.A.C. 1:1-15.5(b); DeBartolomeis v. Bd. of Review, 341 N.J. Super. 80 (App. Div. 2001). The underlying rationale of the rule is that an administrative determination should "not rest upon evidence which the unsuccessful party was *incapable* of impeaching or rebutting." In re Application of Howard Sav. Bank, 143 N.J. Super. 1, 8–9 (App. Div. 1976).

Petitioner objects to the admission of the Giglio Policy into evidence because it avers that its admission would cause undue prejudice and confusion, as it is entirely irrelevant to the issues of mitigation, and because it contends that the document has no foundation and is completely speculative. Respondent, on the other hand, avers that the petitioner's objection to the admissibility of the Giglio Policy on hearsay grounds is completely baseless. Respondent argues that admitting the Giglio Policy would not result in any undue consumption of time and there is nothing prejudicial or confusing about it. Respondent seeks its admission as evidence of the impact that an adverse sanction ruling would have on his duties as an FBI agent. Respondent also avers that the Giglio Policy is a policy of the Justice Department that is publicly published on its website. As such, respondent argues that the document falls within the accepted public-records exception to the hearsay rule pursuant to N.J.R.E. 803(c)(6) and (8).

Initially, it is important to recognize that the question of relevancy must be distinguished from that of sufficiency and weight. Evidence, though weak, may be relevant if it tends to prove the issue. The purpose of the hearing is to give the

respondent a full opportunity to present evidence of mitigation to determine whether a certificate suspension is appropriate. Respondent asserts that the Giglio Policy should be admitted and relied upon (together with other evidence, such as his testimony) as evidence of the impact that an adverse sanction ruling will have on his duties as an FBI agent. Petitioner objects to its admission based upon its claim that the Giglio Policy is irrelevant on the issue of mitigation. Petitioner's position fails to recognize that the impact a disciplinary action has on a teacher's career has been held to be a valid consideration in determining the proper penalty to be imposed when disciplining teachers. Although it concerned a tenured teacher that was appealing his dismissal for conduct unbecoming a teacher, the Appellate Division's admonition to the Commissioner regarding the penalty warranted by the teacher's actions in In re Tenure Hearing of Fulcomer, 93 N.J. Super. 404 (App. Div. 1967), is germane to the present matter. The court stated:

> We hold no brief for the teacher's conduct in this case. . . .
>
> Although such conduct [restraining a student] certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances. . . . **However, consideration should be given to the impact of the penalty on appellant's teaching career, including the difficulty which would confront him, as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in this State** . . . .
>
> . . . We observe that the local board recognized that Fulcomer's teaching record was good and his teaching ability unquestioned. He had not been disciplined in any manner by the board prior to the date of the incidents involved in these charges, and he had consistently received pay raises each year.
>
> The matter is therefore remanded to the Commissioner of Education for the purpose of making an affirmative decision as to the proper penalty to be imposed. Such penalty should be based upon the Commissioner's findings as to the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the teacher's conduct may have had

> on the maintenance of discipline and the proper administration of the school system.
>
> [Fulcomer, 93 N.J. Super. at 421–22 (citation omitted) (emphasis added).]

Therefore, the issue presented by respondent's attempt to introduce the Giglio Policy into evidence is not one of relevance, but instead one of the sufficiency and weight to be accorded the policy. This issue is related to petitioner's objection to the admission of the Giglio Policy based upon its claim that it is hearsay. Respondent argues that petitioner's objection on hearsay grounds is completely baseless. He argues that the document falls within the accepted public-records exception to the hearsay rule pursuant to N.J.R.E. 803(c)(6) and (8).

As defined by the New Jersey Rules of Evidence, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801. Respondent argues that the Giglio Policy should be admitted as evidence of the impact that an adverse sanction ruling will have on his duties as an FBI agent.

N.J.R.E. 803(c)(6) provides that the following statements are not excluded by the hearsay rule, whether or not the declarant is available as a witness:

> **Records of regularly conducted activity.** --A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

And N.J.R.E. 803(c)(8) provides that the following statements are not excluded by the hearsay rule, whether or not the declarant is available as a witness:

> **Public records, reports, and findings.** --Subject to Rule 807, (A) a statement contained in a writing made by a public official of an act done by the official or an act, condition, or event observed by the official if it was within the scope of the official's duty either to perform the act reported or to observe the act, condition, or event reported and to make the written statement, or (B) statistical findings of a public official based upon a report of or an investigation of acts, conditions, or events, if it was within the scope of the official's duty to make such statistical findings, unless the sources of information or other circumstances indicate that such statistical findings are not trustworthy.

The Giglio Policy was adopted by the Justice Department in the regular course of its business. The Rules of Evidence provide that a "business includes activities of governmental agencies." N.J.R.E. 801(d). Both N.J.R.E. 803(c)(6) and (8) are "intended to cover admissibility of documents that are objectively reliable, were not prepared for a specific defendant, and have a sufficient guarantee of trustworthiness. State v. Hix, No. A-4616-05 (App. Div. May 29, 2009), <https://njlaw.rutgers.edu/collections/courts/>. Under both N.J.R.E. 803(6) and (8), any objection to the admissibility of a business or public record must be supported by some evidence that the record is not trustworthy. Ibid. Petitioner contends that the document has no foundation. However, pursuant to N.J.R.E. 902, extrinsic evidence of authenticity as a condition precedent to admissibility is not required of official publications, books, pamphlets, or other publications "purporting to be issued by public authority." N.J.R.E. 902(e). Because the Giglio Policy was adopted by the Justice Department in the regular course of its business and within the scope of its duties; it was not prepared for a specific defendant; it is publicly published on its website; and petitioner is not challenging its accuracy, the Giglio Policy falls within the hearsay exceptions for public records. N.J.R.E. 803(6) and (8). And it is self-authenticating. N.J.R.E. 902(e).

CONCLUSIONS OF LAW

Petitioner objects to the admission of the Giglio Policy as being irrelevant to the issue of mitigation. The question of relevancy, however, must be distinguished from

that of sufficiency and weight. Evidence, though weak, may be relevant if it tends to prove the issue. The purpose of the hearing is to give the respondent a full opportunity to present evidence of mitigation to determine whether a certificate suspension is appropriate. Respondent seeks the policy's admission as evidence of the impact an adverse sanction ruling would have on his duties as an FBI agent. In Fulcomer, supra, 93 N.J. Super. 404, the impact a penalty would have on a teacher's career was recognized as being a valid consideration in determining the appropriate sanction. Therefore, respondent should have the opportunity to introduce the Giglio Policy on the issue of what sanction should be imposed. However, it will be accorded little weight, because respondent failed to introduce any additional evidence to buttress his assertion that the imposition of a one-year penalty will have any different effect on his ability to testify or perform his job than a shorter suspension period. The Certification of Eric Parisi, besides being hearsay, does not mention the Giglio Policy. All it states with regard to the effect that a penalty would have on Im's ability to perform his duties as an FBI agent is:

> I am advised that the suspension of Special Agent Im's teaching license would require a finding of "unprofessional" conduct. It would appear that such a consequence should be avoided in the absence of overwhelming proof of the alleged existence of truly unprofessional conduct.[5]

Mr. Im's testimony did nothing to shed light on the effect that a lesser penalty, or no penalty at all, would have on his ability to testify or to keep his job as a criminal investigator. Im testified that he was advised that under Giglio, if he had to testify in a criminal trial he would have to disclose to the government attorney that he had been found to have acted unprofessionally by leaving his job without proper notice.[6] Why a finding of "unprofessional conduct" would require him to disclose under Giglio is questionable, since it has nothing to do with credibility. But even if his testimony were to be believed, there is absolutely no evidence that a lesser penalty would impact his ability to testify or to retain his job as a criminal investigator. Therefore, there is no

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[5] The respondent did not call Agent Parisi to the stand to be questioned as to what he meant by his statement.

[6] Besides being hearsay, Mr. Im's testimony on this issue is completely self-serving.

credible evidence to substantiate the assertion that the imposition of a lesser penalty or no penalty at all would affect his ability to remain an FBI criminal investigator.

The Commissioner has discretion pursuant to N.J.S.A. 18A:28-8 to impose an appropriate sanction of up to a one-year suspension of a teacher's teaching certificate for unprofessional conduct in resigning their position without giving the required sixty days' notice.

It was clear from the testimony of the District's witnesses that, while the disruption to Mr. Im's students was not catastrophic, there were definitely consequences to his leaving early. While permanent teachers took on all but one of Mr. Im's classes, because of scheduling difficulty for labs, each student had three to four teachers from September until January.[7] While it is true, as the respondent argued, that there would have been a disruption no matter when Im left, the District would have had more time to try to find a replacement for Im and some of the disruption could have been alleviated had he waited the sixty days. In addition, at least one parent complained that the quality of the teaching of the substitute teacher was not up to the standards of the permanent teachers, and the principal had to talk to the substitute about the quality of his teaching. Mr. Im argued that he left all of his materials for the replacement teachers, and therefore credit should be given for his efforts. It appears that Mr. Im was a very capable and organized teacher. However, there was testimony that Mr. Im did not tell either the principal of the school or the replacement teachers that he had left the materials for them. While there was testimony that Mr. Im's materials were available to all the chemistry teachers, this was not due to any special effort on his part to help the teachers at the time of his precipitous departure. Rather, it was a result of his organization throughout the years. As far as his communicating with the students prior to his departure, Mr. Im said that he kept contact with some of the students because he wrote college letters of recommendation for a few of them. There was no testimony that he spoke to his classes before his departure to explain what was happening. The principal of the school, Mr. Palczewski, who was sympathetic toward Im, acknowledged that Im did not find a replacement for himself, nor did he recall Im offering to do so. A

[7] The students either had a substitute teacher or a regular teacher who took on additional classes. Also, because of scheduling, different te4achers had to fill in for the labs.

replacement was found because a newly hired teacher had a friend who decided to apply for the opening. Mr. Palczewski also testified that at the time Im left, he was not aware that the respondent had left his materials for the replacement teachers. Nor did Im talk to the principal about the students and any special needs.

N.J.S.A. 18A:26-10 provides that "[a]ny teaching staff member employed by a board of education . . . who shall, without the consent of the board . . . , cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year." See also N.J.A.C. 6A:9-17.9. The Commissioner has held that the central purpose of N.J.S.A. 18A:26-10 is "to provide notice to the school so that a suitable replacement can be hired without adversely impacting students." Penns Grove-Carneys Point Bd. of Educ. v. Leinen, 94 N.J.A.R.2d (EDU) 405, 407.

The decision to suspend a teaching certificate pursuant to N.J.S.A. 18A:26-10 is discretionary and the Commissioner has historically evaluated all circumstances specific to an individual case. As a general rule, however, with rare exception, the Commissioner has imposed suspensions for the one-year maximum period. Mooney, supra, 1984 S.L.D. at 821; In re Suspension of the Teaching Certificate of Capshaw, EDU 12318-06, Initial Decision (April 30, 2007), modified, Comm'r (June 12, 2007), <http://njlaw.rutgers.edu/collections/oal/>; East Amwell Twp. Bd. of Educ. v. Acken, 1986 S.L.D. 2803. In this matter, there are factors that weigh on both sides of the ledger. While the District had had prior notice of the possibility of Mr. Im's leaving, those notices were vitiated by his subsequent disclosure that he had failed the physical and therefore would not be leaving. As the principal pointed out, the District could not advertise to fill a position until it was actually available. While the respondent's argument that the superintendent brought the charges out of vindictiveness or an attempt to assert his own power as the new administrator may have some validity, the fact is that the statute permits the bringing of charges in situations like this one. Mr. Im left on incredibly short notice, leaving the District to scramble for replacements. While Mr. Im was free to do so, that did not mean that there were not consequences to his actions. Mr. Im could have chosen to retake the physical in September and not begin

the school year. However, he chose to wait, for his own benefit, until he felt that he would be more likely to pass. He also could have chosen to wait until the following year to take the physical. It is true that another freeze could have been instituted and he might not have been able to get the FBI job. He made the decisions he made based on his own self-interest. While it is true that the District did not suffer financial harm due to Mr. Im's departure and Mr. Im did not receive a windfall from his new job, the impact on the students also has to be considered. The purpose of the statute was to protect the students from unnecessary disruption caused by the precipitous departure of a teacher. Here, while the disruption was somewhat mitigated by the fact that seasoned teachers, who were teaching the same curriculum as Mr. Im, took his place in all but one section, there was still disruption, as Mr. Im's own witness testified. Ms. Marturano testified that she thought the disruption would have been greater for the students if Mr. Im stayed the sixty days because the students would have developed a bond with him. On the other hand, if he had stayed sixty days, it could have given the District time to make a smooth transition to a new teacher.

Mr. Im has relied on Burgess, supra, 1983 S.L.D. 183, and Mooney, supra, 1984 S.L.D. 810, for the proposition that sanctions should not be imposed. However, as the District pointed out, these cases can be distinguished from the present matter. In Burgess the school district failed to fulfill its promise to hire an immediate replacement when one was available. Similarly, in Mooney the Board had a candidate for replacement of the respondent on his anticipated release date. This case more closely mirrors Montalbano, supra, EDU 3588-00, Initial Decision (April 24, 2001), adopted, Comm'r (June 11, 2001), <http://njlaw.rutgers.edu/collections/oal/>, where a tenured teacher accepted a position with the Ridgefield Police Department and gave twelve days' notice. The respondent tried to distinguish Montalbano by saying that Montalbano could have waited sixty days and sought a position at that time. In fact, we do not know if the position would have been available for Montalbano in sixty days. Likewise, while Mr. Im might have worried that another sequestration might have arisen, there is nothing in the record to demonstrate that a sequestration was contemplated by the agency.

Weighing all of the mitigating factors, I **CONCLUDE** that a six-month suspension of the respondent's teaching certificate is warranted at this time.

ORDER

Based on the above findings of fact and conclusions of law, I **ORDER** that the respondent's teaching certificate be suspended for a period of six months.

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

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

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

February 24, 2017

DATE

Carol I. Cohen

CAROL I. COHEN, ALJ

Date Received at Agency: February 24, 2017

Date Mailed to Parties: February 24, 2017

db

APPENDIX

List of Witnesses

For Petitioner:

Mark Toback

Kenneth Palczewski

For Respondent:

Chae Im

Diane Marturano

Joint Stipulation of Facts and Exhibits

J-1 Teaching Certification of Chae Hyuk Im

J-2 Tenure Recommendation memos

J-3 2006-07 Employment contract of Im

J-4 2007-08 Employment contract of Im

J-5 2008-09 Employment contract of Im

J-6 May 15, 2014 salary notice

J-7 July 23, 2016 leave request

J-8 August 5, 2014 Board Committee report

J-9 Certification of Eric A. Parisi

J-10 August 15, 2014 email as to fitness testing

J-11 October 6, 2014 email regarding October fitness test

J-12 October 10, 2014 FBI acceptance letter

J-13 October 9, 2014 Notice of Board Meeting

J-14 October 15, 2014 resignation letter

J-15 Teaching materials on disk

J-16 Certification of Claudia Olivo

J-17 November 13, 2014 Wayne Board of Education Agenda

J-18 2007-08 annual teaching evaluation of Im

J-19 2008-09 annual teaching evaluation of Im

J-20 2009-10 annual teaching evaluation of Im

J-21 2010-11 annual teaching evaluation of Im

J-22 2011-12 annual teaching evaluation of Im

J-23 2012-13 annual teaching evaluation of Im

J-24 November 24, 2013 classroom observation of Im

J-25 December 11, 2013 classroom observation of Im

J-26 Wayne District policy 3141

IC 2-17

OAL DKT. NO. EDU 01163-17
(EDU 12760-16 ON REMAND)
(EDU 05774-16 PRIOR REMAND)
AGENCY DKT. NO. 61-2/16

J.T., ON BEHALF OF MINOR CHILDREN, J.T., A.T., AND B.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record, proposed settlement agreement and release, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's January 23, 2017 determination that the prior settlement agreement did not comply with *N.J.A.C.* 6A:3-1.13, as it was neither signed by the Board's attorney, nor contained a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf. Since the settlement agreement now contains a copy of the Board resolution approving the settlement, the Commissioner can approve the within agreement in its present form.

Additionally, the Commissioner notes that the settlement makes reference to a monthly payment intended to begin on August 15, 2016. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

Subject to the foregoing, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/06/17

Date of Mailing: 4/06/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

J.T. on behalf of minor children, J.T., A.T. and B.T.,

Petitioner,

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY

Respondent.

OAL DKT. NO. EDU 01163-17

AGENCY DKT. NO. 61-2/16

ON REMAND

OAL DKT. NO. EDU 05774-16

J.T., parent of minor children, J.T., A.T. and B.T. petitioner, pro se

Deryls Gutierrez, Esq., for respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: February 22, 2017 Decided: February 23, 2017

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

On January 25, 2017, this matter was remanded to the Office of Administrative Law (OAL) for revision of the settlement agreement pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A signed copy of the Revised Settlement Agreement and Release indicating the terms of settlement was forwarded to the undersigned on February 22, 2017 and is attached hereto.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

February 23, 2017

DATE

JEFFREY A. GERSON, ALJ

2-27-17

Date Received at Agency:

FEB 27 2017

Date Mailed to Parties:

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SETTLEMENT AGREEMENT AND RELEASE

J.T. o/b/o J.T., A.T. and B.T. v. South Brunswick Board of Education, Middlesex County,
Agency Docket No. 61-2/16
OAL Docket No.: EDU 05774-2016N

This Settlement Agreement ("Agreement") is made this ____ day of June, 2016, by and between Petitioner J.T. ("J.T.") o/b/o J.T., A.T., and B.T. ("Children"), and Respondent/Cross-Petitioner South Brunswick Board of Education ("Board") (hereinafter collectively referred to as the "Parties").

WHEREAS, on or about February 26, 2016, J.T. filed a Pro Se Residency Appeal with the Commissioner of Education, which was docketed as 61-2/16 ("Petition"), challenging the Board's August 8, 2016 determination that J.T.'s Children did not reside in South Brunswick during the 2015-16 school year; and

WHEREAS, on or about April 12, 2016, the Board filed an Answer to J.T.'s Petition and also filed a Cross-Petition for tuition costs for J.T.'s Children; and

WHEREAS, the matter was transmitted to the Office of Administrative Law for a hearing before the Honorable Jeffrey Gerson, A.L.J. on June 20, 2016, which was docketed as EDU 05774-2016N; and

WHEREAS, the Parties intend to adopt, by way of compromise, without any admission of liability, all claims which were either raised or could have been raised in the Petition and Cross-Petition ; and

NOW THEREFORE, in consideration of the foregoing and of the mutual agreements contained herein, and intending to be legally bound, the Parties agree as follows:

1. This Agreement sets forth all the terms and conditions of the Parties' agreement.
2. J.T. agrees to pay the Board a total sum of thirteen thousand dollars ($13,000.00).

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OFFICE OF ADMIN. LAW

a. Said amount shall be paid by J.T. over the course of sixty-one (61) monthly installment payments.

b. All monthly payments by J.T. shall be in the form of a check or money order made payable to the "South Brunswick School District."

c. All monthly payments shall be sent by J.T. to:

South Brunswick School District
P.O. Box. 181
Monmouth Junction, New Jersey 08852
Attention: School Business Administrator

d. The first payment by J.T. shall be in the amount of one thousand dollars ($1,000.00), and is due to the Board on or before August 15, 2016.

e. The remaining balance of twelve thousand dollars ($12,000.00) shall be paid to the Board in sixty (60) monthly installments of two hundred dollars ($200.00) each, beginning in September 2016. Each of these monthly sixty (60) payments is due to the Board on or before the 5th of each month.

f. If the initial monthly payment is not received by the Board by August 25, 2016, or if any subsequent payment is not received by the Board by the 15th of the respective month, the Board shall send J.T. a letter via certified and regular mail informing J.T. of his default of this Agreement. If J.T.'s default is not cured within five (5) days of the date of the Board's letter, the Board shall apply to the Office of Administrative Law or New Jersey Superior Court for a default judgment in the amount of thirty thousand dollars ($30,000), minus the amount already paid by J.T., if any. If it becomes necessary for the Board to seek a default judgment, J.T. agrees that the Board shall be entitled to counsel fees and costs associated with that application.

g. J.T. understands that his obligation to pay the full sum of thirteen thousand dollars ($13,000.00) in accordance with this Agreement shall remain in effect even if J.T. and/or his Children does not reside in South Brunswick.

3. J.T. has informed the Court that he is in the process of renting an apartment in South Brunswick, and that his Children will be residing with him in the South Brunswick apartment. As such, J.T. agrees to provide the Board with a copy of the fully executed lease agreement if and when he registers his Children for school in accordance with Paragraph 4.

4. J.T. understands that he is required to register his Children in the South Brunswick School District for the 2016-17 school year, provide sufficient proof of residency and comply with all Board Residency/Registration requirements and policies and student residency laws at all times.

5. In exchange for the promises set forth above, J.T. agrees to dismiss the instant Petition and the Board agrees to dismiss its Cross-Petition.

6. Additionally, J.T. agrees to and hereby releases and gives up any and all claims and rights which he may have against the Board (including any of its officers, employees, agents and representatives). This releases all claims of J.T. and his Children, including those of which J.T. is not aware and those not expressly mentioned in this Release. This Release applies to claims resulting from anything which has happened up until and through the date of execution of this Agreement by J.T.

7. The Parties agree that this Agreement, and all of its terms, are and will remain confidential to the maximum extent possible by law. J.T. is expressly forbidden from discussing this Agreement with any person, other than his accountants, tax advisers, and attorney ("permitted disclosures"), and any other individual or entity as necessary to

implement the Agreement or to which he is legally obligated to respond ("legally-required disclosures").

8. This Agreement may not be modified, altered, changed, discharged, terminated or waived, except upon express written consent of the Parties.
9. This Agreement shall not serve as a precedent for any other matter.
10. The Parties acknowledge that they have entered into this Agreement voluntarily and hereby sign it without duress or coercion, and with the opportunity to consult counsel.
11. This Agreement shall be governed by the laws of the State of New Jersey.
12. The Parties agree that this Agreement may be signed in counterparts and that facsimile of signatures will have the same force and effect as original signatures.
13. The Agreement is subject to the formal approval of the Board

PETITIONER
GIROLAMO TOMASELLI (A/K/A JERRY TOMASELLI)

By: _____

Dated: 8/31/16

RESPONDENT/CROSS-PETITIONER
SOUTH BRUNSWICK PUBLIC SCHOOLS

By: _____

Dated: 2/6/2017

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OFFICE OF ADMIN. LAW

1.17 **Approve Settlement & General Release** – That the Board of Education approve the attached Settlement Agreement and General Release between J.T. o/b/o J.T., A.T. and B.T vs. South Brunswick Board of Education – Agency Docket No. 61-2/16 – OAL Docket No.: EDU 05774-2016N.

2 PERSONNEL - Administration recommends that the following personnel items be approved:

2.1 **Accept Resignation** – That the Board of Education accept the following resignations:

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A. Resignations

Name	Assignment	Location	Effective Date
Amanda Roberts	Teacher	Crossroads South	03/24/17
Amanda Rosenberg	Director of Professional Development	Board Office	08/31/17
Janean Vivadelli	Teacher	SBHS	03/24/17

B. For the Purpose of Retirement

Name	Assignment	Location	Effective Date
Robert Andreotta	Teacher	Crossroads South	03/01/17

Yes: Mr. Harry J. Delgado, Dr. Stephen F. Parker, Mr. Martin Abschutz, Mrs. Azra Baig, Mr. Barry Nathanson, Mr. Deven M. Patel, Mr. Patrick Del Piano, Mr. Arthur Robinson and Mr. Peter St. Vincent

No: None

Abstentions: None

CERTIFICATION THAT THIS IS A TRUE EXCERPT OF THE MINUTES OF THE SOUTH BRUNSWICK BOARD OF EDUCATION MEETING HELD ON 2/6/17

THADDEUS THOMPSON
BUSINESS ADMINISTRATOR/
BOARD SECRETARY

103-17L

103-17

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

April 7, 2017

Mark A. Tabakin, Esq.
Weiner Law Group, LLP
629 Parsippany Road
P.O. Box 0438
Parsippany, New Jersey 07054

Kerri A. Wright, Esq.
Porzio Bromberg & Newman P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, New Jersey 07962-1997

Re: *Board of Education of the City of Englewood, Bergen County v. Board of Education of the Borough of Englewood Cliffs, Bergen County, Agency Docket No. 31-2/17.*

Dear Counsel:

I have reviewed the Petition for Declaratory Ruling in the above-captioned matter, together with the respondent's purported answer to the petition. Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that this matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq*.

Accordingly, petitioner's request for declaratory ruling is declined; this matter shall be transmitted forthwith to the Office of Administrative Law.

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

KH/MKD/JKH

11-4-17

CAPEHART & SCATCHARD, P.A.
142 West State Street
Trenton, New Jersey 08608
609.394.2400
BY: William R. Burns
Attorney Identification Number 018892001
ATTORNEYS FOR BURLINGTON COUNTY INSTITUTE OF TECHNOLOGY

IN THE MATTER FO THE TENURE HEARING OF JUDITH EVANS, BURLINGTON COUNTY INSTITUTE OF TECHNOLOGY, BURLINGTON COUNTY	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION Agency Docket Number: 318-12/16 SETTLEMENT AGREEMENT AND WITHDRAWAL OF TENURE CHARGES

This matter having been brought before the Commissioner of Education on December 16, 2016, by the PETITIONER, Burlington County Institute of Technology, against RESPONDENT, Judith Evans and;

WHEREAS, PETITIONER alleged that RESPONDENT engaged in unbecoming conduct as a certificated and tenured employee of the Burlington County Institute of Technology; and

WHEREAS, PETITIONER alleged that RESPONDENT, a tenured faculty member, engaged in a pattern of inappropriate conduct by operating a concession stand from 2010 or 2011 until 2015 at Burlington County Institute of Technology Boys Basketball games in violation of Board Policy; and

WHEREAS, RESPONDENT has denied and continues to deny the allegations; and

WHEREAS, RESPONDENT operated the concession stand with the full knowledge of School District administrators, specifically the building principal, but was not previously subjected to discipline as a result of her operating the concession stand; and

WHEREAS, Counsel for PETITIONER and RESPONDENT attended an initial conference with Arbitrator Lewis R. Amis; and

BCH Initials

JE Initials

WHEREAS, during the initial conference the Arbitrator indicated that the PETITIONER would have a difficult time proving the allegation of unbecoming conduct as set forth in the complaint; and

WHEREAS, the Arbitrator indicated that even assuming the PETITIONER was able to prove the facts alleged in the complaint, in all likelihood PETITIONER would not be able to sustain its burden to terminate RESPONDENT for multiple reasons including the facts that RESPONDENT operated the concession stand for five (5) years without supervisory notice that she acted in violation of Board Policy and served PETITIONER for 22 years without discipline; and

WHEREAS, based on the totality of the circumstances PETITIONER has requested to withdraw of the Tenure charges subject to the following conditions; and

WHEREAS, the withdrawal and dismissal of the Tenure charges is in accordance with the public interest as it will reduce the financial burden on the PETITIONER, eliminate the need and required expense to prosecute the charges, and facilitate the return of a highly experienced certificated faculty member; and

WHEREAS, this Settlement is being submitted in accordance with N.J.A.C. 6A:3-5.6.

NOW THEREFORE this matter in difference having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the tenure charges are hereby withdrawn and the matter is hereby dismissed, without costs against any party, with prejudice, subject to the following terms and conditions:

1. PETITIONER hereby withdraws the tenure charges against RESPONDENT.

Initials
BCIT

Initials
JE

2. The parties agree that the withdrawal of the tenure charges is in accordance with the public interest and prefer the mutual resolution of the tenure charges without the cost and risk of protracted litigation.
3. PETITIONER will issue a letter to RESPONDENT indicating that RESPONDENT violated Board Policy relating to her operation of the Burlington County Boys' Basketball Team Concession Stand and the PETITONER expects RESPONDENT and all BCIT employees to abide by Board Policy. ARBITIRATOR Amis will have final approval of said letter.
4. RESPONDENT shall be reinstated and shall return to work on Monday, February 27, 2017, to the same position, though different campus, that she held at the time the tenure charges were filed. On February 27, 2017, RESPONDENT shall report to Burlington County Institute of Technology Medford Campus.
5. RESPONDENT has entered into this Agreement freely and voluntarily.
6. RESPONDENT has a full understanding of her rights.
7. RESPONDENT has not lost her position as a result of the filed tenure charges; therefore, there appears to be no basis for the Commissioner or PETITIONER to refer this matter to the State Board of Examiners for any action in regard to RESPONDENT'S certifications.
8. PETITIONER agrees to make the RESPONDENT whole as to any and all entitlements owed, and any and all payments made as a result of such charges, including but not limited to the restoration of all vacation, sick, and personal days, as well as reimbursement for any COBRA payments made by RESPONDENT and such

BCIT Initials

JE Initials

other benefits as set forth in the applicable collective bargaining agreement to which the Respondent is entitled.

9. The Parties consent to the terms and conditions of this Agreement and agree to be bound by same.

The PETITIONER and RESPONDENT consent to the entry and form of the within Agreement both as to fact and content.

Theresa L. Margiotta
Burlington County Institute of Technology
Board Secretary and Business Administrator

Date: 3/22/17

William R. Burns, Esq.
Burlington County Institute of Technology
Board Solicitor

Date: 3/22/17

Judith Evans, RESPONDENT

Date: 2/22/17

Andrew M. Schwartz, Esq.
Attorney for RESPONDENT

Date: _____

APPROVED:

Lewis R. Amis,
Arbitrator

Date: 4/3/2017

BCIT Initials

JE Initials

CAPEHART & SCATCHARD, P.A.
142 West State Street
Trenton, New Jersey 08608
609.394.2400
BY: William R. Burns
Attorney Identification Number 018892001
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BCH Initials

JE Initials

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WHEREAS, based on the totality of the circumstances PETITIONER has requested to withdraw of the Tenure charges subject to the following conditions; and

WHEREAS, the withdrawal and dismissal of the Tenure charges is in accordance with the public interest as it will reduce the financial burden on the PETITIONER, eliminate the need and required expense to prosecute the charges, and facilitate the return of a highly experienced certificated faculty member; and

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BCIT Initials

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5. RESPONDENT has entered into this Agreement freely and voluntarily.
6. RESPONDENT has a full understanding of her rights.
7. RESPONDENT has not lost her position as a result of the filed tenure charges; therefore, there appears to be no basis for the Commissioner or PETITIONER to refer this matter to the State Board of Examiners for any action in regard to RESPONDENT'S certifications.
8. PETITIONER agrees to make the RESPONDENT whole as to any and all entitlements owed, and any and all payments made as a result of such charges, including but not limited to the restoration of all vacation, sick, and personal days, as well as reimbursement for any COBRA payments made by RESPONDENT and such

BCIT Initials

JE Initials

other benefits as set forth in the applicable collective bargaining agreement to which the Respondent is entitled.

9. The Parties consent to the terms and conditions of this Agreement and agree to be bound by same.

The PETITIONER and RESPONDENT consent to the entry and form of the within Agreement both as to fact and content.

Theresa L. Margiotta
Burlington County Institute of Technology
Board Secretary and Business Administrator

Date: 3/22/17

William R. Burns, Esq.
Burlington County Institute of Technology
Board Solicitor

Date: 3/22/17

Judith Evans, RESPONDENT

Date: 2/22/17

Andrew M. Schwartz, Esq.
Attorney for RESPONDENT

Date: _____

APPROVED:

Lewis R. Amis,
Arbitrator

Date: 4/3/2017

BCIT Initials

JE Initials

106-17

OAL DKT. NO. EDU 01996-17
AGENCY DKT. NO. 24-2/17

BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ, for the reasons thoroughly set forth in the recommended Order.

The ALJ denied petitioner's request for emergent relief and dismissed the matter on the merits by way of an Order on Emergent Relief, finding that the Commissioner does not have jurisdiction to hear the case. The Commissioner afforded the parties the opportunity to file exceptions pursuant to *N.J.A.C.* 1:1-18.4. The parties did not file exceptions.

Accordingly, the recommended Order of the OAL, denying petitioner's application for emergent relief and dismissing the case for lack of jurisdiction, is adopted as the final decision in this matter for the reasons expressed therein. This case is hereby dismissed with prejudice.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/13/17
Date of Mailing: 4/13/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 01996-17
AGENCY DKT. NO. 24-2/17

BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP,

Petitioner,

v.

CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,

Respondent.

Steven J. Edelstein, Esq., for petitioner (Schwartz, Simon, Edelstein & Celso, attorneys)

Robert L. Tarver, Jr., Esq., for respondent

Record Closed: February 27, 2017 Decided: February 28, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

The Board of Education of the City of Orange Township (petitioner) filed an emergent motion in connection with the adoption of a Referendum question which was

and did not play a role in the ultimate decision on this application. The attorney for the City of Orange Township was permitted to speak at the hearing on February 27, 2017, but agreed that he would not add anything different from the arguments presented by Mr. Edelstein on behalf of the City of Orange Township Board of Education. Both Mr. Edelstein and Mr. Tarver agreed that despite the error in the caption, the true parties of interest in this matter are the City of Orange Township Board of Education and the City Council of Orange Township.

FACTUAL DISCUSSION

The Orange School District (District) is comprised entirely of the City of Orange Township. Prior to November 8, 2016, the District was a Type 1 school district. As such, when it was necessary to bond for capital projects, an appropriate Resolution would be passed by the Board of School Estimate and thereafter, the City would enact an appropriate Bond Ordinance, relying on the credit of the City.

On July 6, 2016, the Council passed a resolution calling for a referendum at the next general election to be held on November 8, 2016, for the City of Orange Township to change from that of an appointed school board to an elected school board effective immediately. With the first school board election to be held during the November 2017 general election.

The Resolution also contained this language in the main body of the Resolution: "BE IT FURTHER RESOLVED that upon the commencement of the November, 2017, general election, this resolution shall take full force and effect forthwith." On November 8, 2016, the following question appeared on the ballot in the City:

CITY OF ORANGE TOWNSHIP
MUNICIPAL PUBLIC QUESTION

> Shall the Board of Education of the City of Orange Township be changed from a board that is appointed by the Mayor, to a Board that is elected by the residents of Orange, effective immediately, with the first school board election to be held during the November 2017 general election.

The minutes indicate that the Clerk read the Ordinance with an amended amount of $2,506,000. On December 20, 2016, the Ordinance was passed by the Council unanimously on its second reading.

LEGAL DISCUSSION

Jurisdiction by the Commissioner of Education

A necessary preliminary issue which must be addressed is whether the Commissioner of Education has jurisdiction to hear this matter. Respondent, the City Council of the City of Orange Township, argues that the Commissioner of Education lacks such jurisdiction and the petitioner, the City of Orange Township Board of Education, argues that the Commissioner of Education has such jurisdiction.

The applicable statute addressing jurisdiction is N.J.S.A. Title 18A:6-9 which provides in part:

> Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioners.

However, when defining what actions constitute controversies and disputes under the school laws, the statute specifically excludes the conduct of school elections by stating:

> For purposes of this Title, controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws. N.J.S.A. 18A:6-9.

Thus the issue as presented is whether the Referendum switching the Board of Education from a Type I school district to a Type II school district arises under the exception of jurisdiction under Title 18A.

Based on the plain reading of the above definition of an election and the exclusion regarding the conduct of school board elections, it is clear that the Commissioner of Education does not have jurisdiction to hear this case and, instead, it should be brought in the Superior Court of New Jersey. Even accepting as true the allegations of errors in the Referendum process, the petitioner is clearly with a remedy by application in the Superior Court despite its argument that it is without any remedy. I am also concerned about the petitioner's failure to act in a timely matter. The Resolution was considered and passed by the City Council of Orange Township on July 6, 2016, calling for a Referendum question to be placed on the ballot for the voters to express their will regarding a change of the type of school district in Orange. The general election was held on November 8, 2016 and the voters passed the Referendum and approved the change of form. This matter was not filed with the Office of Administrative Law until February 8, 2017 with no other action being taken by the petitioner prior to this or any other venue.

Based on the finding reached in this case, there is no need to fully address the standard for emergent relief (N.J.A.C. 6A:3-1.6) and further set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) and argued by the respective parties in their submissions in favor and opposed to the relief requested in the petitioner's petition and application for emergent relief.

For the foregoing reasons, I **CONCLUDE** that petitioner has failed to demonstrate that this venue has the proper jurisdiction to hear this case. Consequently, the petitioner's request for emergency relief is denied and this matter if dismissed.

ORDER

Having concluded that petitioners are not entitled to the requested emergent relief, it is hereby **ORDERED** that the petitioner's request for emergency relief be DENIED and that the Commissioner of Education does not have jurisdiction to hear this appeal and thus this matter if hereby **DISMISSED**.

107-17

Y.Y., ON BEHALF OF MINOR CHILDREN, W.Y. AND D.Y.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF BERGEN COUNTY, BERGEN COUNTY,	:	
INTERVENOR.	:	

SYNOPSIS

Pro se petitioner appealed the determination of the respondent Board that her children, W.Y. and D.Y., are not entitled to a free public education in North Arlington schools. Petitioner contended, *inter alia*, that she has three separate residences in New Jersey, but is legally domiciled in North Arlington. The respondent Board of Education of North Arlington argued that Y.Y. is not legally domiciled within the school district, and filed a motion for summary decision, as well as a counterclaim for tuition. Petitioner filed opposition to the motion for summary decision, asserting that there are genuine issues in dispute which warrant an evidentiary hearing. The Board of Education of the Vocational Schools of Bergen County filed a motion to intervene, as one of petitioner's children attends vocational school at the expense of the North Arlington school district.

The ALJ found, *inter alia*, that: there are no material facts at issue in this matter, and the case is ripe for summary decision; written certifications submitted by the Board in support of its motion for summary decision – from the Board's Superintendent of Schools, the Business Administrator for the district, and a former neighbor who lived near petitioner's residence in Kearny, Hudson County – all attested to the apparent residency of petitioner and her sons in Kearny; and petitioner failed to submit anything to refute the factual assertions of the Board or the documentary evidence contained in the Board's certifications. Accordingly, the ALJ concluded that petitioner is a resident of Kearny, not North Arlington, awarded summary decision to the Board, and ordered that petitioner reimburse the Board for tuition in the total amount of $21,883.94 for the 2014-2015, 2015-2016, and 2016-2017 school years.

Upon review, the Commissioner found, *inter alia*, that: there are genuine issues of material fact herein; therefore, summary decision is not appropriate; petitioner submitted numerous documents to support her claim of residency in North Arlington, and filed an affidavit certifying that she "...has three residences in the state of New Jersey and is domiciled in North Arlington, New Jersey"; and the ALJ failed to consider the evidence in the light most favorable to petitioner, the non-moving party. Accordingly, the Commissioner rejected the Initial Decision and remanded the matter to the OAL for further proceedings.

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

April 17, 2017

107-17

OAL DKT. NO. EDU 09260-16
AGENCY DKT. NO. 149-5/16

Y.Y., ON BEHALF OF MINOR CHILDREN, W.Y. AND D.Y.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF BERGEN COUNTY, BERGEN COUNTY,	:	
INTERVENOR.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner and the North Arlington Board of Education (Board) – pursuant to *N.J.A.C.* 1:1-18.4 – and the petitioner's reply thereto. The Board's reply was untimely filed and was therefore not considered by the Commissioner. Petitioner's reply to the Board's reply was also not considered, as *N.J.A.C.* 1:1-18.4 does not allow such a filing.

In her exceptions, petitioner argues that the ALJ erred in granting summary decision to the Board because there are genuine issues of material fact, which render summary decision inappropriate. Petitioner contends that the ALJ viewed the facts in the light most favorable to the Board, rather than the non-moving party, and made numerous credibility determinations. Petitioner contends that through a hearing, the ALJ would have been able to

hear testimony and make credibility determinations, but petitioner did not have the opportunity for a hearing. Additionally, petitioner points out that the ALJ failed to consider the documents she submitted, including tax bills, certificate of occupancy, voter registration, utility bills, W-2 statement, and bank statements. Petitioner maintains that while she has three residences, her domicile is in North Arlington; yet the ALJ failed to mention that she owns property in North Arlington, and avoided using the term "domicile" in his Initial Decision. The ALJ instead considered evidence of petitioner using her Kearny residence, but petitioner maintains that she has the right to use that property. Petitioner further emphasizes that the ALJ failed to consider case law involving the domicile of individuals who own multiple residences.

Petitioner also argues that the ALJ's assessment of tuition was incorrect. For example, petitioner contends that D.Y. only attended sixth grade for ten days, rather than the 127 days found by the ALJ. Petitioner contends that the information relied upon by the ALJ in the Marano Certification, Exhibit 4, is unclear as to how many days D.Y. attended school. Finally, petitioner challenges the ALJ's denial of her motion to suppress the Board's evidence, and argues that the ALJ has a conflict of interest.

In its exceptions, the Board argues that the ALJ correctly found that petitioner is not a resident of North Arlington and, as such, is liable for tuition for the period of her children's ineligible attendance. However, the Board contends that the ALJ failed to factor into consideration the payments that the Board has made to the Bergen County Technical School for W.Y.'s attendance for the months since the Board submitted its motion. Specifically, the Board contends that it is entitled to reimbursement for the additional payments made on February 28 and March 27, 2017.

In reply to the Board's exceptions, petitioner argues that the Board's calculation of tuition is false.

Upon review, the Commissioner agrees with petitioner that there are genuine issues of material fact herein, and summary decision should not be granted in this circumstance. A motion for summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue of material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b). In evaluating such a motion, the ALJ must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 540 (1995).

The ALJ found that there was no material fact in dispute. "Petitioner did not submit anything to refute the factual assertions, or the documentary evidence" in the certifications submitted by the Board. (Initial Decision, at 10) The ALJ noted that "[p]ointedly, there is no rebuttal at all to the observations of the North Arlington Police Department, Mr. Gilmore, Mr. O'Connor, or to the Kearny Police Department incident reports, all of which amply demonstrate that Petitioner is a resident of Kearny, New Jersey." (Initial Decision, at 10-11)

The Commissioner notes that in opposition to the Board's motion for summary decision, petitioner submitted the following evidence to support her position that her domicile is in North Arlington: (1) the deed to her North Arlington property; (2) property tax bills; (3) a certificate of occupancy; (4) electric/gas bills and Verizon bills; (5) voter registration; (6) grand

juror summons with payment stubs for grand jury service; (7) home health aide certification; (8) photos of her North Arlington property; (9) correspondence regarding Verizon Fios service; (10) W-2; and (11) bank statements. Petitioner subsequently submitted an affidavit, certifying that – among other things – "Petitioner has three residences in the state of New Jersey and is domiciled in North Arlington, New Jersey." (Petitioner's affidavit, dated January 17, 2017, at ¶5)

Considering the standard for summary decision, petitioner's certified statement that she is domiciled in North Arlington – in addition to the documentary evidence that petitioner submitted – creates a genuine issue of material fact as to petitioner's domicile. Although the Board submitted certifications and evidence in support of its position that petitioner is domiciled in Kearny, the ALJ was required to consider the evidence in the light most favorable to petitioner, as the non-moving party. When viewing the evidence in that manner, there is a genuine issue of material fact that prevents this matter from being decided by way of summary decision. Instead, at a hearing on the merits, the ALJ will be able to make credibility determinations as to the witnesses and weigh all of the evidence presented before deciding the matter.

Accordingly, the Initial Decision of the OAL is rejected – for the reasons expressed herein – and the matter is remanded to the OAL for further proceedings.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/17/17

Date of Mailing: 4/17/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 09260-16
AGENCY REF. NO. 149-5/16

Y.Y. ON BEHALF OF MINOR CHILDREN,
W.Y. AND D.Y.,
Petitioners,
vs.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,
Respondent,
and
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF BERGEN COUNTY,
Intervenor.

Y.Y., Petitioner, pro se

Jennifer M. Herrmann, Esq., for Respondent (Methfessel & Werbel, attorneys)

William C. Soukas, Esq., for Intervenor (Nowell, P.A., attorneys)

Timothy D. Cedrone, Esq., for movant Town of Kearny (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: January 23, 2017 Decided: February 28, 2017

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the residency decision of Respondent. The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on June 22, 2016 as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A prehearing conference was held on July 12, 2016, and a prehearing Order was entered by the undersigned on July 13, 2016.

An amended prehearing Order was entered by the undersigned on August 19, 2016.

The Board of Education of the Vocational Schools in Bergen County filed a motion to intervene on August 1, 2016. Respondent filed its response to said motion on August 3, 2016, wherein it indicated it had no objection to said motion being granted. Petitioner did not file a response to said motion. An Order granting the motion was entered by the undersigned on August 17, 2016.

Respondent filed a motion for leave to amend its Answer, and include a Counterclaim, on August 22, 2016. Petitioner filed a letter in opposition to said motion on August 22, 2016. An Order granting the motion was entered by the undersigned on August 23, 2016. Respondent filed an Amended Answer and Counterclaim seeking tuition reimbursement, dated August 23, 2016.

Respondent filed a motion for Summary Decision dated November 1, 2016. Petitioner was granted an extension of time to respond to said motion, with the consent

of Respondent, until December 1, 2016. Interpleader filed a brief in support of its interests on December 2, 2016.

The Town of Kearny filed a motion to Quash a Subpoena issued by Petitioner. Said Motion was filed on November 16, 2016. Respondent, Petitioner, and Interpleader filed no response thereto.

Respondent filed a motion to Quash a Subpoena issued by Petitioner. Said motion was filed on November 28, 2016. Respondent requested a telephone conference as well. A telephone conference was held on November 29, 2016, wherein the undersigned advised the parties that discovery was closed and that no further discovery requests shall be made. Petitioner was also given until January 2, 2017, to file their opposition to Respondent's motion for summary decision.

Petitioners filed their response to Respondent's motion to Quash a Subpoena on December 12, 2016.

By Order dated December 28, 2016, the motions to quash subpoenas filed by the Town of Kearny and Respondent were granted; and, Petitioner's request for discovery was also granted.

Petitioner filed a brief in opposition to Respondent's motion for summary decision on January 3, 2017. Respondent filed its reply thereto on January 17, 2017. Petitioner filed a certificate of mailing and an affidavit on January 23, 2017.

Petitioner filed a motion to suppress evidence on January 9, 2017.

FACTUAL DISCUSSION

Respondent, in support of its motion for summary decision, filed the following:

1. Certification of Dr. Oliver W. Stringham, Superintendent of the North Arlington Public Schools (District), wherein Dr. Stringham asserts he sent a letter, dated November 2, 2015, to Petitioner at xxx Park Place, Kearny, New Jersey, and xx Union Place, North Arlington, New Jersey. (Exhibit 1.) In said letter Dr. Stringham advised Petitioner that her children, D.Y. and W.Y., could continue their enrollment in the District until the Board of Education (Board) could review evidence and make a determination as to residency. (Exhibit 1, p. 1.) Petitioner was invited to a closed hearing before the Board on November 16, 2015. (Exhibit 1, pp. 2-3.)

2. Certification of Kathleen Marano, Business Administrator for the District, wherein Ms. Marano outlined the District's concern over Petitioner's residency. Part of her duties includes attending all Board meetings and record minutes of the meetings. Petitioner was requested to provide proof of residency by North Arlington Middle School Principal Nicole Russo, at the instruction of Dr. Stringham. The Board reviewed documents provided by Petitioner, including a utility bill for the North Arlington house in the amount of $54, which the Board believed to be too low. (Exhibit 1.) The Board also reviewed a police report prepared by North Arlington Police Department Detective Anthony Scala. (Exhibit 2.) Detective Scala, on September 16 and 17, 2015, observed a vehicle registered to Petitioner parked in the same spot for two consecutive days in front of the North Arlington house. On September 17, 2015, at 6:30 a.m. Detective Scala observed Petitioner and a teenage male leave 105 Park Place in Kearny, New Jersey, and enter a vehicle registered to Petitioner and travel to an unknown location. (Exhibit 2.) Approximately an hour later he observed D.Y. exit the Kearny residence and enter a Toyota Sienna with an elderly man, who dropped D.Y. off at school in North Arlington. Detective Scala informed Petitioner of his observations and Petitioner admitted that she drove W.Y. to school from the Kearny residence. Ms. Marano also states the Board was advised of surveillance video taken in February and April 2016 showing Petitioner and her sons engaging in activities of daily living at the Kearny residence, including departing for school in North Arlington. The Board also reviewed screen shots of the video. (Exhibit 3.) At the residency hearing on

December 14, 2015, the Board requested that Petitioner allow a Board member, the Board attorney, with Petitioner and her attorney, to visit her residence in North Arlington. Petitioner refused and requested another hearing date. The new date was May 2, 2016. After fifteen minutes, Petitioner left the meeting as the Board was not immediately available to her. This determined that Petitioner and her sons did not reside in North Arlington. D.Y. and W.Y. were dis-enrolled on May 4, 2016. W.Y. continues to attend Bergen County Technical Schools at the District's expense. Mr. Marano then outlined tuition costs for both W.Y. and D.Y. (Exhibits 5, 6, and 7.)

3. Certification of Matthew Gilmore, who resided at xxx Park Place, Kearny, New Jersey, the house adjacent to Petitioner's Kearny residence. Mr. Gilmore no longer resides at this address, but his mother continues to reside there. Mr. Gilmore reviews the surveillance video obtained from the Park Place address. The video shows Petitioner, her husband, and two sons engaging in activities of daily living at Petitioner's Kearny residence. The undersigned viewed the video in its entirety. Additionally, Mr. Gilmore sets forth his personal observations of Petitioner during the time he resided at xxx Park Place, where he consistently saw Petitioner and her two sons leave their Kearny residence early in the morning at various times during the year.

Respondent, in opposition to the motion for summary decision, filed the following:

1. Affidavit of Petitioner wherein Petitioner merely states there are genuine issues in dispute which warrant an evidentiary hearing.

FINDINGS OF FACT

1. The North Arlington Board of Education is a School District in the County of Bergen.

2. The Township of Kearny is in Hudson County.

3. D.Y. attended fourth grade in the District for eighty-four days for the 2013/2014 school year. (Marano Certification, ¶22, Exhibit 4, NASD 0291-292.)

4. In the 2013/2014 school year the pupil tuition rate for grades one through five was $11,307. (Marano Certification, Exhibit 4, NASD 0293.)

5. D.Y. attended fifth grade in the District for 168 days for the 2014/2015 school year. (Marano Certification, Exhibit 4, NASD 0289-290.)

6. In the 2014/2015 school year the pupil tuition rate for grades one through five was $10,844. (Marano Certification, Exhibit 5, NASD 0294.)

7. D.Y. attended sixth grade in the District for 127 days for the 2015/2016 school year. (Marano Certification, Exhibit 4, NASD 0287-288.)

8. In the 2015/2016 school year the pupil tuition rate for grades six through eight was $12,290. (Marano Certification, Exhibit 5, NASD 0295.)

9. In the 2014/2015 school year the District paid Bergen County Technical Schools (Bergen Tech) $8,568 on behalf of W.Y. (Marano Certification, Exhibit 5, NASD 00235-245.)

10. In the 2015/2016 school year the District paid Bergen Tech $7,081 on behalf of W.Y. Marano Certification, Exhibit 6, NASD 00246-249.)

11. As of October 28, 2016, In the 2016/2017 the District has paid Bergen Tech $940 on behalf of W.Y. (Marano Certification, Exhibit 7, NASD 00296-29.7)

12. The District has received an invoice from Bergen Tech for W.Y. in the amount of $841. (Marano Certification, Exhibit 7, NASD 0297.)

13. W.Y. attends the Bergen Tech presently. He has attended Bergen Tech for the 2014/2015, 2015/2016 and 2016/2017 school years. (Marano Certification, Exhibit 4, NASD 0235-245, 0246-249, 0296-297.)

14. North Arlington Police Department surveillance of Petitioner's residences in North Arlington and Kearny on September 16 and 17, 2015, shows Petitioner and her two sons residing at the Kearny residence. Petitioner admitted to North Arlington Police that she did drive W.Y. to school. (Marano Certification, Exhibit 2.)

15. Kearny Police Department incident reports dated May 7, 2014, May 23, 2014, September 15, 2014, June 18, 2015, and July 26, 2016, show Petitioner and her two sons residing at the Kearny residence over an extended period of time. (Herrmann Certification, Exhibits B, C, D, E, and H.)

16. The report of private investigator James O'Conner, retained by the District shows Petitioner driving her son to Bergen Tech from the Kearny residence on October 13, 2016, at approximately 7:03 a.m.

17. Matthew Gilmore's Certification establishes that Petitioner and her two sons resided at their Kearny residence at least since 2014 through the present via both his personal observations and the video obtained from his mother's surveillance camera.

18. A review of the video surveillance clearly shows Petitioner, her husband, and her two sons residing at the Kearny residence at the times the video was made: February 25, 2016; April 4, 2016; April 5, 2016; April 18, 2016; July 13, 2016; July 14, 2016; July 15, 2016; July 18, 2016; September 8, 2016; and, September 17, 2016. (Gilmore Certification, Exhibits 1, 2, 3, 3a, 3b, 4, 4a, 4b, 4c, 4d, 5, 5a, 5b, 5c, 5d, 5e, 6, 6a, 6b, 6c, 7, 7a, 7b, 7c, 7d, 8, 8a, 8b, 8c, 8d, 8e, 9, 9a, 9b, 9c, 9d, 9e, 10, 10a, and 10b.)

19. The District informed Petitioner via letter from Dr. Stringham that the District does not believe she resides in North Arlington and afforded her the opportunity to appear before the Board. Said letter also informed Petitioner of her right to appeal to the Commissioner of the Department of Education, and that D.Y. and W.Y. could remain in the District pending the outcome of the appeal. (Stringham Certification, Exhibit 1.)

20. The District, also via letter from Dr. Stringham, informed Petitioner that she may be assessed the costs of tuition for D.Y. and W.Y. should she not prevail on the residency appeal. (Stringham Certification, Exhibit 1.)

21. A residency hearing was held on December 14, 2015, at which time a Board requested of Petitioner that a Board member, the Board attorney, Petitioner and Petitioner's attorney visit the North Arlington residence. Petitioner refused. Petitioner requested another hearing date. (Marano Certification, ¶13, ¶14, and ¶15.)

22. A residency hearing was held before the Board on May 2, 2016, wherein the Board determined that Petitioner did not reside in North Arlington. (Marano Certification, ¶15, ¶19.)

23. Petitioner left before the residency hearing commenced, approximately fifteen minutes after arriving. (Marano Certification ¶16 and ¶17.)

24. D.Y. and W.Y. were dis-enrolled on May 4, 2016. (Marano Certification, ¶20.)

25. Petitioner had previously filed a Residency Appeal on October 6, 2015. (Herrmann Certification, Exhibit A.)

26. Petitioner resides in Kearny, New Jersey, Hudson County, and has since at least the 2014/2015 school year to the present.

27. During the 2014/2015 school year there were twenty-three days of compensable ineligible attendance (May 23, 2015, through June 24, 2015) for a total of $1,385.52 for D.Y. and $1,094.80 for W.Y. (Marano 2nd Supp. Cert. ¶3.)

28. During the 2015/2016 school year there were 129 days of compensable ineligible attendance (September 2015 through May 2, 2016) for a total of $8,808.12. (Marano Certification, Exhibit 4.)

29. During the 2015/2016 school year Respondent paid Bergen County Technical Schools $7,081.00 on behalf of W.Y. (Marano Certification, Exhibit 6.)

30. During the 2016-2017 school year Respondent paid Bergen County Technical Schools $3,514.00 to date on behalf of W.Y. (Marano 2nd Supp. Cert., Exhibit 8.)

LEGAL ANALYSIS AND CONCLUSION

Petitioner's Motion to Suppress

Initially, I will address the Petitioner's motion to suppress evidence. The concept of suppressing evidence, called the exclusionary rule, is found in criminal proceedings, and is used where law enforcement runs afoul of the Fourth Amendment to the United States Constitution. See Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961); Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

The Fourth Amendment of the U.S. Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The exclusionary rule is rare in administrative proceedings. See New Brunswick v. Speights, 157 N.J. Super. 9 (App. Div. 1978). I cannot find anything that would invoke the exclusionary rule in the instant matter. The evidence complained of consists mostly of video surveillance obtained from Petitioner's neighbor in Kearny, New Jersey, and a North Arlington Police Department report. Both were obtained without need for a warrant. The other evidence Petitioner seeks to suppress, outlined in the brief in support of the motion, and also did not violate any rights of Petitioner.

Petitioner raises four additional points in the motion to suppress, all of which are without basis and do not merit discussion herein.

It must be noted herein that this matter is an administrative proceeding where the rules of evidence are relaxed. In an administrative hearing all relevant evidence is admissible. See Delguidice v. New Jersey Racing Comm'n, 100 N.J. 79 (1985).

I **CONCLUDE** that Petitioner's motion to suppress evidence should be denied.

Standard for Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

In the instant matter there is no material fact in dispute. Petitioner did not submit anything to refute the factual assertions, or the documentary evidence in Certifications of Kathleen Marano, Dr. Oliver Stringham, Matthew Gilmore, and Jennifer Herrmann, Esq. Pointedly, there is no rebuttal at all to the observations of the North Arlington Police Department, Mr. Gilmore, Mr. O'Connor, or to the Kearny Police Department

incident reports, all of which amply demonstrate that Petitioner is a resident of Kearny, New Jersey.

Further, Petitioner does not dispute what is clearly shown on the video evidence obtained from home surveillance camera of her neighbor in Kearny. Rather, Petitioner sought to have the same excluded.

I **CONCLUDE** that there is no dispute as to a material fact and that Respondent's motion for summary decision should be granted.

Right to a Free Public Education

N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a) sets forth the right of a student to a free public education, which in pertinent parts states:

> Public schools shall be free to the following persons over five and under twenty years of age:
>
> a. Any person who is domiciled within the school district[.]

Consideration in proving residency for purposes of establishing eligibility for school district placement is found at N.J.A.C. 6A:22-3.4(a),

> (a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:
>
> 1. Property tax bills, deeds, contracts of sale, leases, mortgages, signed letters from landlords and other evidence of property ownership, tenancy or residency;
>
> 2. Voter registrations, licenses, permits, financial account information, utility bills, delivery receipts, and other evidence of personal attachment to a particular location;
>
> 3. Court orders; State agency agreements; and other evidence of court or agency placements or directives;

> 4. Receipts; bills; cancelled checks; insurance claims or payments; and other evidence of expenditures demonstrating personal attachment to a particular location or to support the student;
>
> . . .
>
> 6. Affidavits, certifications and sworn attestations pertaining to statutory criteria for school attendance, from the parent, guardian, person keeping an "affidavit student," adult student, person(s) with whom a family is living, or others as appropriate;
>
> . . .
>
> 8. Any other business record or document issued by a governmental entity.
>
> (b) A district board of education may accept forms of documentation not listed in (a) above, and shall not exclude from consideration any documentation or information presented by a person seeking to enroll a student.
>
> (c) A district board of education shall consider the totality of information and documentation offered by an applicant, and shall not deny enrollment based on failure to provide a particular form of documentation, or a particular subset of documents, without regard to other evidence presented.

In S.S. ex rel. A.S. and A.S. v. Board of Education of the Township of Marlboro, Monmouth County, EDU 192-12, Initial Decision (August 26, 2013), http://njlaw.rutgers.edu/collections/oal, evidence submitted by an investigator hired by the Marlboro New Jersey School District to determine whether certain minor children who were enrolled in the school district in fact were domiciled therein within the meaning of N.J.A.C. 6A:22-3.1(a) was sufficient to establish that the children in fact were not domiciled in the district during the period in question and, instead, supported a conclusion that the minors resided at their grandmother's home in Edison New Jersey. Even though their mother had submitted documentation of the type described in N.J.A.C. 6A:22-3.4(a) that supported her claim that the minors were domiciled in Marlboro, the circumstances of the mother's employment, which included late hours, was such that the minors were properly found to be residing with their grandmother. On that basis, the administrative law judge recommended that the Department of Education find the mother liable for tuition for the minors.

In the instant matter the District provided substantially more than the report of an investigator hired by the District. Submitted were a North Arlington Police Department report wherein the police observed Petitioner at the Kearny residence; several Kearny Police Department incident reports involving Petitioner and a neighbor at the Kearny residence; and, video surveillance showing Petitioner, her husband, and her two sons coming and going from the Kearny residence and performing activities of daily living. The inescapable conclusion is that Petitioner resides in Kearny.

If a school district discovers that a non-resident child is attending one of its schools, the district may act to remove the child. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.3. If so, the chief school administrator must first issue a notice of ineligibility. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.2, -4.3. The notice shall inform the parent of the right to a hearing before the school district and the right to appeal the school district's decision to the Commissioner of Education. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-5.1. The notice shall also inform the parent whether the district's policy allows for continued attendance, with or without tuition, for students who move out of the district during the course of the school year. N.J.A.C. 6A:22-4.2(b)(7)(i). If, on appeal to the Commissioner, the parent fails to demonstrate his child's entitlement to attend the schools of the district, the parent may be liable for tuition for any period of ineligible attendance. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.2; N.J.A.C.6A:22-6.2, -6.3. Petitioner received adequate notice via a letter from the District Superintendent, Dr. Stringham. Petitioner's claim of a denial of due process must fail.

According to N.J.A.C. 6A:22-6.3(a), "[t]uition assessed pursuant to the provisions of this section shall be calculated on a per student basis for the period of a student's ineligible enrollment, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23-3.1."

Petitioner alleges that the District acted in an arbitrary, capricious and unreasonable manner in her appeal to the Commissioner of Education.

An action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Thus, in order to prevail, Petitioner "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. and E.H. ex rel. K.H. v. Bd. of Educ. of the Bor. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014) (citation omitted), <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (April 10, 2014). Also, a board's decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, Comm'r (April 25, 2013), <http://njlaw.rutgers.edu/collections/oal/>.

Petitioner asserts nothing in the brief addressing these issues. Moreover, I cannot ascertain anything remotely arbitrary, unreasonable or capricious in the record regarding District's actions in this matter.

I **CONCLUDE** that Petitioner failed to demonstrate that D.Y. and W.Y. are entitled to attend the District's schools, that Petitioner is liable for tuition for the period of ineligible attendance and that Petitioner's appeal should be dismissed.

ORDER

Based upon the forgoing, it is **ORDERED** that Respondent's motion for summary decision is **GRANTED**; and,

It is further **ORDERED** that Petitioner's motion to suppress evidence is **DENIED**; and,

It is further **ORDERED** that Petitioner's appeal is **DISMISSED** with prejudice; and,

It is further **ORDERED** that Petitioner reimburse Respondent tuition as follows:

- 2014-2015 school year, $1,385.52 for D.Y. and $1,094.80 for W.Y. for a total of $2,480.32.
- 2015-2016 school year, $8,808.12 for D.Y. and $7,081.00 for W.Y. for a total of $15,889.12.
- 2016-2017 school year, $3,514.50 for W.Y.

Total tuition to be reimbursed by Petitioner to Respondent totals $21,883.94.

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

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

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

Feb. 28, 2017
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: February 28, 2017

Date Mailed to Parties: MAR 1 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

APPENDIX

List of Moving Papers

For Petitioner:

Brief in opposition to Motion for Summary Decision dated January 2, 2017, with Exhibits 1 through 21

Affidavit of Petitioner dated January 23, 2017

Motion to suppress evidence dated January 9, 2017, with Exhibits 1 through 8

For Respondent:

Motion for Summary Decision dated November 1, 2016

Brief in support of Summary Decision motion dated November 1, 2016, with Exhibits A through Q

Certification of Jennifer M. Herrmann, Esq., dated November 1, 2016

Certification of Matthew Gilmore dated August 2016 with Exhibits 1 through 10c[1]

Certification of Dr. Oliver W. Stringham dated November 4, 2014, with Exhibit 1

Certification of Kathleen Marano dated October 28, 2016 with Exhibits 1 through 7

Respondent's reply brief to Petitioner's brief, dated January 10, 2017, with Exhibit R

Second Supplemental Certification of Kathleen Marano dated February 8, 2017, Exhibit 8

For Intervenor:

Letter brief dated December 1, 2016

Certification of Howard Lerner, Ed.D., with Exhibits a through E

[1] Exhibits for Mr. Gilmore's certification are found on the computer flash drive containing video or Petitioner's Kearny property.

THE BANYAN SCHOOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FINANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – the Banyan School (Banyan), a private school for children with disabilities – appealed the determination of the respondent Office of School Finance (OSF) to classify certain employee payments in the 2012-2013 school year as "non-allowable bonuses". Banyan additionally sought to alter its tentative tuition rates to address the budgetary shortfall created by these disallowed 2012-2013 payments. Banyan filed its appeal with the Department of Education on April 23, 2015. The Department contended that the appeal must be dismissed for failure to file within the 90-day timeframe required by *N.J.A.C.* 6A:3-1.3(i). The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue in this matter, and the case is ripe for summary decision; OSF issued its final decision regarding the disallowance at issue here in a letter to petitioner dated June 30, 2014; petitioner's contention that this letter invited Banyan to pursue further discussions on the matter – and that no other communication was received prior to a March 18, 2015 letter that could be construed as notice of a final determination or Banyan's right to appeal – is without merit; no compelling circumstances exist in this case to relax the 90-day rule; additionally, petitioner failed to state a claim upon which relief may be granted. Accordingly, the ALJ concluded that the petition must be dismissed with prejudice.

Upon review, the Commissioner concurred with the ALJ that the petition is appropriately dismissed for failure to adhere to the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). In so deciding, the Commissioner found that the petitioner was required to file its appeal no later than 90 days from the date of receipt of respondent's final determination, which in this case was communicated to Banyan in a letter from OSF dated June 30, 2014. Banyan did not file its petition until April 23, 2015. Accordingly, the appeal was dismissed.

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

April 18, 2017

108-17

OAL DKT. NO. EDU 08696-15
AGENCY DKT. NO. 89-4/15

THE BANYAN SCHOOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FINANCE,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, along with petitioner The Banyan School's (Banyan) exceptions – filed pursuant to *N.J.A.C.* 1:1-18.4 – and respondent New Jersey State Department of Education, Office of School Finance's (OSF) reply thereto.

In its exceptions, Banyan argues that the Administrative Law Judge (ALJ) erred in failing to address the merits of its claims – i.e., the correctness of respondent's determination regarding allowable costs. Banyan reasons that the ALJ's failure to address the merits of Banyan's case is reversible error because the employee's payments were improperly treated as bonuses when they were instead made pursuant to the employee's contracts. Further, Banyan contends that that the 90-day limitations period should be relaxed in accordance with *N.J.A.C.* 6A:3-1.16, because strict adherence would result in injustice as OSF failed to respond to Banyan's inquiries. Banyan argues that the ALJ's reliance on *Polaha v. Buena Regional School District*, 212 *N.J. Super.* 628 (App. Div. 1986) – for the proposition that when parties are engaged in ongoing conversations, the limitations period may be tolled – was misguided, as the case law does not specify the number of contacts parties must have, but rather the nature of the communications. Here, Banyan maintains

that it reasonably expected OSF to respond to its communications and understood that the parties were engaged in ongoing discussions, which should have warranted the relaxation of the 90-day limitations period.

In reply, OSF argues that the ALJ correctly found that OSF's June 30, 2014 letter was a "clear-cut refusal" to revise its determination, and therefore Banyan's petition was time-barred. (Initial Decision at 7) OSF contends that the ALJ properly found that the circumstances did not warrant a relaxation of the limitations period as Banyan and OSF were not engaged in ongoing discussions. OSF disputes Banyan's argument that it understood the parties to be engaged in ongoing discussions, pointing out that Banyan made no attempt to discuss the matter with OSF for seven months, nor did OSF's June 30, 2014 letter invite any further discussion on the matter. Additionally, OSF argues that the ALJ correctly did not address the legal merits of Banyan's claims because the matter was filed out of time and failed to state a claim. OSF also maintains that the ALJ correctly refused to relax the limitations period because Banyan does not have a right to appeal the 2014-2015 tuition rate, as the regulations only permit such an appeal where the tentative tuition rate would cause undue financial hardship on the school. Accordingly, OSF argues that the Initial Decision should be adopted.

Upon review, the Commissioner concurs with the ALJ that the instant petition is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). The Commissioner agrees with the ALJ that OSF's June 30, 2014 letter was a definitive refusal to revise its published 2014-2015 tentative tuition rate. The Commissioner is also in accord with the ALJ that there is no compelling reason to relax the 90-day limitations period. As such, according to *N.J.A.C.* 6A:23A-18.10 and *N.J.A.C.* 6A:3-1.3(i), Banyan had 90 days from June 30, 2014 to file a petition of appeal and failed to do so until April 23, 2015.

Accordingly, the Initial Decision – to the extent that it dismisses the petition as untimely – is adopted as the final decision in this matter, for the reasons stated therein. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/18/17

Date of Mailing: 4/18/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 08696-15
AGENCY DKT. NO. 89-4/15

THE BANYAN SCHOOL,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FINANCE,
Respondent.

Vito A. Gagliardi, Jr., Esq., and **Janelle Edwards-Stewart**, Esq., for petitioner (Porzio, Bromberg, and Newman)

Caroline Jones, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: July 19, 2016 Decided: January 18, 2017

BEFORE **ELIA A. PELIOS** ALJ:

STATEMENT OF THE CASE

Petitioner, The Banyan School (Banyan), a private school for children with disabilities, appeals a determination by respondent the Office of School Finance (OSF) within the Department of Education, to classify payments made to one employee in the 2012-2013

school year as a non-allowable bonus. Additionally, if the Department's determination is not affirmed, Banyan seeks to alter its tentative tuition rates to address the budgetary shortfall then created.

The Department contends that petitioner failed to file the appeal within the ninety-day timeframe required by N.J.A.C. 6A:3-1.3(i), and that as there is no mechanism for granting the relief that petitioner seeks, the appeal also should be dismissed for failure to state a claim upon which relief can be granted.

PROCEDURAL HISTORY

Petitioner's appeal was received at the Department of Education on April 23, 2015. The Department determined to treat the matter as a contested case, and was transmitted to the Office of Administrative Law (OAL), where it was filed on June 15, 2015. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The matter was assigned to Administrative Law Judge John F. Russo, Jr. The parties filed cross-motions for summary decision, which had not been addressed at the time that ALJ Russo left the OAL for the Superior Court in late December 2015. On January 4, 2016, the matter was transferred to the undersigned. Oral argument, which was adjourned from April 21, 2016, at the parties' request, occurred on July 18, 2016. The record then closed.

FACTUAL DISCUSSION

The parties disagree on which of the communications from the OSF counts as a final ruling. They also differ on the correctness of the OSF determination regarding allowable costs, and the related question of tuition treatment of those costs.

With regard to the "final ruling," the parties agree on the following facts. In general, as an approved private school for students with disabilities, petitioner charges tuition fees to public school districts that send students with learning disabilities to Banyan's lower school (for children in kindergarten through eighth grade) and its high school. The regulatory scheme set forth in N.J.A.C. 6A:23A-18.2 provides for recovery of actual costs incurred by approved schools during the school year. The regulations provide a projected cost, known as

a "tentative tuition rate," because an approved school cannot know its actual costs before the year begins. Thus, for each school year, the OSF sets the maximum tentative tuition rate for each approved school. These rates typically are established in January of the preceding school year, based upon the audited financial statements of the prior year. For example, the school year 2013-2014 rate would be established in January 2013, based on the audit of school year 2011-2012. The tentative rate is calculated by inflating the prior year's audit information by twice the spending-growth limitation of 2.5 percent. However, if the OSF is challenging any portion of the prior year's audit, the rate for that particular school is not released in January. Instead, the OSF issues a letter to the school, outlining its issues and requesting revisions. On receiving the revisions, the OSF provides a certified rate letter.

By letter dated April 30, 2014, the OSF issued a letter to petitioner stating that payment made to one employee during the 2012-2013 school year constituted a non-allowable bonus. Banyan was directed to file a revised audit report within thirty-five days, or have the OSF place it on conditional approval and preclude it from accepting new students. By letters dated May 8, 2014, and May 27, 2014, petitioner's accountant, Ronald Zuckerman, responded with a justification of the costs, asking the OSF to reverse its determination and to adjust the tentative 2014-2015 tuition rates accordingly. In a letter dated June 30, 2014, the OSF stated:

> As of April 30, 2014, the Department of Education published the 2014-2015 maximum tentative tuition rate for Banyan's Lower School ("Lower School").

It went on to note:

> . . . The information presented by Mr. Zuckerman does not change the determination of those non-allowable costs. . . . Absent compelling information, the Office of School Finance does not 'revise' its published 2014-2015 tentative tuition rate.
>
> Additionally, as you are aware a tentative rate is an interim rate, and may increase upon year end calculation of the certified actual cost per student. If the tentative tuition rate is less than the final tuition rate charged, the Lower School's management may charge each sending district board of education all or part

> of the difference; thereby allowing the recovery of the difference between the tentative and final tuition rates charged.
>
> [Gagliardi Certif., Exh. B.]

The letter says nothing about a right of appeal.

Later, in response to a letter of March 11, 2015, from Vito A. Gargliardi, Jr., Esq., counsel to the petitioner, the OSF stated that it received his letter:

> . . . regarding the 2014-2015 tentative tuition rate for Banyan School (Lower) and seeking information on a formal appeal. In response to your May 27, 2014, inquiry on this matter, I issued a letter on June 30, 2014, on behalf of former Assistant Commissioner Corso, which detailed the Office of School Finance's position. The provisions regarding a formal appeal of this decision are contained in applicable code and specifically, N.J.A.C. 6A:23A-18.10.
>
> [Id., Exh. C.]

As regards the substance of Banyan's appeal—whether the employee payments constituted unreimbursable bonuses—the respondent has not offered any information to rebut the certification of Ronald Zuckerman, the Board's accountant, regarding the circumstances surrounding the payments. (Zuckerman Certif., Exh. C.) Therefore, all of the following constitutes undisputed **FACT**.

The employee whose compensation was challenged by the OSF was given notice that her employment would be terminated at the close of the 2012-2013 school year. In response, the employee indicated to school personnel that she would begin to exhaust all her available leave time, which amounted to nine personal days and forty-three vacation days, which together had a value of $22,389.12. (Id., ¶¶ 11, 12, and 14.) Had she done so, Banyan would have been forced to hire a substitute administrator for the remainder of the year. As recorded in the minutes of the Banyan Board of Trustees, the employee was paid for her leave "as a concession for . . . remaining at the school through June 30, 2013." (Zuckerman Certif., Exh. A.) Her contract stated that either party could terminate without cause, upon sixty days' written notice of intention to terminate. The Banyan minutes also noted that if termination is not for cause, the employee "shall be entitled to either the notice

required hereunder or the applicable pro rata compensation and benefits for the notice period at Banyan's option." (Id., Exh. C.) Banyan's employee handbook stated that staff members could bank up to fifteen days of personal leave, and depending on their status, would receive between eight and twelve days of personal leave annually. It allowed the banking of "unlimited vacation time," but also stated that "vacation time will only be reimbursed upon retirement or for medical reasons." (Zuckerman Certif., Exh. B.)

In its initial letter of April 30, 2014, the OSF noted that the employee received the $22,389.12, in addition to her regular salary, and that the handbook stated that vacation time was reimbursed upon retirement or for medical reasons. Since neither of the conditions for vacation reimbursement was met, the OSF took the position that payment of those funds constituted a bonus. (Console Certif., Exh. A.)

Additionally, the OSF said the per-diem payment amount was in error—it was $430.56, when it should have been $360.92. Thus, "the amount of $19,140.81 has been considered non-allowable costs when calculating the 2014-2015 tentative tuition rate." (Id., Exh. B.) In his letter of May 8, 2014, to the OSF, Zuckerman took issue with the per-diem payment, noting that the Essex County per diem, which was appropriate to use, was $612.27, well above the $430.56 the school had used. (Zuckerman Certif., Exh. AA). The OSF appears never to have addressed this particular argument.

According to Zuckerman, although the OSF letter made no mention of a second faculty member, who was paid $16,393.50, in the 2012-2013 year, and $21,858.00, in the 2013-2014 year, in connection with a retirement related to medical reasons, "it appears that its mislabeling of her payout has not been fully resolved, as no notice, corrected report, or monies have been properly forwarded." (Zuckerman Certif., ¶19.) Altogether, this meant that "Banyan's unrestricted funds must necessarily be reduced by $36,248.00 in order to cover the [unapproved] expenses for year ended June 30, 2013, and $22,795.00 for year ended June 30, 2014," or a total of $59,043.00. (Id., ¶21.) Additionally, "Banyan will be required to refund $19,228.00 to schools for year end June 30, 2013, and $41,775.00 for year end June 30, 2014," or a total of $61,003.00. (Id., ¶22.) With regard to Zuckerman's concerns about the second employee, the OSF appears never to have responded in writing

to this concern—it neither verified the existence of a disagreement, nor stated that it had not disapproved that payment.

LEGAL ANALYSIS

Summary decision may be granted when "the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The rule further provides that an adverse party must respond by affidavit setting forth specific facts showing that there is a genuine issue which can only be determined at an evidentiary hearing. Ibid. The OAL rule is modeled on New Jersey Court Rule 4:46-2. The New Jersey Supreme Court has explained that when deciding a motion for summary judgment under R. 4:46-2,

> . . . a determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).]

Here, the parties have agreed on all the facts, although they dispute their legal significance. Therefore, I **CONCLUDE** that the matter is appropriate for summary decision.

The OSF argues that Banyan failed to appeal timely, and therefore its petition must be dismissed. N.J.A.C. 6A:23A-18.10(a), which address appeals of decisions regarding the calculation and approval of the tentative tuition rate, and conditional approval status pursuant to N.J.A.C. 6A:23A-18.9(i), states that these determinations may be appealed in accordance with N.J.A.C. 6A:3.

N.J.A.C. 6A:3-1.3(i) states that to initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws,

> [t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

The OSF issued its decision to petitioner on or about June 30, 2014. Therefore, the OSF argues, Banyan was required to file a petition of appeal on or before September 29, 2014, to meet the time requirements.

Banyan contends that the OSF letter of June 30, 2014, "invites Banyan to pursue further discussions and specifically indicates that these discussions should be had within its forum." It further contends that no communication prior to the March 18, 2015, letter gave notice of either final determination or Banyan's right to appeal. Therefore, the operative date for final decision was March 18, 2015, and Banyan filed within the ninety-day time frame.

Additionally, Banyan argues that the Commissioner should use his authority under N.J.A.C. 6A:3-1.16 to relax or dispense with procedural rules "in any case where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice."

With regard to the adequacy of notice, in Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572 (1993), the Supreme Court held that an unofficial and informal note stating that two positions had been created and filled was sufficient to trigger the start of the ninety-day period in which Kaprow could assert his tenure rights. The Court explained that "adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Kaprow, supra, 131 N.J. at 587. Here, the June 2015 letter from the OSF said that the information presented by Mr. Zuckerman did not change its determination on non-allowable costs, and that the lower school rate was posted in April. It also said that "[a]bsent compelling information the Office of School Finance does not 'revise' its published 2014-2015 tentative tuition rate." I **CONCLUDE** that this was a clear-cut refusal, fulfilling the notice requirement.

In relation to relaxing the ninety-day rule, the case law makes clear that this occurs only under exceptional circumstances or if there is a compelling reason to do so. Id. at 590. In Polaha v. Buena Regional School District, 212 N.J. Super. 628, 635 (App. Div. 1986), the Appellate Division relaxed the ninety-day rule where evidence demonstrated that the petitioner and the respondent engaged in ongoing discussion in an attempt to "agree on an acceptable position."

Here, Banyan offered no evidence of numerous phone calls or communications between June 30, 2014, and February 2015. There is only the letter of February 2015, which mentioned the appeal information in a routine letter, answering a question from the District, that included a question on appeal rights. Thus, I **CONCLUDE** that because petitioner waited six months to make further inquiry, and nearly seven months, until April 23, 2015, to file its appeal, the petition must be dismissed as out of time.

Although dismissal for lack of timeliness is sufficient to decide the dispute, for completeness' sake, the issue with the mechanism for relief is addressed below.

The regulatory structure for determining tuition rates has two distinct pieces. The first, which is prospective, is the tentative tuition rate. The second is retrospective, occurring at the conclusion of the school year on June 30, when actual costs are known. The appeal language for tentative tuition rates in N.J.A.C. 6A:23A-18.10 states:

> (a) The decision of the Assistant Commissioner, Division of Finance regarding the calculation of the tentative tuition rate pursuant to N.J.A.C. 6A:23A-18.2(j), regarding the approval of a tentative tuition rate pursuant to N.J.A.C. 6A:23A-18.3 and regarding conditional approval status pursuant to N.J.A.C. 6A:23A-18.9(i), may be appealed in accordance with N.J.A.C. 6A:3.
>
> (b) The decision of the Assistant Commissioner, Division of Finance in regard to certification may be appealed in accordance with N.J.A.C. 6A:3.

The OSF contends that the language "calculation of the tentative tuition rate" only allows for complaints that the school faces undue financial hardship because "calculation" is limited by "pursuant to N.J.A.C. 6A:23A-18.2(j)," which states, "The Commissioner may approve a

higher tentative tuition rate for any year in which the approved private school for students with disabilities can prove to the satisfaction of the Commissioner that the maximum tentative tuition rate for the year is not adequate and would cause an undue financial hardship on the private school." The section goes on to require such claims to be made by "no later than January 31 preceding the beginning of the ensuing school year." N.J.A.C. 6A:23A-18.2(j)(1). It also states:

> 1. In the event of such hardship claim, the approved private school for students with disabilities shall submit its request for a higher tentative tuition rate for the entire school year to the Assistant Commissioner, Division of Finance no later than January 31 preceding the beginning of the ensuing school year. The approved private school for students with disabilities shall submit such request with appropriate documentation, which shall include, but may not be limited to, the following information:
>
> i. A budget reflecting projected costs, working capital fund or surcharge, estimated enrollment and the requested tuition rate based on this information;
>
> ii. A detailed explanation of the need for increases in excess of those already provided in the tentative tuition rate calculation; and
>
> iii. A financial report which is properly completed and in the format prescribed by the Commissioner for the six months of operations ending December 31 immediately preceding the school year. This report format is available at the Division of Finance, PO Box 500, Trenton, New Jersey 08625-0500.
>
> [Ibid.]

Banyan argues that even if it failed to demonstrate a hardship by January 31, that does not mean it has no remedy for the disputed amount. Petitioner points to the OSF's own explanation of the retrospective part of the process. At the close of the school year, which is June 30, approved schools have until November to provide audited financial statements that "reflect the certified actual cost(s) per students." N.J.A.C. 6A:23A-18.9(c).

> Once the year-end audit is complete, [the] OSF reviews the financial statements provided by the [approved schools] to

> ensure compliance with applicable regulations. If the [school's] financial statements are compliant [the] OSF issues . . . 'a Certified Rate Letter' identifying the CACPS [certified actual cost per student] rate for the prior year. N.J.A.C. 6A:23-18.2(k). The [school] can either bill the sending school districts for the difference between the CACPS rate and the tentative rate, or if the CACPS is lower than the tentative rate already paid, the [school] issues refunds to the sending districts. N.J.A.C. 6A:23A-18.2(a); N.J.A.C. 6A:23A-18.2(m).
>
> [Resp. Br. at 2-4.]

This language, however, refers to N.J.A.C. 6A:23A-18.10(b), which is an appeal of the certified rate letter, which is not the subject of this particular appeal. Therefore, I **CONCLUDE** that the petition must be dismissed for failure to state a claim upon which relief may be granted, as there is no appeal of tentative rates outside of the hardship provision, the school's two May submissions do not use the word "hardship," and the submissions do not include all of the information necessary to make a hardship claim. Moreover, a hardship application was due no later than January 31, 2016, and must have included a financial report for the six months of operations ending December 31, immediately preceding the school year.

ORDER

For both of the reasons cited above—failure to comply with the ninety-day rule for appeals, and failure to state a claim upon which relief may be granted—the petition is hereby **DISMISSED WITH PREJUDICE**.

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

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

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

January 18, 2017
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: January 20, 2017

Date Mailed to Parties: January 20, 2017

nd

10-9-17

CLINTON BARLOW, III,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF TRENTON	:	
RESPONDENT.	:	

SYNOPSIS

Pro se petitioner filed a petition with the Commissioner in November 2014, seeking permission to enter Trenton Central High School to collect recyclable junk trash prior to the demolition of the school. The matter was transmitted to the OAL, where it was filed in January 2015.

The ALJ to whom the case was reassigned on January 23, 2017 placed a telephone call to the petitioner, and received the information that the school had already been demolished and there was no recyclable junk trash to collect. The ALJ sent a letter to the petitioner on January 23, 2017, outlining the history of the matter, attaching a withdrawal form for petitioner to sign and return. The ALJ's letter made clear that if petitioner did not respond by March 1, 2017, the matter would be dismissed as moot. As no response was received as of March 7, 2017, the ALJ ordered the matter dismissed on the grounds of mootness.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter for the reasons stated therein.

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

April 18, 2017

OAL DKT. NO. EDU 01399-15
AGENCY DKT. NO. 331-11/14

CLINTON BARLOW, III,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF TRENTON	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Administrative Law Judge's (ALJ) recommended decision for the reasons expressed therein. Accordingly, the petition is hereby dismissed as moot.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/18/17
Date of Mailing: 4/18/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01399-15
AGENCY DKT. NO. 331-11/14

CLINTON BARLOW, III,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON,
Respondent.

Clinton Barlow, III, petitioner, pro se

Adam S. Herman, Esq., for respondent Board of Education of the City of Trenton (Adams, Guitierrez & Lattiboudere, L.L.C., attorneys)

Record Closed: March 7, 2017 Decided: March 7, 2017

BEFORE **LAURA SANDERS**, Acting Director & Chief ALJ:

On November 17, 2014, petitioner Clinton Barlow, III, filed a petition with the Commissioner of Education seeking permission to enter Trenton Central High School to collect recyclable junk trash prior to the schools demolition. Respondent's answer to the verified complaint was received by the Department of Education on January 30, 2015. The Department of Education transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on January 29, 2015. N.J.S.A. 52:14B-1 to

-15; N.J.S.A. 52:14F-1 to -13. The matter was originally assigned to Administrative Judge Sarah G. Crowley, who on April 27, 2015, held a telephone prehearing conference and issued a prehearing order. It was determined on that call that Judge Crowley may recuse herself concerning a law suit brought against Mercer County by Mr. Barlow, unrelated to this matter, as Judge Crowley had worked for the Mercer County Counsel's office prior to her appointment as an ALJ. Judge Crowley did recuse herself and the matter was then re-assigned to Judge Schuster on May 4, 2015. As Judge Schuster is preparing to retire on April 1, 2017, the matter was then reassigned to the undersigned on January 23, 2017.

A telephone call made to petitioner yielded the answer that the high school had already been demolished and there was no recyclable junk trash to collect. The undersigned wrote to petitioner on January 23, 2017, outlining the history of the matter to date and asked that he sign and return the withdrawal form that was attached thereto. The letter stated that if I did not hear from him by March 1, 2017, I would dismiss the matter as moot. As of March 7, 2017, there has been no further communication from petitioner. Therefore, it is **ORDERED** that the appeal by Clinton Barlow, III, is **DISMISSED** on grounds of mootness.

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

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

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

March 7, 2017
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: March 7, 2017

Date Mailed to Parties: March 7, 2017

/caa

110-17

STATE OF NEW JERSEY – DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Arbitration Between:

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

"Petitioner

and

VA'LORIE JAMES

"Respondent"

OPINION AND AWARD ON MOTION FOR SUMMARY DISMISSAL

Agency Docket No. 181-6/16
[Va'Lorie James]

BEFORE
ARNOLD H. ZUDICK
ARBITRATOR

Appearances:

For the Petitioner
Robert Tosti, Esq.
Purcell, Mulcahy, Hawkins,
Flanagan & Lawless, LLC

For the Respondent
Nicholas Poberezhsky, Esq.
Caruso Smith Picini, P.C.

PROCEDURAL HISTORY

This is a Decision on the Respondent's Motion for Summary Dismissal. On April 11, 2016, Dr. Mario Santos, Principal of the Petitioner's East Side High School, served the Respondent (James) pursuant to *N.J.S.A.* 18A:6-11, with a Notice of Tenure Charges. Santos alleged that the Respondent was guilty of being chronically absent, being absent without leave, and being chronically tardy, all of which he claimed warranted James' dismissal or reduction of salary. Santos also alleged that James is guilty of conduct unbecoming a teaching staff member for refusing to follow the Petitioner's (District) "sign in" procedures and for failing to fulfill her proctor responsibilities for State required testing. Santos claimed such conduct constituted insubordination.

On or about May 15, 2016, Respondent submitted a response to those charges. On June 27, 2016, the Petitioner's State District Superintendent having considered the charges, supporting evidence and the Respondent's submission, concluded that the charges, if credited, were sufficient to warrant Respondent's dismissal or reduction of salary, and he (the Superintendent) certified the charges to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-11 for a hearing in accordance with *N.J.S.A.* 18A:6-16.

Based upon the Superintendent's June 27, 2016 certification, the Respondent was suspended pursuant to *N.J.S.A.* 18A:6-14 effective June 28, 2016. That suspension was without pay for 120 calendar days from that date. It is unclear whether the suspension continued with pay beginning on the 121st day after such certification and/or whether or when James returned to work.

On July 25, 2016, the Department's Bureau of Controversies and Disputes (Bureau) determined that the charges, if true, were sufficient to warrant dismissal or reduction in salary and it referred the matter to Arbitrator David Gregory pursuant to *N.J.S.A.* 18A:6-16.

Although the sequence of events is not entirely clear thereafter, apparently, Arbitrator Gregory preferred to consider the matter through motion rather than conduct a hearing which prompted the Respondent to file its original Motion for Summary Dismissal on or about September 19, 2016. By letter of October 21, 2016 to the Bureau, the Petitioner expressed its reluctance to proceed by "motion only" and requested the case be transferred to another arbitrator.

Apparently, subsequent to the Petitioner's October request the parties engaged in settlement discussions. By January 25, 2017, however, the Petitioner notified the Bureau that settlement had not been reached and it renewed its request that the case be assigned to a new arbitrator.

This matter was formally assigned to me on February 16, 2017. On or about that date I received the Respondent's revised Motion for Summary Dismissal. After a request for an extension of time to which the Respondent consented, the Petitioner filed its response to that Motion on March 20, 2017.

BACKGROUND

The Respondent was a tenured social worker with the District in 2016 when on January 15, 2016, the Petitioner filed tenure charges against her alleging chronic absenteeism, tardiness and conduct unbecoming for allegedly failing to follow District signing in and out procedures encompassing the 2007-2008, 2008-2009 and 2014-2015

academic years. The District alleged that during the 2008-2009 and 2014-2015 school years James was warned several times about her excessive absenteeism and tardiness, and that her conduct could lead to disciplinary action. The District also alleged James engaged in conduct unbecoming by failing to appear to fulfill her proctor responsibilities for scheduled testing. The District's allegation included a claim that James was tardy 31 times by June 1, 2009 in the 2008-2009 school year; that she was tardy approximately 20 days by January 2015 in the 2014-2015 school year; and, that by May 2015 she had 18 absences in the 2014-2015 school year.

On February 18, 2016, the Respondent filed her answer to the January 2016 tenure charges. The Respondent alleged that since her hire in 2001, she never earned less than a "satisfactory" or "effective" annual evaluation or observation rating. The Respondent's answer alleged James stays late after class and performs volunteer work and it labeled the charges as arbitrary and capricious. It argued that the claims of James' alleged excessive absenteeism, tardiness and unbecoming conduct during 2014-2015 should be excluded from the tenure charges because all such issues were previously resolved between the parties. It also argued that the allegations of absences and tardiness in 2007-2008 and 2008-2009 were trivial and too far removed to support tenure charges.

The Petitioner did not certify the January 2016 tenure charges to the Commissioner and no further proceedings or action were taken on those charges. The charges giving rise to the Respondent's February 2017 Motion in this case were filed on April 11, 2016, which were similar to but more expansive than the charges filed against her in January 2016 which were not certified. In the April 2016 charges the Petitioner essentially alleged the same charges as it had in the January or original charges, that

James was chronically absent and chronically tardy, but it also added allegations covering the 2007-2008 through the 2015-2016 school years up to and including March 17, 2016. The Petitioner alleged that by March 2008 James had been absent 9 days to that point in the 2007-2008 school year and was warned about excessive absenteeism and not following proper sign in procedures in 2008. The April 2016 charges also alleged that in 2009 James was tardy 31 times by June of that year and that she had been warned about "unauthorized punching", or signing in at a different location without permission that same year.

The April 2016 charges alleged that James was absent 351 days or an average of 39 days per year since 2007. In those charges the Petitioner included the following list of days tardy for James:

School Year	Days Tardy	School Year	Days Tardy
2007-2008	44	2012-2013	13
2008-2009	71	2013-2014	56
2009-2010	70	2014-2015	38
2010-2011	106	2015-2016	20 (until 3/17/16)
2011-2012	101		

Those charges further alleged that James was late 38 days in the 2014-2015 school year and was warned in January 2015 about being tardy 20 days. The Petitioner alleged that after a March 2, 2015 agreement to fine James one days pay for excessive absenteeism and tardiness it warned her again for excessive absenteeism

The April 2016 charges also alleged that on May 14, 2015, James was warned about both excessive absenteeism and tardiness and she was docked a day's pay for allegedly being absent without leave (AWOL) on that day. The charges noted that James was warned discipline, including tenure charges would be filed against her.

The Petitioner concluded its April 2016 charges alleging that: James was warned about failing to comply with sign-in and out procedures in 2008 and 2009; she was warned on November 24, 2014 that her unauthorized punches could lead to discipline; and, that she had failed to fulfill her proctor responsibilities on April 30 and May 5, 2015.

In its May 13, 2016 Answer to the April charges, the Respondent argued that the number of absences and days tardy alleged by the Petitioner were misleading and inaccurate. It claimed that many of the alleged absences actually were summer days and it claimed that 286 of the 351 days of alleged absences were incorrect.

The Respondent also claimed that many of the absences alleged by the District included time not subject to discipline such as FMLA time. The Respondent alleged James had 126 occasional absences from 2007-2008 through 2015-2016 or an average of 14 absences per year.

The Respondent also noted that 204 of the alleged days tardy from 2007-2008 through 2015-2016 were within 5 minutes of the start of school. Respondent acknowledged 31 days tardy during 2008-2009, but claimed James needed to provide care for her mother prior to the start of classes. Respondent also claimed that most of her absences in 2014-2015 were taken for legitimate medical reasons and she denied being AWOL on May 14, 2015.

Finally, the Respondent denied she failed to fulfill the proctor assignment and she denied being insubordinate.

POSITIONS OF THE PARTIES ON THE MOTION

RESPONDENT

The Respondent presented five arguments to support its Motion. In Point I it argued that all of the tenure charges be dismissed with prejudice because the Petitioner failed to comply with *N.J.S.A.*18A:6-13.

That statute provides as follows:

> Dismissal of charge for failure of determination by board.
> 18A:6-13. If the board does not make such a determination within 45 days after receipt of the written charge, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon.

The Respondent contends that pursuant to the above statute the District is prohibited from pursuing the April tenure charges against James because it took no action on the charges filed in January 2016 within the time provided by the Statute. Noting that the initial charges were filed on January 15, 2016 and answered on February 18, 2016, the Respondent argued that the District was required to certify charges by April 4, 2016.

Arguing that the District simply disregarded the original tenure charges, the Respondent contends that the District was attempting to circumvent the rules by refilling tenure charges in April 2016 based upon the same underlying allegations of excessive absenteeism, tardiness and conduct unbecoming that it alleged in the January 2016 charges. According to the Respondent, the TEACH NJ statutory requirements must be strictly followed and enforced, and it claims that arbitrators have enforced such compliance with the statute's deadlines. Noting that *N.J.S.A.* 18A:6-13 uses the word "shall"; the Respondent argues its wording indicates a mandatory intent that charges be dismissed when no further proceedings were taken thereon.

The Respondent argues that based upon the statute's wording her rights were violated by the District's re-filing of charges in April. Therefore, it contends that those charges should now be dismissed with prejudice by operation of law.

In Point II of its Motion the Respondent, relying upon the Doctrine of Industrial Double Jeopardy, argued that since James' salary was docked on March 2, 2015 by a Memorandum of Agreement (MOA) between the parties, and because her pay was docked again on May 14, 2015 for allegedly being AWOL, that she cannot be punished a second time for the same offenses that have already resulted in discipline. The Respondent relied upon arbitration decisions governed by TEACH NJ to support its argument. See, *In re Jill Buglovsky*, Agency Docket No. 265-9/12, final decision (12/21/12) confirmed, *Buglovsky v. Randolph Twp. B.E.*, Docket No. MRS-C-13-13 (7/16/13); *In re Nikita Clarke-Huff*, Agency Docket No. 290-9/15, final decision (11/16/15); and, *In re John Carlomagno*, Agency Docket No. 180-8/13, final decision (12/20/13).

The MOA referred to above was an agreement between the District and James and the Newark Teachers Union signed on March 2, 2015. It noted that James had (to that point) arrived late on 27 occasions during the 2014-2015 school year and had been conferenced and warned regarding her excessive tardiness. The parties to the MOA agreed that James would be fined one days pay ($458.32) which was for March 2, 2015, which would constitute full and final resolution of all issues regarding James' unsatisfactory attendance during the 2014-2015 school year. The docking of her pay for allegedly being AWOL on May 14, 2015 obviously occurred after the MOA was signed.

The Notice provision near the end of the MOA puts James on notice that future excessive tardiness:

> . . . will result in more harsh disciplinary consequences up to, and including, withholding of increments, tenure charges and removal from employment.

The MOA concludes with a paragraph explaining the "Binding Nature of Agreement" which states that neither James nor her Union can appeal the MOA and that Section concludes with the following pertinent language:

> . . . all issues encompassed by the within Agreement are fully and forever resolved by and between the parties.

In the *Buglovsky* case the teacher had been charged with inappropriate conduct and misuse of a board computer and internet during work time over a period of years. For conduct occurring during the 2008-2009 school year she received a written reprimand on April 27, 2009. Additional charges alleged similar and continued misconduct through 2011-2012. Relying on the decision in *Desly Getty*, OAL Docket No. EDU 08750-08 (6/14/09), and with support found in Elkouri and Elkouri, *How Arbitration Works*, 5th Ed. pp. 923-925 (1997), the Arbitrator applied a double jeopardy theory and dismissed the 2008-2009 charges for which the teacher had already been disciplined. The Arbitrator in *Buglovsky* also found that certain employee conduct that the Board allowed to continue without discipline was no longer actionable due to the passage of time and the employee's subsequent good behavior.

In the *Clarke-Huff* case a teacher's increment was withheld in 2011 based upon absenteeism extending between 1996 and a point in 2011. The teacher's absenteeism continued from a point in 2011 through the 2014-2015 school year and the Board filed tenure charges in part based upon all of her absenteeism. The Arbitrator sustained the

Respondent's Motion to Dismiss the charges related to the absenteeism for which she had already been disciplined based upon a double jeopardy theory and barred the Board from seeking additional discipline on those matters.

In the *Carlomagno* case, charges were filed and certified during 2013 based upon the employee's conduct during the 2011-2012 and 2012-2013 school years. Relying upon both Brand and Biren, *Discipline and Discharge in Arbitration*, 2nd Ed. p.54 (2008) and Elkouri and Elkouri, *How Arbitration Works*, 7th Ed., Ch. 15.3F and the decisions in *Buglovsky,* and *I/M/O Tenure Hearing of Frank Flood, Cumberland County Technical Education Center,* Docket No. 95-5/13 (7/29/13), the Arbitrator held that under the double jeopardy theory the teacher could not be disciplined again for certain aggressive and unprofessional conduct in December 2012 for which he had already been disciplined. The Arbitrator in the *Flood* case noted that while the prior disciplined conduct could be considered for progressive discipline purposes for future discipline, the prior disciplined conduct could not be subject to additional discipline.

Emphasizing that the District's withholding of James' salary on March 2 and May 14, 2015 was a significant form of discipline covering 2014-2015, and because the Respondent noted that the District did not claim any infractions subsequent to James' May 14, 2015 suspension, it argued that charges focusing on her attendance record must be dismissed.

In Point III of her Motion, Respondent argues that all the claims of excessive absenteeism and tardiness preceding the MOA signed in March 2015 must be dismissed with prejudice based upon the Doctrine of *Res Judicata*. Basically, the Respondent is arguing that by entering into the MOA, James agreed to an unpaid suspension in

exchange for not being further disciplined for any attendance issues preceding its ratification, and that since any prior attendance issues have been resolved, then *res judicata* prevents the District from pursuing any more discipline of James based upon her prior attendance/tardiness issues.

The Respondent further argued in its brief that based upon the wording of the MOA "James would be subject to disciplinary action only for future instances of excessive absenteeism and tardiness". The language the Respondent appears to refer to near the end of the MOA is as follows:

> Ms. James is placed on notice that future excessive tardiness will result in more harsh disciplinary consequences up to, and including, withholding of increments, tenure charges and removal from employment.

In Point IV of her Motion the Respondent argues that the tenure charges must be dismissed with prejudice based upon the Doctrines of Estoppel, Laches and Waiver because the District failed to address James' alleged attendance issues from 2008-2009 through the 2013-2014 school years contemporaneously to when the alleged offenses were allegedly committed. The Respondent argues that too much time has passed for James to be able to defend her record back to 2008. It claims she would be unable to recall or prove the circumstances of every alleged tardy or absence issue which would prejudice her ability to defend against the charges.

Relying on *Buglovsky, supra*, the Respondent argued that the Arbitrator in that case dismissed attendance related charges dating back five years that were not previously prosecuted because those charges were too far removed from the alleged offense.

Finally, in Point V of her Motion the Respondent argued that the tenure charges must be dismissed with prejudice based upon the Doctrine of Unclean Hands because the

District failed to follow the disciplinary protocol under the Attendance Improvement Plan regarding James' alleged excessive absenteeism and tardiness. The Respondent explained that the District mostly failed to hold conferences, issue warning notices or recommend disciplinary action as the Plan provided. Respondent alleges that despite the District's claim that James was tardy 348 times from 2009-2010 to 2013-2014, no conferences were held, no warning letters issued and no disciplinary action was recommended. By failing to take such timely action in accordance with the Plan the Respondent argues that the District denied James her due process protections.

The Respondent seeks dismissal of all charges with prejudice and an order reimbursing James for salary and benefits that had been withheld.

PETITIONER

The Petitioner presented four arguments in opposition to the Respondent's Motion. In Point I of its response the Petitioner addressed the procedural argument the Respondent made regarding the impact in this case of the 45 day rule in 18A:6-13 on the District's failure to certify the original charges filed against James in January 2016. The Petitioner explained that after the original charges were filed it uncovered a history of poor attendance and, therefore, expanded its charges.

The Petitioner argued that the original charges simply were not litigated and that *N.J.S.A.* 18A:6-13 did not prevent the filing of the new charges. It cited two cases to support its argument. *In The Matter of the Tenure Hearing of Debra Suitt-Green, State Operated School District of the City of Newark*, OAL Docket No. EDU 7071-96 (October 14, 1997), the District did not find probable cause to certify charges against a teacher. The District subsequently filed charges against the same teacher based upon both the

incidents listed in the prior charges in combination with new incidents. The Respondent moved to dismiss the case relying on *N.J.S.A.* 18A:6-13 and arguing that based upon the Statute the District could not re-file charges based upon incidents previously considered and not certified. The ALJ rejected the Motion and found such prior incidents could be reconsidered. The Commissioner affirmed.

In *The State Operated School District of the City of Newark v. Victoia Jakubiak*, OAL Docket No. EDU 3961-97 (December 22, 1998), charges were initially filed on December 9, 1996 but were not certified. The charges were re-filed – same as before – on February 19, 1997. The Respondent sought to dismiss those charges based on its reading of 18A:6-13. The ALJ, citing to *Suitt-Green*, denied the Respondent's Motion in that case. The Petitioner here seeks the same result here.

In Point II of its response to the Motion, the Petitioner here argued that the limited release language contained in the MOA does not prevent the 2014-2015 charges from being considered in this case. The Petitioner noted that the parties' collective agreement permits fines and penalties and that the MOA language expressly contemplates potential future disciplinary action including termination. Petitioner further argued that James was disciplined in May 2015, subsequent to the MOA and that there was no basis to conclude that the totality of James' attendance record could not be reviewed in a tenure case merely because a minor penalty had been previously agreed upon.

In Point III of its response to the Motion, the Petitioner emphasized that this case is about excessive absenteeism and that there are many cases by the Commissioner and arbitrators holding that even legitimate absences when numerous can be the basis for termination. The Petitioner cited Commissioner decisions: *In the Matter of the Tenure*

Hearing of Alicia Dugan, School District of the City of Jersey City 6/14/12 (#244-12); *In the Matter of the Tenure Hearing of Lisa Rosa, School District of the City of Jersey City* 9/1/11 (#368-11); *In the Matter of the Tenure Hearing of Frances R. Metallo, School District of the City of Union City* 5/12/03 (#244-03); and, arbitration decisions: *Burke and the State Operated School District of the City of Camden*, Docket No. 5-1/13 (March 30, 2015); *Stapleton and the Jersey City Board of Education*, Docket No. 284-9/12 (March 20, 2013); and, *Lenore Francis and the Jersey City Board of Education*, Docket No. 285-9/12 (January 10, 2013) to support its position that excessive absenteeism, even if based upon legitimate reasons, are grounds for termination.

The Petitioner also cited to well known treatises used in arbitration to support that position. Elkouri and Elkouri, *How Arbitration Works*, p. 822 (6th Edition); and Brand and Biren, *Discipline and Discharge in Arbitration*, 2nd Edition, p. 124 (2008).

In the presentation of Point III the Petitioner appears to argue that I should consider the merits of James' absences and how she reacted and communicated concerning those absences.

In Point IV of its response to the Motion, the Petitioner emphasized the strong public interest in monitoring teacher attendance and it argued that a full factual hearing is warranted here despite the asserted legal defenses in order to consider and weigh the facts and legal issues.

DISCUSSION

In considering all the above arguments, I remind the parties that currently the merits of the allegations against James – no matter how egregious they may appear – are not before me for determination. Rather, based upon the Respondent's Motion my

jurisdiction at this time is limited to determining what if any allegations in the April tenure charges may proceed to a hearing *de novo*. Consequently, despite the Petitioner's specific allegations, many of which the Respondent has disputed, I will not resolve the viability of those allegations in this Decision. I will, instead, only determine which, if any, allegations may proceed to hearing.

In Point I of its Motion the Respondent argued that all of the charges filed by the District in April 2016 be dismissed because the District allegedly violated *N.J.S.A.* 18A:6-13 by failing to certify to the Commissioner within 45 days all the original charges it filed against James in January 2016. In its brief, the Respondent argued that tenure charges along with an employee's response must be presented to a board of education to decide whether probable cause exists to warrant the employee's dismissal or reduction in salary and if so, the charges must be certified to the Commissioner. The language in *N.J.S.A.* 18A:6-13, however, does not contain such specific requirements.

In fact, the language in that Statute does not require a board to make any determination. It merely says that if a board does not make a determination – presumably whether or not to certify charges to the Commissioner – within 45 days (of when the charges were filed), then the charges that were filed be deemed dismissed and no further proceeding or action be taken thereon – presumably on the charges filed at that time. The pertinent statutory language appears to be a mechanism to automatically dismiss tenure charges if a board has not acted on them within 45 days – presumably to prevent such charges from lingering for an extended period of time. The ending language in that Statute "no further proceeding or action shall be taken thereon" appears to refer back to the charge(s) that was (were) dismissed and appears to have been intended to ensure that

no further action be taken on that which was dismissed, once again to prevent those charges from lingering and creating doubt for the respondent. But the language in 18A:6-13 does not say a board cannot re-file previous charges. That is, the Statute does not say a board cannot serve a new filing on a respondent which includes charges that had been contained in an earlier dismissed filing.

The *Suitt-Green* and *Jakubiak* decisions support that view, holding that charges previously dismissed by operation of 18A:6-13 may be re-filed and reconsidered in subsequent charges particularly if the new charges are filed in close proximate time to the original charges. The same result was reached in *I/M/O Tenure Hearing of Sabino Valdes, Union City School District*, OAL Docket No. EDU 3620-1 (8/9/01), confirmed *Valdes v. City of Union City Board of Education,* Docket No. A-1337-04T3 (App. Div. 1/22/07), certification denied (5/15/07).

In *Valdes* the ALJ held that the Board's failure to certify charges within the time provided in *N.J.S.A.* 18A:6-13 required those charges be dismissed. But he also held that lacking any judicial decisions to the contrary and based upon Department of Education decisions, such dismissals are without prejudice to the right of the Board to re-file such charges. The Appellate Division agreed. Noting that the Board did not rule on the merits of the initial charges and the re-filing occurred within a reasonable time, the Court held:

> We conclude that so long as an employee has not been prejudiced by a re-filing of charges within a reasonable period of time, the passage of the statutory time period from the filing of the initial charges should be viewed as a dismissal without prejudice. (slip opinion p. 5).

That same result is appropriate here. After the initial tenure charges were filed on January 15, 2016, the District continued to examine James' records and re-filed the charges on April 11, 2016. I find that the January charges were dismissed by operation of

law (*N.J.S.A.* 18A:6-13) but without prejudice, and that the re-filing in April occurred within a reasonable time of the initial filing. Other than the fact that the Respondent needed to continue to litigate over this matter, and noting that James has either continued to work or at least been paid (after 120 days of suspension) the Respondent did not demonstrate that it was otherwise prejudiced by the re-filing of charges.

Consequently, based upon the above discussion I find that the January 2016 tenure charges were dismissed without prejudice. Thus, the District did not violate *N.J.S.A.* 18A:6-13 by re-filing tenure charges in April 2016. Accordingly, the Respondent"s Motion for Summary Dismissal based upon its first Point is denied.

In Point II of its Motion the Respondent, relying on a theory of double jeopardy, vigorously argued that tenure charges based upon any of her conduct in the 2014-2015 school year be dismissed because she has already been disciplined for such conduct as evidenced by: 1) the MOA signed on March 2, 2015 which docked her pay; and, 2) the subsequent additional docking of her pay on May 14, 2015. The Respondent essentially made the same argument relying on a *res judicata* theory in Point III of her Motion. Respondent relied upon *Buglovsky*; *Clarke-Huff* and *Carlomango* to support her argument.

The concept of double jeopardy in the labor relations context has been frequently applied. *Discipline and Discharge in Arbitration* at p. 54 explains:

> Fundamental concepts of justice and fairness require that once an employee has been disciplined for misconduct, the employee will not again be subject to discipline for the same offense. ...Double jeopardy concepts also preclude increasing the penalty for a violation after discipline has been imposed.

In its response to the Motion, the Petitioner argued that the MOA contained "limited release language" which it claims does not prevent consideration of all tenure charges. The Petitioner's argument appears to be based on several things: 1) the language in the Notice Section of the MOA that future excessive tardiness will result in more harsh disciplinary consequences; 2) the fact that James was disciplined for conduct on May 14, 2015, subsequent to the MOA; and 3) apparently because – in the Petitioner's words – the "minor penalty" (presumably the one day docking of pay) could not block the review of the totality of James' attendance record.

Although the MOA seems to primarily concern tardiness, I find that the third specific agreement listed therein broadened the purpose of the MOA to include absenteeism. The pertinent language provides:

> 3. The parties acknowledge that this Agreement constitutes full and final resolution of all issues regarding Ms. James unsatisfactory attendance during the 2014-2015 school year.

The Petitioner seemed to dismiss the Respondent's double jeopardy argument by claiming that the MOA language was limited and that the Respondent's argument was unsound for several reasons. First; because the collective negotiations agreement presumably covering James, permits fines or penalties as an exception to tenure charges; second, because the MOA expressly contemplates potential future discipline; third, because James was disciplined again in May 2015; and fourth, because the agreed upon penalty was minor.

Those arguments are not persuasive to defeat Respondent's Motion. Although the MOA does state that future excessive tardiness will result in more harsh discipline, that document clearly and unequivocally also states that said Agreement:

> . . .constitutes full and final resolution of all issues regarding Ms. James unsatisfactory attendance during the 2014-2015 school year.

If the District did not intend that Agreement to cover all of James' attendance issues for the entire 2014-2015 school year, which I believe was intended to cover tardiness and absenteeism, I would think it would not have agreed to that specific language in that Agreement. The discipline for May 14, 2015 while "attendance" related, was for allegedly being AWOL which differs from tardiness or approved absenteeism, it did not negate the "attendance" language in the MOA. In fact, the discipline in May 2015 demonstrated that the District was willing and capable of taking action against James contemporaneously with an alleged infraction, something it clearly choose not to do in the years preceding 2014-2015.

The Petitioner in its brief also spent considerable time arguing why excessive absenteeism is a legitimate basis for dismissing a teacher even when the absences were "justified" and "approved". I don't doubt the Petitioner's argument in that regard or the cases cited in support thereof, but that is more an argument over the merits of the allegations in the charges and potential discipline therefrom, none of which is before me at this time. As explained earlier, I am only determining here, what, if any, allegations may proceed to hearing.

Having considered the parties' positions as well as the decisions and legal treatises cited above I find the double jeopardy concept as well as *res judicata* apply in this case, at least with respect to all attendance - tardy and absentee - allegations against James for all of the 2014-2015 school year as specifically stated in the MOA. Similarly,

double jeopardy applies for the alleged AWOL event of May 14, 2015 for which James was docked a full days pay.

Double jeopardy and *res judicata*, however, do not apply to alleged sign-in or out procedures or proctor failures that may have occurred in the 2014-2015 school year because the MOA was, by its own terms, limited to attendance issues for that year which, I find, only included absenteeism and tardiness. Nor did those legal concepts apply to the 20 alleged tardy days in the 2015-2016 school year alleged in the April tenure charges because the MOA was limited to 2014-2015.

Consequently, based upon the MOA and the docking on May 14, 2015, the Motion is sustained regarding all attendance – absentee and tardy – allegations and the AWOL allegation against James for the 2014-2015 school year. The District may not proceed to hearing on any of those charges/allegations. However, the Motion is denied regarding: 1) the alleged November 24, 2014 warning about unauthorized punches; 2) James alleged failure to perform proctor duties on April 30 and May 5, 2015; and, 3) the allegation that James was tardy 20 times during the 2015-2016 school year. The Petitioner may proceed on those charges/allegations but may not expand on those specific charges.

Based upon its application of *Buglovsky*, the Respondent in Point IV of its Motion essentially argued that the District's inaction until 2016 waived any right it may have had to proceed on the 2008-2009 through 2013-2014 charges/allegations against James. I agree for the same reasons expressed in that decision. Although the Petitioner in Point IV of its response to the Motion argued public interest considerations for wanting a hearing on all of the charges it filed in April 2016, I note it was the District's burden to proceed

with timely charges which would have protected both the public interest and James' due process rights.

In this case the District has sought to litigate over absenteeism and tardiness allegedly occurring as much as eight years before the filing of the 2016 tenure charges. Here, one could infer that if James had as poor an absence/tardy record as alleged – and one which the District determined was unacceptable – the District would have taken vigorous action against James much sooner, certainly at various times during the 2008-2009 through 2013-2014 time period. But other than warning James, it does not appear that the District thought James' record serious enough to take further action during that time. James was allowed to continue working even during the time when she was allegedly continuing to accumulate an absence and tardy record. Either the District was derelict in its duty to earlier file tenure charges, or it had determined that James' conduct – though troublesome – did not justify such action. I tend to believe the latter. In either case, it appears to me that James' conduct in 2014-2015 was the catalyst for the 2016 charges and that the allegations of excessive absences/days tardy prior thereto was merely added for effect.

When considering the fact that the District, through the 2015 MOA, resolved what was alleged to have been a significant number of absences and days tardy during the 2014-2015 school year with only a one day salary penalty, and did not even address any of the alleged absenteeism and tardiness occurring prior thereto, I infer that the District did not appear to consider that such prior conduct justified serious discipline. With that in mind, and noting the significant delay between the alleged prior absences and days tardy and the filing of the instant charges, it appears to me that it would be fundamentally

unfair and violate James' due process to proceed now on conduct arising prior to the 2014-2015 school year. The District had amply opportunity between 2008-2009 and 2013-2014 to contemporaneously proceed on charges concerning conduct during those years. Having failed to do so during the appropriate time period, it waived the right to add charges from those years to the 2014-2015 charges in this case. I, therefore, sustain the Motion with respect to all allegations of conduct occurring prior to the 2014-2015 school year. The Petitioner may not proceed on any charges prior to that year.

Accordingly, based upon all of the above I issue the following:

AWARD

The Respondent's Motion for Summary Dismissal is sustained in part and denied in part.

A. The Motion is sustained regarding:

1. All alleged conduct occurring during the 2008-2009 through the 2013-2014 school years.
2. All alleged absenteeism and tardiness occurring during the 2014-2015 school year.
3. The alleged AWOL conduct occurring on May 14, 2015.

B. The Motion is denied regarding:

1. Respondent's allegation that the tenure charges could not be re-filed.
2. The alleged November 24, 2014 warning about unauthorized punches.
3. James' alleged failure to perform proctor duties on April 30 and May 5, 2015.
4. The allegation James was tardy 20 times during the 2015-2016 school year.

C. I retain jurisdiction over a possible Remedy for the matters dismissed in Section A, and retain jurisdiction for the matters remaining in Section B, numbers 2, 3, and 4. A conference call will be arranged with the parties to determine the further processing of this case.

Arnold H. Zudick
Arbitrator

Dated: April 17, 2017
Morrisville, PA

Commonwealth of Pennsylvania}
County of Bucks }

On this 17th day of April 2017, before me personally came and appeared Arnold H. Zudick to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Susan M. Zudick
Notary Public

AWARD

The Respondent's Motion for Summary Dismissal is sustained in part and denied in part.

A. The Motion is sustained regarding:

1. All alleged conduct occurring during the 2008-2009 through the 2013-2014 school years.
2. All alleged absenteeism and tardiness occurring during the 2014-2015 school year.
3. The alleged AWOL conduct occurring on May 14, 2015.

B. The Motion is denied regarding:

1. Respondent's allegation that the tenure charges could not be re-filed.
2. The alleged November 24, 2014 warning about unauthorized punches.
3. James' alleged failure to perform proctor duties on April 30 and May 5, 2015.
4. The allegation James was tardy 20 times during the 2015-2016 school year.

C. I retain jurisdiction over a possible Remedy for the matters dismissed in Section A, and retain jurisdiction for the matters remaining in Section B, numbers 2, 3, and 4. A conference call will be arranged with the parties to determine the further processing of this case.

Arnold H. Zudick
Arbitrator

Dated: April 17, 2017
Morrisville, PA

Commonwealth of Pennsylvania}
County of Bucks }

On this 17th day of April 2017, before me personally came and appeared Arnold H. Zudick to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Susan M. Zudick
Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
SUSAN M. ZUDICK, Notary Public
Falls Twp., Bucks County
My Commission Expires September 2, 2018

111-17

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Arbitration Hearing of:

Joann Smith, State Operated School District of the City of Paterson

---

Before: Thomas D. Hartigan, Arbitrator

Agency Docket No. 2-1/17

Appearances:

For the District: Deborah J. Bracaglia, Esq.
Apruzzese, McDermott, Mastro & Murphy, P.C.

For Respondent: Gail Oxfeld Kanef, Esq.
Oxfeld Cohen, P.C.

AWARD

The parties have entered into an Employment Separation Agreement (copy enclosed) in resolution of the above referenced matter. I have reviewed the Agreement and found it to be in compliance with N.J.A.C. 6A:3-5.6. As indicated in Item 3 of the Agreement, page two, "The parties mutually irrevocably and unconditionally waive, release and forever discharge any and all claims or rights, whether known or unknown which they have or may have against each other, personally and officially, individually and collectively…."

The Separation Agreement came about after extensive discussions at which the nature of the charges were fully presented and known to Ms. Smith. Both parties have freely entered into this Agreement and both have signed the Agreement. As noted on page five (5) of the Agreement, Ms. Smith acknowledged her

understanding of the agreement which had been negotiated by her attorney with her knowledge and consent. Both parties have acknowledged, page one (1) of the Agreement, that the Agreement is in their mutual interest and I find it to be in the public interest.

Thomas D. Hartigan

Thomas D. Hartigan, Arbitrator
April 14, 2017

LAW OFFICES
APRUZZESE, McDERMOTT, MASTRO & MURPHY

VINCENT J. APRUZZESE (2)*
FREDERICK T. DANSER, III
MAURICE J. NELLIGAN, JR. (4)
BARRY MARELL
ROBERT T. CLARKE
MARK J. BLUNDA (1)
LISA BARRÉ-QUICK (2)(3)
ROBERT J. MERRYMAN (3)
ARTHUR R. THIBAULT, JR.
RYAN S. CAREY (2)
NEHA PATEL (5)
TIMOTHY D. CEDRONE (2)
H. THOMAS CLARKE (3)
DEBORAH J. BRACAGLIA
KYLE J. TRENT (2)

A PROFESSIONAL CORPORATION
(MAIL TO)
P.O. BOX 112
LIBERTY CORNER, N.J. 07938

(DELIVER TO)
SOMERSET HILLS CORPORATE CENTER
25 INDEPENDENCE BOULEVARD
WARREN, N.J. 07059

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—
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FRANK X. McDERMOTT
(1924-2011)
—
FRANCIS A. MASTRO
(1929-2008)
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(1938-1990)
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ALSO DC(1) NY(2) PA(3) MD(4)
VA(5)
*OF COUNSEL

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CONTROVERSIES & DISPUTES
2017 APR 18 A 11:04

April 13, 2017

VIA Email to gok@oxfeldcohen.com
And Regular Mail

Gail Oxfeld Kanef, Esq.
Oxfeld Cohen, P.C.
60 Park Place, Suite 600
Newark, New Jersey 07102

RE: In the Matter of Tenure Charges against Joann Smith and State Operated School District of the City of Paterson

Dear Ms. Kanef:

With regard to the above-referenced matter, enclosed please find a fully executed Employment Separation Agreement. The Board of Education approved the Separation Agreement at their meeting last night, April 12, 2017.

I am advised by the District that Ms. Smith will receive all monies owed to her in the next payroll cycle, April 28th.

By copy of this letter I am forwarding a copy of the signed agreement to Arbitrator Hartigan so that he may close the case.

Please feel free to call me with any questions. Thank you for your cooperation in resolving this matter.

Very truly yours,

Deborah J. Bracaglia

Deborah J. Bracaglia

/djb
Enclosure
cc: Arbitrator Thomas D. Hartigan (Via Email and Federal Express; With Enclosure)
Robert Murray, Esq. (Via Email Only; Without Enclosure)
Luis Rojas (Via Email Only; Without Enclosure)

EMPLOYMENT SEPARATION AGREEMENT

This Employment Separation Agreement (the "Agreement") is made by and between JOANN SMITH ("SMITH") and the **STATE OPERATED SCHOOL DISTRICT OF PATERSON** (the **"BOARD"**). The signatories to this Agreement will be referred to collectively and/or jointly, as appropriate, as the "Parties."

WHEREAS, the BOARD and SMITH have consulted with each other, and with their respective counsel, and have determined that it would be in their mutual best interest that SMITH and the BOARD end their employer-employee relationship; and

WHEREAS, on the basis of the foregoing, SMITH will resign her tenured position, as a teaching staff member with the BOARD, effective April 30, 2017 and the BOARD, in turn, agrees to provide certain consideration to SMITH in connection with her transition from employment with the BOARD.

NOW, THEREFORE, in consideration of the mutual promises, covenants and obligations contained herein, the Parties agree as follows:

1. At the time of execution of this Agreement, SMITH will submit a letter of resignation of her position with the BOARD to be effective April 30, 2017. The letter of resignation shall be in the form attached hereto as **Appendix A** and is made part of this Agreement. It is understood that Smith's resignation from her position with the Board is final, binding and irrevocable. The Board will maintain SMITH on paid administrative leave under the terms of the CBA with the Paterson Education Association until April 30, 2017, including back pay for the period of her unpaid

suspension. Her contractual health benefits shall continue through April 30, 2017. Thereafter, SMITH may obtain health coverage through COBRA.

2. Neither the BOARD nor SMITH, nor anyone acting on behalf of SMITH, shall take any adversarial action against each other arising out of SMITH's employment with the BOARD, whether by grievance, complaint, litigation, investigation or otherwise. To that end, the parties mutually release each other from and against any and all claims and potential claims arising out of or in connection with their mutual employment relationship except for any workers compensation, unemployment or disability related claims that SMITH may have. By signing this Agreement, SMITH represents that she is unaware of any facts that would give her a basis for a claim for workers' compensation or disability benefits.

3. The parties mutually irrevocably and unconditionally waive, release and forever discharge any and all claims or rights, whether known or unknown, which they have or may have against each other, personally and officially, individually and collectively, against past and present Board members, officers and administrators, its agents and employees, personally and officially, as well as their successors and assigns, including, but not limited to any and all claims for attorney's fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this settlement, and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal

Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retraining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any and all other claims for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims for health insurance continuation coverage under and pursuant to the Consolidated Omnibus Budget Reconciliation Act (referred to hereinabove as "COBRA"), the New Jersey Workers Compensation Act, any claim to unemployment benefits to which a party may be entitled and her right to enforce the terms of this Agreement.

4. The BOARD will also grant SMITH permission to make arrangements with the building administration to enter her place of employment for the purpose of removing any of her personal records and belongings and returning any property belonging to the BOARD. SMITH agrees that on or before March 1, 2017, she will return to the BOARD all BOARD property including, but not limited to, keys, identification cards, computers, etc.

5. The BOARD shall continue to provide contractual medical, dental, prescription and vision health insurance benefits to SMITH through April 30, 2017. SMITH will be

eligible to continue health insurance benefits thereafter at her expense through COBRA.

6. SMITH agrees that she will not seek reemployment with the BOARD now or in the future, and if she does, she understands that the BOARD will not be obligated to consider her for re-employment. SMITH further agrees that she and/or anyone acting on her behalf has no right to challenge and will not challenge or otherwise institute an action over the BOARD's failure to process or consider any such application for reemployment or reinstatement.
7. SMITH agrees that she is not owed any further monies or benefits from the BOARD, whether by way of collective bargaining agreement, BOARD policy or otherwise, and the BOARD is not obligated to make any further payments to SMITH, except as expressly provided herein.
8. The Parties acknowledge that they have read the agreement and understand all of its terms, that they have consulted with counsel, and that their agreement is executed voluntarily, without duress, and with full knowledge of its legal significance.
9. This Agreement constitutes the complete agreement between the parties. It may not be altered or amended, except in writing, with the same formality as this agreement. SMITH acknowledges and agrees that this Agreement will not be enforceable until formally approved by Resolution of the Board of Education.
10. SMITH acknowledges that, pursuant to N.J.S.A. 17:1-6.3, the BOARD may be required to disclose this agreement to the Division of Pensions.

11. SMITH acknowledges that, pursuant to N.J.A.C. 6A:9B-4.3 and Child M. v. Fennes, 2016 WL 4473253 (App. Div. 2016) (unreported), this matter must be referred to the State Board of Examiners.

12. Employee acknowledges that she is releasing all rights and claims arising under the Age Discrimination in Employment Act. To satisfy the requirements of the Older Workers' Benefit Protection Act, 29 U.S.C. § 626(f), the parties agree as follows:

a. Employee acknowledges that she has read and understands the terms of this Agreement.

b. Employee is hereby advised to consult with an attorney prior to executing this Agreement. Employee represents that she has consulted with her attorney of record in the Action, Gail Oxfeld Kanef, Esq., and has received all advice she deems necessary concerning this Agreement.

c. Employee acknowledges that she has twenty-one (21) days to consider this Agreement, although she may, in the exercise of her own discretion, sign or reject it at any time before the expiration of the twenty-one (21) day period. Employee acknowledges that she has taken as much time as necessary to consider whether to enter into this Agreement, and has chosen to enter this Agreement freely, knowingly, and voluntarily.

d. For a seven (7) day period following the execution of this Agreement, Employee may revoke this Agreement by delivering a written revocation to the law firm of Apruzzese, McDermott, Mastro & Murphy, attorneys for Employer, 25 Independence Blvd, Warren, NJ 07059. This Agreement will not become effective or enforceable until after the end of this revocation period.

WHEREFORE, having fully read and understood the terms of this Agreement, the Parties sign their names below with the intention that they shall be bound by it.

JoAnn Smith
JOANN SMITH

2/27/17
Dated

STATE OPERATED SCHOOL DISTRICT OF PATERSON

By: Donna W. Evans

2/20/17
Dated

STATE OF NEW JERSEY)

SS:

COUNTY OF BERGEN)

I CERTIFY that on February 27, 2017, JOANN SMITH personally came before me and acknowledged under oath, to my satisfaction, that this person:

(a) Is named in and personally signed this document; and

(b) Signed, sealed and delivered this document as her own act and deed.

Esther Jones

ESTHER LOLETA JONES
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 3/4/2018

STATE OF NEW JERSEY)

SS:

COUNTY OF PASSAIC)

I CERTIFY that on Dr. Donnie Evans personally came before me and acknowledged under oath, to my satisfaction, that he or she is the person:

(a) named in and personally signed the document; and

(b) is authorized by the **STATE OPERATED SCHOOL DISTRICT OF PATERSON** to execute this document;

(c) Signed, sealed and delivered the document in his or her official capacity as the act and deed of the **STATE OPERATED SCHOOL DISTRICT OF PATERSON**.

3/20/17

Attorney at Law
State of New Jersey

Appendix A

February 27, 2017

Donnie Evans, Ed.D., Superintendent
State Operated School District of the City of Paterson
90 Delaware Avenue
Paterson, NJ 07503

Dear Dr. Evans:

This letter will serve as my official notification to the State Operated School District of the City of Paterson that I hereby irrevocably resign my position effective April 30, 2017.

Sincerely,

JoAnn Smith

Joann Smith

PATERSON PUBLIC SCHOOL DISTRICT
ACTION FORM

1. All Board Resolutions must clearly state how that program/initiative relates to or is specifically connected to the Priorities and Goals contained in the Strategic Plan.
2. This Action Form must be in the State District Superintendent's office according to cutoff date before the meeting of the Board of Education.

Recommendation/Resolution: SETTLEMENT;

I HEREBY CERTIFY THE WITHIN TO BE A TRUE COPY

WHEREAS, J. S. is a tenured teacher in the District; and

WHEREAS, the State District Superintendent served Smith with a Notice of Tenure Charges and Supporting Statement of Evidence, executed under oath; and

WHEREAS, the Tenure Charges were certified to the Commissioner or Education; and

WHEREAS, J.S., through Counsel, submitted a response to such Tenure Charges, denying same; and,

WHEREAS, without any admission by either party as to the validity of the Tenure Charges, the District and J. S. have determined to amicably sever their relationship prior to an arbitration hearing being conducted;

NOW, THEREFORE, BE IT RESOLVED THAT the District and J. S. agree to sever their relationship in accordance with the terms of the Employment Separation Agreement and General Release presented for approval; and

BE IT FURTHER RESOLVED THAT, as part of that settlement, J. S. letter of resignation be and is hereby accepted with an effective date of April 30, 2017; and

BE IT FURTHER RESOLED THAT all action required to effectuate the settlement is authorized.

APPROVALS REQUIRED

1. Submitted by Mr. Luis Rojas, Executive Director of Labor Relations /Affirmative Action (Name, Title) — Date: 3-27-17
2. Approval by Divisional Administrator _____ (State District Superintendent, Deputy, Assistant Superintendent or Business Administrator) — Date: _____
3. Account No. _____

   Certification of Funds – Business Administrator _____ (Signature) — Date: 3/27/17

Funds Available		Funds Not Available		Funds Not Needed		Non-Budget Item	

4. Verification by Legal Department, if required _____ — Date: 3/27/17
5. Approval - State District Superintendent _____ — Date: 3/30/17
6. Board Adoption Date April 12, 2017 Resolution Number G-1

Copies as follows:
White-To Board Office Green-To #5 Yellow-To Business Administrator Pink-To #1 Gold-To #2

May 2011

112-17

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
Case No: 1-1/17

In the Matter of the TENURE Hearing between the

The SOUTH HACKENSACK BOARD OF EDUCATION,

PETITIONER

and

CHRISTOPHER MASULLO,

RESPONDENT

BEFORE: Ira Cure, Esq.
Arbitrator

APPEARANCES

For the Petitioner School District:
Vittorio S. LaPira, Esq.
Fogarty & Hara, Esqs.

For the Respondent:
Ty Hyderally, Esq.
Sally A. Sattan, Esq.
Hyderally & Associates, P.C.

OPINION and AWARD

Pursuant to *N.J.S.A., 18A:6-16,* as amended by *P.L. 2012, c. 26 and P.L. 2015, c. 109* ("TEACHNJ"), the tenure charges brought by the South Hackensack Board of Education on behalf of the South Hackensack Public School District ("District") against Christopher Masullo ("Masullo") were referred to me for a hearing and decision. The charges were filed with the New Jersey Department of Education ("DOE") on January 3, 2017. An answer was filed by Mr. Masullo with the DOE on January 18, 2017. I was

appointed to hear this dispute on January 30, 2017. I conducted a hearing at Hillside Square, 8 Hillside Avenue, Montclair, New Jersey on March 6, and March 8, 2017.

Both parties were afforded a full opportunity to examine and cross-examine witnesses, submit evidence, and present arguments in support of their respective positions. The parties submitted briefs and the record was closed as of March 31, 2017. The evidence adduced and the positions and arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

Vittorio S. LaPira, of the firm of Fogarty & Hara, Esqs. represented the District. Ty Hyderally, Esq. and Sally A. Sattan, Esq. represented Mr. Masullo.

THE ISSUE:

The issue for arbitral determination is:

Has the District established that Mr. Masullo engaged in misconduct alleged in the charge brought against him? If so what shall be the penalty?

THE CHARGE[1]

> Christopher J. Masullo, a tenured teaching staff member in the employ of the South Hackensack Board of Education, engaged in conduct unbecoming a teaching staff member when he disconnected a loudspeaker in his Computer Lab classroom without permission, thus jeopardizing the health and safety of students and staff, since he could not hear emergency notifications (such as a school security drill or *actual* bomb threat, active shooter situation, etc.), and such action alone (and certainly when combined with Mr. Masullo's attempt to cover up his actions and his prior incidents of misconduct), *justifies dismissal from his teaching position.*

(Emphasis in the original).

[1] There are numerous specifications to the Charge which will not be set forth herein.

BACKGROUND

A. Mr. Masullo's History in the District

Mr. Masullo, a teacher for twenty years, was hired by the District in 2007. Mr. Masullo is a sixth-grade math teacher and is a computer teacher for students in grades Pre-K through 8. He teaches at the District's Memorial School.

Throughout most of Mr. Masullo's employment in the District, Dr. William DeFabiis ("DeFabiis") served as both District Superintendent of Schools and Principal of Memorial School. Dr. DeFabiis retired in June 2013, and was succeeded by the present District Superintendent and Principal, Dr. Gregorio Maceri.

Dr. DeFabiis testified that Mr. Masullo was an excellent teacher, and an invaluable staff member who took initiative and worked with staff members to solve problems with electronic technology. As Mr. Masullo's supervisor, Dr. DeFabiis prepared observation reports (Respondent Exs. 1, 2, 3 and 6), and performance reports concerning Mr. Masullo. (Respondent Exs. 4 and 5). These observation reports and performance reports were uniformly positive. Each of the observation reports concluded with the phrase "Keep up the good work!" The performance reports had three possible ratings for 38 separate criteria. These ratings were: satisfactory, needs improvement and unsatisfactory. In both 2013 and 2012, Dr. DeFabiis rated Mr. Masullo as satisfactory in each of the 38 criteria. In both years, Dr. DeFabiis recommended that Mr. Masullo receive a salary increment. (Respondent Exs. 4 and 5).

Dr. DeFabiis' testimony was not uniformly positive regarding Mr. Masullo's performance. Dr. DeFabiis testified that on two separate occasions he had a strict talk with Mr. Masullo about the teacher's interactions with other staff members[2].

On May 10, 2016, Dr. Maceri prepared a Teacher Summary Rating form for Mr. Masullo. That form contains twenty-seven different criteria concerning teacher performance. Dr. Maceri rated Mr. Masullo as proficient in one category, accomplished in sixteen categories, and distinguished in ten categories. There were no comments in the section entitled "Recommended Actions for Improvement." The final comment on the document stated in pertinent part: "Mr. Masullo is encouraged to continue his approach of locating and implementing new and innovative methods of improving student achievement." (Respondents Ex. 9).

B. Mr. Masullo's Classroom and the Loudspeaker

Because Mr. Masullo is a computer teacher for the District's Pre-K to 8th grade students, his primary classroom is the Computer Lab. The Computer Lab is in a glass enclosed room that adjoins the Memorial School Library. There are low ceilings in the Computer Lab, and there is no sound buffering or dampening system in the room.

Each classroom and office in the Memorial School has a loudspeaker embedded in the ceiling of the room. The loudspeaker is used to make school announcements, and to announce security drills including "bomb drills" and "active shooter drills." (There is a separate alarm system for fire drills). Security drills are announced in "plain language" over the loudspeaker. The person making the announcement would state "active shooter" or "bomb threat[3]." In addition, during the school day, if a visitor incorrectly rings the night

[2] One such discussion occurred in 2008.

[3] Pursuant to Department of Education guidelines, the individuals making the announcement rotate.

bell, the sound of the bell is transmitted through the loudspeaker system into each classroom including the Computer Lab.

Mr. Masullo testified that, because of the configuration of the Computer Lab, sounds emanating from the loudspeaker are extremely loud and disruptive. Mr. Masullo testified that he had chronic ear infections, and that because of a surgical procedure in 2013 to get rid of fluid in his ears, he was very sensitive to sounds. (A medical record detailing Mr. Masullo's auditory problems was introduced as Respondent's Ex. 10).

Mr. Masullo also testified that some of his students were on the autism spectrum, and that they reacted poorly to noises from the loudspeaker. Mr. Masullo testified that it took time to calm his students down after hearing the jarring noises of the loudspeaker.

On March 21, 2013, Mr. Masullo sent an email to Dr. DeFabiis concerning the loudspeaker. The email stated in pertinent part: "Can we do anything about the volume of the ceiling speakers? The sound of the bells and such are deafening in the Library and Computer Lab." (Respondent Ex. 7).

Dr. DeFabiis did not remember receiving the email, but did remember speaking to Mr. Masullo about the noise in the Computer Lab. Dr. DeFabiis testified that he made some inquiries and determined that because there was no volume control on the speaker there was no way to adjust the volume in the Computer Lab. Mr. Masullo also complained to Head Custodian James Parisi ("Parisi") and to Custodian Carmine Barricella ("Barricella") about the excessive noise in the Computer Lab. Mr. Parisi testified that he would not disconnect the loudspeaker unless he was authorized to do so by Dr. DeFabiis.

After Dr. Maceri became District Superintendent and Principal a meeting was held in his office with Mr. Masullo and Jeff Badre ("Badre"), an information technology

consultant, to discuss certain computer contracts. Mr. Masullo testified that at the meeting he observed Mr. Parisi disconnect the loudspeaker in Dr. Maceri's office because it was too loud. Mr. Parisi admitted that he had disconnected the loudspeaker in Dr. Maceri's office, but he did not remember if Mr. Masullo observed him performing that task.

At some point in 2015, after Mr. Masullo learned that Mr. Parisi disconnected the loudspeaker in Dr. Maceri's office, Mr. Masullo unilaterally decided to disconnect the loudspeaker in the Computer Lab. Mr. Masullo claimed that he was still able to hear the monthly security alarms even after the loudspeaker was disconnected. Mr. Masullo also testified that he told Anne Turtoro ("Turtoro") the Library/Media Specialist and Gifted and Talented Teacher whose work area in the library adjoined the Computer Lab, and Mr. Barricella that he disconnected the loudspeaker. Both Ms. Turtoro and Mr. Barricella testified and denied knowing that Mr. Masullo had disconnected the loudspeaker[4].

Ms. Turtoro testified that on two occasions in the Spring of 2015 and in September 2016 she alerted Mr. Masullo to an ongoing security drill. Ms. Turtoro testified that as she was leaving for these drills, she could see Mr. Masullo through the glass walls and that he did not seem to be preparing to take part in the security drills. Ms. Turtoro alerted Mr. Masullo to the drills, and Mr. Masullo and his classes took part in those drills without incident.

C. The Events of October 19, 2016 and the Aftermath

On October 19, 2016, Dr. Maceri initiated a security drill by announcing over the loudspeaker the phrase "bomb threat" three times. Except for Mr. Masullo's class, the entire building was evacuated and moved to staging areas adjacent to the school. Ms.

[4] There is no indication that Mr. Masullo ever told Dr. Maceri that he disconnected the loudspeaker.

Turtoro heard the alarm but, because of the configuration of the library, she left with a student she was working with without observing that Mr. Masullo and his class remained in the Computer Lab[5].

At the time of the drill, Mr. Masullo was working with Teacher Jessica Carroll's ("Carroll") third grade class. When Ms. Carroll noticed that her class had not come down for the drill, she alerted Dr. Maceri. After trying to determine if Mr. Masullo utilized a different staircase and was perhaps delayed, Dr. Maceri went into the building to look for Mr. Masullo. Fifteen minutes after the drill began, Dr. Maceri found Mr. Masullo teaching his class of nineteen students. When confronted by Dr. Maceri, Mr. Masullo said that he had not heard the drill. Dr. Maceri left to conclude the drill and arrange for the students to return to the building. Dr. Maceri then directed Mr. Parisi to check on the loudspeaker in the Computer Lab.

Teacher Assistant Gina Jiries ("Jiries") was working with Mr. Masullo at the time of the security drill. Ms. Jiries testified that she did not learn about the drill until Dr. Maceri came to the Computer Lab. Ms. Jiries testified that Dr. Maceri directed her to stay in the Computer Lab until the other students returned to the school. Ms. Jiries said some of the students were upset about missing the drill, and that she calmed them down. Ms. Jiries stated that Mr. Masullo asked her if she was going to escort the students to their next class. Ms. Jiries stated that, at that point, she told Mr. Masullo that she would be remaining in the Computer Lab as directed by Dr. Maceri. Ms. Jiries testified that she then observed Mr. Masullo leave the Computer Lab and return with a ladder. Mr. Masullo then placed the

[5] The Library surrounds the Computer Lab in the form of a horseshoe, and if Ms. Turtoro was in a particular spot in the Library, she would not be able to see the Computer Lab or be able to determine if Mr. Masullo was preparing to take part in a drill.

ladder under the loudspeaker and Ms. Jiries observed Mr. Masullo remove a tile from the ceiling. Ms. Jiries testified that she was not sure what Mr. Masullo was doing on the ladder. When Ms. Turtoro returned to the Library, Ms. Jiries determined that the drill had concluded as such Ms. Jiries escorted her students to their next class. Later that day, Ms. Jiries escorted another class to the Computer Lab, and noticed that Mr. Masullo was on the ladder again.

Dr. Maceri informed Mr. Parisi that Mr. Masullo's class never heard the drill announcement. Dr. Maceri directed Mr. Parisi to correct the problem. When Mr. Parisi got to the Computer Lab accompanied by Dr. Maceri, the ladder left by Mr. Masullo was under the loudspeaker. Mr. Parisi climbed the ladder, removed the ceiling tile and discovered that the loudspeaker had been disconnected. Mr. Parisi informed Dr. Maceri that the loudspeaker had been disconnected, and Dr. Maceri directed Mr. Parisi to call the vendor to have it repaired.

Later, on October 19th, Mr. Masullo called Mr. Parisi's cell phone and informed Mr. Parisi that he reconnected the loudspeaker. Mr. Masullo called Mr. Parisi once more and asked if Mr. Parisi knew who disconnected the loudspeaker. On October 20, 2016, Mr. Masullo called Mr. Parisi and inquired about what was going on. Mr. Parisi testified that he told Mr. Masullo that, "some people" had seen Mr. Masullo on the ladder, and Mr. Parisi counseled Mr. Masullo to tell the truth to Dr. Maceri.

Also on October 20, 2016, Dr. Maceri made further inquiries concerning the events of the previous day and Mr. Masullo's failure to respond to the drill. Dr. Maceri spoke to Ms. Jiries and Ms. Turtoro. Dr. Maceri then convened a meeting attended by Mr. Masullo, South Hackensack Education Association ("Association") President Lori Murphy

("Murphy") and Association Vice-President Kelly Marella ("Marella")[6]. Dr. Maceri questioned Mr. Masullo about the disconnection of the loudspeaker. Mr. Masullo initially denied that he disconnected the loudspeaker, and suggested that he received permission from Dr. DeFabiis to disconnect the loudspeaker. Upon hearing this, Dr. Maceri said that he would call Dr. DeFabiis to confirm whether, Dr. DeFabiis gave Mr. Masullo permission to disconnect the loudspeaker. Mr. Masullo testified that he brought up Dr. DeFabiis only to indicate that Dr. DeFabiis was aware of the issue with the loudspeaker. Eventually, Mr. Masullo admitted that he did not have Dr. DeFabiis's permission to disconnect the loudspeaker. Mr. Masullo confessed that he had disconnected the loudspeaker.

At the conclusion of the meeting, Dr. Maceri demanded that Mr. Masullo resign and stated that if Mr. Masullo did not have tenure he would fire Mr. Masullo immediately. Mr. Masullo refused to resign. Dr. Maceri immediately suspended Mr. Masullo. On November 2, 2016, NJEA/Uniserv Field Representative Richard Lockke ("Lockke") met with Mr. Masullo, Ms. Murphy, Ms. Marella, and Dr. Maceri in an effort to convince Dr. Maceri to reinstate Mr. Masullo to his position. This effort was not successful.

Mr. Masullo testified that he understood the seriousness of his actions, and expressed a great deal of remorse. Mr. Masullo said he would never deliberately put his students at risk.

[6] The meeting was transcribed by Elizabeth Schaefer the School Secretary.

POSITIONS OF THE PARTIES

A. The District's Position

The District vigorously argues that the only acceptable penalty for Mr. Masullo's actions is termination. In reviewing the record evidence, the District notes that "Mr. Masullo disconnected the loudspeaker in the Computer Lab without authorization from, or notification to, the school administration."

The District also contends that, once Mr. Masullo realized he missed the drill on October 19, 2016, he compounded his errors by trying to cover up his actions. The District posits that Mr. Masullo tried to have Ms. Jiries leave the Computer Lab so that he could reconnect the loudspeaker. In addition, the District maintains that when Mr. Parisi first climbed the ladder in the Computer Lab to determine what was wrong, Mr. Masullo could have admitted that he disconnected the loudspeaker, but Mr. Masullo said nothing. In addition, even though Dr. Maceri directed Mr. Parisi to reconnect the loudspeaker, Mr. Masullo took that task upon himself. The District contends that this is further evidence that Mr. Masullo hoped that no one would find out who disconnected the loudspeaker. The District maintains that Mr. Masullo panicked and tried to cover up his actions.

The District goes on to argue that at the October 20, 2016 meeting with Dr. Maceri, Mr. Masullo tried to deflect his guilt by initially asserting that Dr. DeFabiis was aware that he had disconnected the loudspeaker. The District contends that Mr. Masullo only admitted his guilt when Dr. Maceri threatened to call Dr. DeFabiis. The District portrays disconnecting the loudspeaker as being done in secret, without authorization and states that Mr. Masullo's actions endangered the lives of students and staff.

The District characterizes the testimony of Mr. Masullo's treating therapist and

social worker Dr. James Silvestri ("Silvestri") as damning[7]. Dr. Silvestri testified that Mr. Masullo had a personality that liked to solve problems. The District characterized this personality trait as being consistent with Mr. Masullo's decision to take matters into his own hands and to disconnect the loudspeaker.

The District also strenuously contends that, in the event of a real bomb threat or shooting incident, the lives of Mr. Masullo's students would have been in jeopardy.

In applying the facts to the legal standards governing this proceeding, the District argues that termination is the only acceptable penalty. The District states that any teacher that puts students and staff members lives at risk does not deserve a second chance. The District concedes that there are not many cases on point but argues that:

> Behavior rising to the level of unbecoming conduct 'need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.'

(District Brief at 3, *quoting, In re Tenure Hearing of Motley,* No. EDU 7421-97 (Initial Decision May 5, 1999), *aff'd as modified,* No. 252-99 (Comm'r Aug. 4, 1999), aff'd *o.b.,* No. 38-99 (State Bd. Dec. 1, 1999) (slip op. at 15-16).

The District also notes that conduct unbecoming can embrace a wide range of conduct, and that unfitness for tenure may be shown by a single egregious incident. The District argues that a teacher "forfeits his/her protection of tenure when 'by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected'." (District Brief at 4, *quoting, In re Tenure Hearing of Bradley,* 1990

[7] Dr. Silvestri has been treating Mr. Masullo for anxiety issues since 2008.

S.L.D. 790, 816 (Initial Decision), (internal cite omitted) *adopted,* 1990 *S.L.D.* 818 (Comm'r 1990), *aff'd as modified,* 1991 *S.L.D.* 2521 (State Bd. 1991).

The District argues that an award upholding Mr. Masullo's termination would be consistent with other cases. The District points to one case where a teacher, like Mr. Masullo, disconnected a loudspeaker. The teacher's termination was upheld by the Commissioner[8].(District Brief at 38, *quoting, In re Tenure Hearing of Thomas,* No. EDU 05594-02 (Initial Decision August 14, 2002), *aff'd,* No. 361-02 (Comm'r Oct. 9, 2002). The District also notes that the Commissioner has upheld terminations of teachers for conduct unbecoming based on a single instance of egregious behavior; *see, e.g.* (District Brief at 39-40, *citing, In re Tenure Hearing of Chaki*, No. EDU 1529-11 (Initial Decision Oct. 24, 2011), *aff'd as modified*, No. 542-11 (Comm'r Dec. 12, 2011) (making derogatory remarks to a student; (District Brief at 43-42, *quoting, In re Tenure Hearing of Cooper* EDU 6550-00 (Initial Decision Feb. 2, 2001), *aff'd*, No. 104-01 (Comm'r March 22, 2001) (teacher terminated for telling student to kiss the teacher's "butt"). (District Brief at 43-44, *quoting, In re Tenure Hearing of O'Brien*, No. EDU 5600-11 (Initial Decision Oct. 11, 2011), *adopted*, No. 544-11(Comm'r Oct. 28, 2011), *aff'd,* No. A-2452-11 (App. Div. Jan. 11, 2013) (teacher terminated for calling students criminals on Facebook page). The District also notes that an arbitrator upheld terminations for a single instance of conduct unbecoming; *see, e.g.* (District Brief at 44, *quoting, In re Tenure Hearing of Bringhurst,* No.236-8/12 (Nov. 30, 2012) (Gifford Arb.) (teacher terminated for streaking)).

The District argues that under well settled labor arbitration principles an employee

[8] As will be discussed below, the teacher in question also wore earplugs and had a history of excessive absenteeism.

may be terminated for placing others at risk. Accordingly, the District asks that Mr. Masullo's termination be upheld.

B. Mr. Masullo's Position

Mr. Masullo contends that his actions did not have an "injurious effect" upon the school or its administration, and therefore his actions did not constitute "conduct unbecoming." Mr. Masullo notes that, under similar factual circumstances a school principal's license was suspended but not revoked. (Respondent's Brief at 3-4 citing, *In re Suspension of the Certificates of Steven Kramer*, No. A-4573-08T2, 2010 N.J. Super. Unpub. LEXIS 2588 (Super. Ct. App. Div., 2010)). In the *Kramer* case, the principal of a school had a malfunctioning fire alarm system that went off several times per month and disrupted the school. Without board approval, the principal switched the alarm to "test" which had the effect of disabling the alarm system's ability to alert the fire department. A fire occurred and because of changes to the alarm, notification to the fire department was delayed. Tenure charges were filed against the principal. The State Board of Examiners did not revoke the principal's license, but imposed a suspension of two and a half months.

Mr. Masullo contends that the holding in this case is instructive, and maintains that he acted reasonably to rectify a difficult situation. He asserts that the loudspeaker caused "pain, annoyance and disruption," and affected Mr. Masullo's ability to teach and, also had a deleterious impact on his students. Mr. Masullo notes that he had complained to Dr. DeFabiis and Dr. Maceri, and to the custodial staff. Mr. Masullo also justifies his actions because he has suffered auditory damage and the loudspeaker was making his hearing difficulties worse.

Mr. Masullo points to Dr. Silvestri's testimony which generally supports the

contention that Masullo lacked malicious intent, and that Mr. Masullo was trying to protect his students from the disruption caused by the loudspeaker.

Mr. Masullo notes that prior to October 19, 2016, he never previously missed a security drill, and that he believed that because there existed other loudspeakers were outside of the Computer Lab, he would have been alerted to the drill on October 19, 2016. Mr. Masullo states that previously Ms. Jiries had heard the drills and announcements. In addition, Mr. Masullo contends that Ms. Turtoro's testimony in which she stated that she had previously alerted Mr. Masullo to other security drills lacks credibility, and notes in this regard that prior to the October 19, 2016 incident, Ms. Turtoro never spoke about issues concerning the loudspeaker with either Mr. Masullo or school administrators. Mr. Masullo also contends that the announcement for the bomb drill lasted only a few seconds and that the record was unclear concerning who made the announcement.

Mr. Masullo points to the fact that he was generally regarded as a superior teacher who freely gave his time and money to help the Memorial School. Mr. Masullo notes that his record is devoid of any serious discipline. Mr. Masullo characterizes the events of October 19, 2016 as unique unfortunate occurrence and that there has never been any other instance where Mr. Masullo jeopardized the health and safety of students or staff. Mr. Masullo contends that the health and safety of his students was his paramount concern.

Regarding the events of October 19, 2016, Mr. Masullo denies that he was surreptitiously trying to hide the fact that he disconnected the loudspeaker. Mr. Masullo states that he admitted to Mr. Maceri and Mr. Parisi that he disconnected the loudspeaker. Mr. Masullo maintains that he never would have left the ladder out in plain sight if he had

been trying to hide the fact that the loudspeaker was disconnected. Mr. Masullo maintains that he never implied that Dr. DeFabiis gave him permission to disconnect the loudspeaker, and contends that he mentioned Dr. DeFabiis at the October 20, 2016 meeting to indicate that Dr. DeFabiis was aware of Mr. Masullo's complaints regarding the loudspeaker.

Mr. Masullo states that he has shown remorse for his actions. He also points to the testimony of Mr. Lockke, the NJEA/Uniserv representative, concerning the devastating impact that an adverse finding in this proceeding would have on Mr. Masullo's career. Mr. Masullo contends that an examination of his overall record should mitigate any penalty that might be imposed. (Respondent's Brief at 11-12 citing, *In re Tenure Hearing of Leslie Ann Ramos, School District of the City of Elizabeth, Union County,* DOE Docket No. 261-9/14 at 18 (Jan. 5, 2015); *In re Tenure Hearing of John Vingara, Somerset County Vocational Technical School District, Somerset County,* DOE Docket No. 121-4/16 at 56 (Jan. 17, 2017)).

Mr. Masullo notes that if the ultimate penalty is imposed there is a very good chance that his teaching license would be revoked, and that all of his training, including doctoral level courses in Instructional Technology, would be rendered useless.

Mr. Masullo also maintains that the penalty of discharge is too severe because he was not subjected to progressive discipline. Mr. Masullo concedes that on occasion a teacher's behavior may be so egregious that a single incident might justify the ultimate penalty of termination. However, he contends that the events of October 19, 2016 merited progressive discipline and not termination. (Respondent's Brief at 13 citing, *In re Tenure Hearing of Leonard Yarbourough, State Operated School District of the City of Newark,*

Essex County, New Jersey, DOE Docket No. 259-9/15-12/14 at 15 (May 24, 2016)).

Finally, Mr. Masullo argues that, if his actions constitute conduct unbecoming, dismissal is not the appropriate remedy and that he should be reinstated and made whole for his loss in pay, seniority, benefits and emoluments. Mr. Masullo, conceded that his conduct may have constituted a lapse in judgment but he contends it should be analyzed as a single incident. Mr. Masullo contends that he has recognized his wrongdoing and expressed his remorse, and that this should have a bearing on any penalty that might be imposed (Respondent's Brief at 18 citing, *In re Tenure Hearing of Maryellen Lechelt, Edison Township Board of Education,* DOE Docket No. 360-12/14 at 84 (June 30, 2015)). Mr. Masullo cites to numerous cases where arbitrators and administrative law judges have reduced the penalties of teachers for conduct that is more egregious than Mr. Masullo's. (Respondent's Brief at 18-20 and the cites therein).

In the alternative, Mr. Masullo asks that his suspension be reduced to 120 days or less.

DISCUSSION

A. The Legal Standard

The Education Tenure Act governing teacher tenure provides in pertinent part:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . .
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

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

Tenure is a "statutory right that may not be forfeited or waived." *Spiewak v. Rutherford Bd. of Educ.*, 90 N.J. 63, 77 (1982). Tenure is designed to protect employees from dismissal "for unfounded, flimsy or political reasons". *Wright v. Bd. of Educ. Of E. Orange*, 99 N.J. 112, 118 quoting *Zimmerman v. Newark Bd. of Educ.*, 38 N.J. 65, 72 (1962). Although an employee's lack of fitness may be "demonstrated by a series of incidents" it is well established that a single "flagrant" act may be sufficient to remove a tenured teacher from his or her position. *In re Tenure Hearing of Harriman*, No. EDU 3510-12 (Initial Decision Aug. 31, 2102), *adopted*, No. 408-12 (Comm'r Oct. 12, 2012) citing, *Redcay v. State Bd. of Educ.*, 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326, 327 (E. and A. 1944).

In order to find that an employee engaged in conduct which merits removal, that

employee is "entitled to an evaluation of the conduct in terms of its relationship to the nature of the office itself, and in that context, an appraisal of the actual or potential impairment of the public interest which may be expected to result from the conduct in question." *Sch. Dist. Of Parsippany-Troy Hills v. Hess,* 97 N.J.A.R. 2D (EDU) 34, 45 (citations omitted). Charges of unbecoming conduct are determined on a "case-by-case basis." *Santiago v. Bd. of Educ. Of Elizabeth,* No. EDU 7135-98 (Initial Decision Aug. 16, 2000) (slip op. at 4), *aff'd sub nom. In re Tenure Hearing of Santiago,* No. 330-00 (Comm'r Oct. 2, 200d), *aff'd o.b.,* No. 54-00 (State Bd. Mar 9, 2001).

In *In re Tenure Hearing of Fulcomer,* 93 N.J. Super. 404 (Super. Ct. App. Div. 1967), the Court established a number factors that should be considered when deciding whether a teacher should be dismissed for unbecoming conduct. Those factors include: 1) the nature and gravity of the offenses under all the circumstances involved; 2) the teacher's attitude – i.e. whether the acts were premeditated, cruel, or done with intent to punish; 3) any evidence as to provocation, extenuation or aggravation. In *Fulcomer,* the Court recognized that there may be circumstances which should be considered which may mitigate any penalty to be imposed on a respondent teacher. These factors include: 1) the teacher's ability, record and length of service[9]; 2) the teacher's disciplinary record; and 3) the "impact of the penalty on the [teacher's] career, including the difficulty which would confront him as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in the State."

[9] *Fulcomer* involved allegations of corporal punishment. The Court noted that the Respondent's "teaching record was good and his teaching ability unquestioned. [The Respondent] had not been disciplined in any manner by the Board prior to the date of the incidents" in question.

B. The *Fulcomer* Factors Applied to Mr. Masullo

Although there is no case precisely on point, both the District and Mr. Masullo were able to locate cases where pedagogues tampered with alarm systems. The District relies in part on *In re Tenure Hearing of Thomas,* No. EDU 05594-02 (Initial Decision August 14, 2002), *aff'd,* No. 361-02 (Comm'r Oct. 9, 2002). In *Thomas*, the teacher in question not only disconnected the loudspeaker in her classroom endangering students, but on three separate occasions wore earplugs, on one occasion failed to follow proper procedures in a fire drill, was insubordinate, and was frequently absent. The administrative law judge sustained the tenure charges and dismissed the teacher.

On the other hand, Mr. Masullo relies on the case of *In re Suspension of the Certificates of Steven Kramer,* No. A-4573-08T2, 2010 N.J. Super. Unpub. LEXIS 2588 (Super. Ct. App. Div., 2010). As noted above, in *Kramer,* a school principal altered a fire alarm system which had malfunctioned and was disrupting the operation of a school. The alteration of the alarm prevented the fire department from learning that that the alarm was triggered. Having analyzed the actions of the principal and having concluded that it constituted conduct unbecoming, the State Board of Examiners weighed those actions against the difficult circumstances that the principal faced, together with his long and distinguished career, and suspended the principal for sixty-nine days. The principal appealed his loss of back pay to the Appellate Division. The Court held that the Board of Examiners' decision was supported by substantial credible evidence and was neither arbitrary nor capricious.

A comparison of *Thomas, supra* and *Kramer, supra* supports the premise that tenure issues must be determined on a case-by-case basis. While a tenured pedagogue

may have engaged in unbecoming conduct, that conduct must be weighed against that pedagogue's career and record. In *Thomas,* the teacher in question was guilty of far more than merely disconnecting an alarm in her classroom. Her overall record revealed behavior which combined with the conduct in disconnecting the alarm, in the aggregate, were considered by the Commissioner and provided the basis for upholding her dismissal. In *Kramer* by contrast, the principal's overall record as an excellent employee limited his discipline to a sixty-nine-day suspension.

The lesson drawn from these cases is that the record must be analyzed to determine if there are enough mitigating factors to reduce the ultimate penalty of dismissal. In this proceeding, Mr. Masullo's conduct in disconnecting the loudspeaker in the Computer Lab constituted a grave offense which may have endangered students and staff. Under well settled principles, this act was flagrant enough that a serious penalty is merited. It is of no moment that this might have been the only time that Mr. Masullo failed to participate in a security drill pursuant to an announcement by school administration. I credit Ms. Turtoro's testimony that on at least two previous occasions she believed that she successfully alerted Mr. Masullo to the fact that a security drill was taking place and Mr. Masullo followed protocol and participated in the drill. Once the loudspeaker in the Computer Lab was disconnected by Mr. Masullo, there existed a continuing danger to Mr. Masullo's students. It is of no significance that Mr. Masullo believed that he could hear the loudspeakers outside of the Computer Lab. Clearly, on October 19, 2016, Mr. Masullo did not hear the loudspeaker. If there had been an actual shooter or bomb scare on October 19, 2016, Mr. Masullo's students would have been in grave danger.

Nevertheless, termination is not an appropriate penalty in Mr. Masullo's case. In

reviewing the *Fulcomer* factors as applied to this case, I conclude that the penalty of termination should be reduced. While I conclude that Mr. Masullo acted recklessly when he disconnected the loudspeaker, I do not believe that he intentionally sought to endanger either his students, other staff members or himself. His testimony demonstrated a tremendous amount of remorse, and I believe that if he is reinstated he will not engage in such reckless behavior again.

I credit Mr. Masullo's testimony that he felt justified in disconnecting the loudspeaker because he became sensitive to the sounds emanating from the loudspeaker. I also credit Mr. Masullo's testimony that the loudspeaker sounds disrupted Mr. Masullo's classroom and that the sounds disturbed students on the autism spectrum.[10] Mr. Masullo's sensitivity to the sounds does not excuse his actions and he could certainly have been more forceful in pressing for an accommodation to this problem.

Mr. Masullo's conduct in this matter must be weighed against his entire record as a teacher. Although there is some evidence of poor interactions with other staff members, Mr. Masullo's disciplinary record is generally a good one, and he has shown himself to be an active participant in school activities. The testimony of both Dr. DeFabiis and Dr. Maceri establish that Mr. Masullo took leading roles in extracurricular activities, and spent his own time and money in support of the school. In addition, the record evidence established that, overall, Mr. Masullo is an excellent teacher. The District's observation and evaluation reports entered into the record support this conclusion.

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[10] As set forth below in this decision, I have concluded that Mr. Masullo shall be reinstated to his position. If he is reassigned to the Computer Lab, I make no finding regarding any accommodation, if any which should be made regarding the volume of the loudspeaker. *See, e.g. The New Jersey Law Against Discrimination, N.J.S.A.* 10:5-12.

Finally, I am mindful that, if Mr. Masullo was to be terminated, there is a very strong likelihood that his license to teach within the state of New Jersey would be revoked. While this is obviously true of all teachers faced with a loss of tenure, given Mr. Masullo's overall record, I conclude that he is deserving of one more chance. I do not believe that the actions proven in this case render Mr. Masullo unfit to teach.

It is my view that if Mr. Masullo is returned to the classroom, he will continue to be an effective teacher. Mr. Masullo is cautioned that he may not engage in any activity that could be perceived as endangering the safety and wellbeing of his students and fellow staff members. In lieu of termination, I direct that Mr. Masullo be suspended for the remainder of the 2016-2017 school year, that his increment for the 2016-2017 school year (if any) be withheld upon his return in the 2017-2018 school year, and that he receive no payments for time lost from the date of his suspension to the date of his reinstatement.

Based on the above, I render the following:

AWARD

The undersigned Arbitrator having been designated pursuant to *N.J.S.A., 18A:6-16*, as amended by *P.L. 2012, c. 26 and P.L. 2015, c. 109* ("TEACHNJ") hereby issues and AWARDS as follows:

1. The Allegation of the Charge has been proven, with such conduct constituting conduct unbecoming and providing just cause for discipline;
2. Christopher Masullo shall remain suspended for the remainder of the 2016-2017 school year;
3. Christopher Masullo shall be reinstated to his position as a tenured teacher in the South Hackensack Public School District and resume his duties in the District at the appropriate time for teachers to return to work for the 2017-2018 school year;
4. There shall be no back pay for the period of Christopher Masullo's suspension, and his increment for the 2016-2017 school year (if any) shall be withheld upon his return to employment;
5. The undersigned shall retain jurisdiction for the limited purpose of resolving any disputes concerning the remedy herein.

Dated: April 18, 2017

Ira Cure

State Of New York)
)
County of Kings)

On this 18th day of April 2017 before me personally came and appeared Ira Cure, to me known and known to me to be the individual described herein and who executed the foregoing instrument and he acknowledged that he executed the same.

Notary Public

KAMAL P. SONI
Notary Public, State of New York
No. 01SO6089949
Qualified in Kings County
Commission Expires March 31, 2019

113-17

OAL DKT. NO. EDU 05666-15
AGENCY DKT. NO. 62-3/15

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
C.C., on behalf of minor child, T.W.-C.,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/20/17

Date of Mailing: 4/20/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05666-15

AGENCY DKT. NO. 62-3/15

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Petitioner,

v.

C.C. ON BEHALF OF T.W.-C.,

Respondents.

Heather Savage-Ford, Esq., for petitioner (Deputy Counsel, for Elizabeth Board of Education)

C.C., pro se

Record Closed: March 1, 2017 Decided: March 2, 2017

BEFORE **LELAND S. MCGEE**, ALJ:

On April 22, 2015, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for hearings on December 9, 2015, August 24, 2016 and March 29, 2017, but the dates were adjourned because the parties agreed to settle the matter. A signed copy of the Settlement Agreement and General Release

indicating the terms of settlement was forwarded to the undersigned October 18, 2016 and is attached hereto.

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

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

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

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

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

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

March 2, 2017
DATE

LELAND S. McGEE, ALJ

Date Received at Agency: 3-8-17

Date Mailed to Parties: MAR 8 2017

lr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made this 20 day of December 2015, by and between the Elizabeth Board of Education ("Defendant") and its members, officers, administrators, agents, employees and attorneys, and Angelica Briceno ("Briceno"), Coleen Callinan ("Callinan") and Elliott Brooks ("Brooks") (collectively "Plaintiffs"). Plaintiffs and Defendant collectively shall be referred to as the "Parties."

WHEREAS, on or about June 3, 2014, Plaintiffs commenced an action against Defendant in the Superior Court of New Jersey, Law Division, Union County, entitled Angelica Briceno, Coleen H. Callinan, Elliott Brooks v. Elizabeth Board of Education, Docket No. UNN-L-1965-14 ("Rice Notice Action"); and

WHEREAS, Defendant thereafter commenced the following actions against Plaintiffs with the Commissioner of Education:

(a) Elizabeth Board of Education v. A.B., on behalf of minor children Ad.Y., Al.Y. and An.Y., OAL Docket No. EDU 04878-2015 N, Agency Ref. No. 64-3/15, against Briceno for unpaid tuition for three (3) students;

(b) Elizabeth Board of Education v. C.C., on behalf of minor child T.W.C., OAL Docket No. EDU 05666-2015 N, Agency Ref. No. 62-3/15, against Callinan for unpaid tuition for one (1) student; and

(c) Elizabeth Board of Education v. E.B., on behalf of minor child J.B., Agency Ref. No. 63-3/15, against Brooks for unpaid tuition for one (1) student (collectively "Unpaid Tuition Actions").

WHEREAS, Plaintiffs and Defendant have determined that it is in the best interests of all Parties to resolve all disputes between them; and

NOW, THEREFORE, in consideration of the agreements contained herein and other good and valuable consideration, the Parties agree as follows:

Consideration

1. Defendant has agreed to withdraw its Unpaid Tuition Actions against Plaintiffs in full and final settlement of any and all claims that Plaintiffs have or may have, whether known or unknown, against Defendant and its past and present members, officers, administrators, agents, employees and attorneys. Defendant will make reasonable efforts to ensure that the Unpaid Tuition Actions are withdrawn within thirty (30) days of execution of the Agreement.

2. The Parties agree to dismiss the Rice Notice Action and execute the Stipulation of Dismissal annexed hereto as Exhibit A.

Mutual Release

3. In exchange for the above consideration, the Parties hereby irrevocably and unconditionally waive, release and forever discharge any claims or rights, whether known or unknown, for any and all claims that have or could have arisen prior to the execution of this Agreement, which they have or may have against each other, including, but not limited to, any claims for counsel fees, back pay or front pay, any claims for emotional distress or pain and suffering, any claims involving tax liability stemming from this settlement and any claims arising under any federal, state or local law or ordinance, including, but not limited to, Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, et seq., U.S. Constitution Amendment XIV, the Age Discrimination in Employment Act, the New Jersey Law Against Discrimination, the New Jersey Civil Rights Act, the New Jersey Tort Claims Act, any common law claim and any other claims for harassment, discrimination, bullying or retaliation of any kind, breach of contract, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge or any other tort, contractual or quasi-

contractual claim. The above release does not include any currently unknown claims that Plaintiffs may have related to workers' compensation, or claims in which Plaintiffs allege that Defendant committed an "intentional wrong," pursuant to N.J.S.A. 34:15-8, in relation to Plaintiffs' exposure to toxic substances. If either party breaks this promise and files a lawsuit or claim waived under this paragraph, the party initiating the action will be responsible for all costs, including reasonable counsel fees, incurred in the opposing party's defense against the claims. The Parties agree that they have not waived their right to enforce this Agreement in the event of a breach.

4. Plaintiffs represent that neither they nor any non-governmental person, organization or any other entity acting on their behalf have any lawsuits currently pending asserting any claim that is waived under Paragraph 3, and Plaintiffs agree that they will not in the future file any lawsuit asserting any claim that is waived under Paragraph 3. Plaintiffs further represent that neither they nor any non-governmental person, organization or any other entity acting on their behalf have any claims or charges currently pending before any federal, state or local agency, including, but not limited to, the Equal Employment Opportunity Commission and the New Jersey Division on Civil Rights, asserting any claim that is waived under Paragraph 3, and Plaintiffs agree that they will not in the future file any claim or charge with any federal, state or local agency, including, but not limited to, the Commissioner of Education, the Equal Employment Opportunity Commission and the New Jersey Division on Civil Rights, asserting any claim that is waived under Paragraph 3. Notwithstanding the foregoing, this Agreement shall not affect the rights and responsibilities of the Equal Employment Opportunity Commission or similar federal or state agency to enforce applicable laws, and the Parties further acknowledge and agree that this Agreement shall not be used to justify interfering with Plaintiffs' protected

right to participate in an investigation or proceeding conducted by the Equal Employment Opportunity Commission or similar federal or state agency.

5. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective legal representatives, successors, heirs and assigns.

No Rehire

6. Plaintiffs acknowledge that Defendant has no obligation, contractual or otherwise, to rehire or reemploy Plaintiffs should they seek any future employment or consultant relationship with Defendant.

Representation

7. Each party to this Agreement is represented by counsel.

Confidentiality

8. The Parties agree to keep the existence and substance of this Agreement, the settlement giving rise to this Agreement and the consideration for this Agreement strictly confidential to the fullest extent permitted by law. The Parties are expressly forbidden from discussing this Agreement with any person, other than to each other, their immediate families, accountants, tax advisers and attorneys ("permitted disclosure"), and to any other individual or entity as necessary to implement the Agreement or to which they are legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, the Parties agree that they will tell the person to whom they are making the permitted disclosure that the existence and substance of this Agreement, the settlement giving rise to this Agreement and the consideration for this Agreement are to be held strictly confidential as permitted by law. The Parties specifically agree not to discuss the nature, terms and conditions of this Agreement with, among others, any representative of the media and any past, present or prospective employee of

Defendant or its agents or attorneys. The Parties understand that this provision is an integral and material part of this Agreement. If subpoenaed for any litigation or administrative action, Plaintiffs will provide Defendant notice within five (5) days of receipt of a subpoena by sending such notice via facsimile and U.S. Mail, postage prepaid, addressed to Defendant's counsel:

JODY T. WALKER, ESQ.
SCHWARTZ SIMON EDELSTEIN & CELSO LLC
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981
Telephone: (973) 301-0001
Facsimile: (973) 993-3152

Defendant may then move to quash the subpoena. If Defendant makes such a motion, Plaintiffs will await receipt of an order determining the validity of the subpoena before responding to the subpoena, provided that such action by Plaintiffs does not cause them to violate any legal obligation to comply with the subpoena.

If subpoenaed for any litigation or administrative action, Defendant will provide Plaintiffs notice within five (5) days of receipt of a subpoena by sending such notice via facsimile and U.S. Mail, postage prepaid, addressed to Plaintiffs' counsel:

PAUL W. TYSHCHENKO, ESQ.
CARUSO SMITH PICINI, P.C.
60 Route 46 East
Fairfield, New Jersey 07004
Telephone: (973) 667-6000
Facsimile: (973) 667-1200

Plaintiffs may then move to quash the subpoena. If Plaintiffs make such a motion, Defendant will await receipt of an order determining the validity of the subpoena before responding to the subpoena.

Mutual Non-Disparagement

9. The Parties agree not to disparage each other, nor to make or solicit any comments or statements related to the facts underlying the Rice Notice Action, the Unpaid Tuition Actions and this Settlement Agreement, to the media or to others that may be considered derogatory or detrimental in nature. This provision is a material part of this Agreement and any breach of this provision shall constitute a breach of the entire Agreement, thus affording the Parties any and all remedies available at law and/or equity, including, without limitation, injunctive relief and/or monetary damages.

Successors and Assigns

10. This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective successors and assigns.

Neutral Reference

11. Defendant agrees to limit remarks regarding Plaintiffs in response to any future employment inquiries, either orally or in writing, to confirming the dates of Plaintiffs' employment with Defendant, the amount of Plaintiffs' salary in the final year of their employment and the position that Plaintiffs held with Defendant. Employment inquiries shall be directed to the Superintendent of the Elizabeth Public Schools.

No Admission

12. It is further specifically acknowledged and understood by the Parties that this Agreement and/or the consideration contained herein are not an indication or admission of any liability or the violation of any law, statute or regulation or a breach of any duty by Defendant, its past and present members, officers, administrators, agents, employees or their attorneys in connection with the Rice Notice Action. It is further acknowledged that the consideration is not

indicative of any action or inaction taken by Defendant and its past and present members, officers, administrators, agents, employees or their attorneys. The consideration is given solely to alleviate the necessary time and expense of a trial, preparation therefore and/or further proceedings. This Agreement, and compliance with this Agreement, shall not be construed as an admission by any party of any liability whatsoever with respect to any matter. Defendant, its past and present members, officers, administrators, agents, employees and its attorneys expressly deny liability. This Agreement may not be introduced into evidence or used in any other way in any other legal or administrative proceeding other than a proceeding seeking the enforcement of the terms of this Agreement. None of the Parties shall be considered the "prevailing party" to this matter.

Law Governing

13. This Agreement shall be governed by the laws of the State of New Jersey, and any dispute arising out of this Agreement shall be subject to the exclusive jurisdiction of the Courts of the State of New Jersey.

Severability

14. If any provision of this Agreement, or the application thereof, is held invalid, such invalidity shall not affect other provisions or applications and, to this end, the provisions of this Agreement are declared to be severable.

Execution

15. This Agreement may be executed simultaneously in two (2) or more counterparts, each of which shall be deemed an original and all of which, when taken together, constitute one and the same document. The signature of any party to any counterpart shall be deemed a signature to, and may be appended to, any other counterpart.

Negotiated by Counsel

16. Plaintiffs and Defendant acknowledge that this Agreement is the result of arms length negotiations between the Parties, all of whom are represented by counsel. The Parties have consulted with their attorneys throughout the negotiations and have been fully advised of all of the ramifications of this Agreement, including the claims and rights that they are waiving herein and the affirmative obligations that they are agreeing to undertake. The Parties are fully satisfied with the services of their counsel with respect to both this Agreement and all other aspects of this case and they enter into this Agreement knowingly, willingly and without any coercion or improper inducements.

Assent to Terms

17. Plaintiffs further acknowledge that they were given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and were given seven (7) days from the execution of this document to revoke this Agreement, by delivering written notification to Jody T. Walker, Esq., Schwartz Simon Edelstein & Celso, LLC, 100 South Jefferson Road, Whippany, New Jersey 07981. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Plaintiffs will not be entitled to the consideration described herein.

Board Approval

18. This Agreement is subject to formal approval by the Elizabeth Board of Education.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement as of the date first written above.

Angelica Briceno

ANGELICA BRICENO

Dated: 12/7/15

Witness/Attest

Talaco

Dated: 12-7-15

COLEEN CALLINAN

Dated: _____

Witness/Attest

Dated: _____

ELLIOT BROOKS

Dated: _____

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement as of the date first written above.

_____
ANGELICA BRICENO

Dated: _____

Witness/Attest

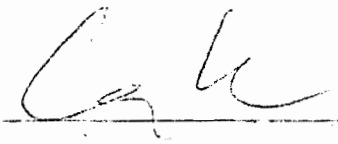
_____

Dated: _____

COLEEN CALLINAN

Dated: 12/15/15

Witness/Attest



Dated: 12/15/15

_____
ELLIOT BROOKS

Dated: _____

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement as of the date first written above.

_____
ANGELICA BRICENO

Dated: _____

Witness/Attest

_____

Dated: _____

_____
COLEEN CALLINAN

Dated: _____

Witness/Attest

Dated: 12/21/15

Elliott Brooks
ELLIOT BROOKS

Dated: 12/30/15

Witness/Attest

Dated: 12/24/15

ELIZABETH BOARD OF EDUCATION

Date: 2/21/17

Stanley Neron, Board President

Dated: _____

Witness/Attest

HAROLD E. KENNEDY, JR.
Board Secretary/Business Admin.

Dated: 2/21/2017

C
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BOARD OF EDUCATION

RESOLUTION

BE IT RESOLVED that the Elizabeth Board of Education hereby approves the attached settlement of Agreement and Release with former employees Angelica Briceno, Coleen H. Callinan, and Elliott Brooks; and

BE IT FURTHER RESOLVED that the Elizabeth Board of Education authorizes the Board President and the School Business Administrator/Board Secretary to execute the Settlement Agreement and Release on behalf of the Board; and to take such further steps as may be necessary to effectuate the within Settlement Agreement and Release and carry out this action of the Board.

Elizabeth, New Jersey
January 19, 2017

16-201

PATRICIA MCRAE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a non-tenured second grade teacher employed by the respondent Board through the Provisional Teacher Program Alternate Route for the 2015-2016 school year – appealed the non-renewal of her contract following notification, by letter received on or about May 11, 2016, that she would not be renewed for the 2016-2017 school year based upon her performance and conduct. Petitioner filed a petition for emergent relief on August 24, 2016, alleging that she was terminated as a result of ineffective and partially effective performance ratings. Petitioner asserted that funds were withheld from her paycheck to pay for required mentoring services that were never provided to her, and therefore her evaluations should be viewed as unfair and considered null and void. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue herein, and the matter is ripe for summary decision; petitioner had notice of the Board's decision to non-renew her contract as of May 11, 2016; the time for filing a petition is clearly set forth at *N.J.A.C.* 6A:3-1.3(i), which provides that a petition of appeal before the Commissioner must be filed no later than the 90th day from the date of receipt of the notice of a final order or ruling; in this case, the petitioner filed her appeal on August 24, 2016, which was 106 days after she received notice of non-renewal; and jurisdiction over whether respondent had a contractual obligation to provide mentoring services or failed to provide such services does not rest with the Commissioner or with the OAL. The ALJ concluded that the within petition was not timely filed pursuant to *N.J.A.C.* 6A:3-1.3(i). Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ that the within petition was untimely filed and must be dismissed on those grounds. In so determining, the Commissioner clarified that petitioner's allegations related to teacher mentoring services implicate New Jersey school law, as all novice teachers are required to enroll and successfully complete the respective district's mentoring program in order to become eligible for a standard teaching certificate. *N.J.A.C.* 6A:9B-8.4, 8.7. Accordingly, the recommended decision of the OAL was adopted with modification. The petition was dismissed.

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

Issued 4/20/17

OAL DKT. NO. EDU 13150-16
AGENCY DKT. NO. 230-8/16

PATRICIA MCRAE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the petition of appeal was time barred under *N.J.A.C.* 6A:3-1.3(i)[1] because, consistent with well-settled law, the ninety-day time period accrues from the employee's receipt of the board of education's notice of nonrenewal.[2] Furthermore, a *Donaldson* hearing – an "informal appearance" before the board "to permit the staff member to convince the members of the board to offer reemployment"[3] – does not toll the time for an employee to file a petition of appeal with the Commissioner because the *Donaldson* hearing occurs *after* the board has already made its decision to not renew the employee's contract and has *acted* on that decision by providing notice of nonrenewal to the employee. Therefore, the day that petitioner received the notice of nonrenewal from the

[1] *N.J.A.C.* 6A:3-1.3(i) provides in relevant part: "The petitioner shall file a petition no later than the 90th day from the *date of receipt of the notice of a final order, ruling or other action* by the district board of education . . . ." (emphasis added).

[2] *E.g.*, *Suarez v. State-Operated School District of the City of Jersey City*, OAL Dkt No. EDU 11077-04, Commissioner Decision No. 393-05 (Oct. 28, 2005); *Perkins v. Bd. of Educ. of the Twp. of Gloucester*, OAL Dkt. No. EDU 13750-15, Commissioner Decision No. 76-16, (Feb. 19, 2016); *Campbell v. Bd. of Educ. of the City of Camden*, OAL Dkt. No. EDU 480-12, Commissioner Decision No. 359-12, (Aug. 30, 2012); *Clark v. Bd. of Educ. of the Twp. of Winslow*, 2011 U.S. Dist. LEXIS 12981 (D.N.J. Feb. 9, 2011).

[3] *See N.J.S.A.* 18A:27-4.1.

District – May 11, 2016 – is the date from which petitioner had ninety days to file her cause of action. Additionally, requesting a statement of reasons and a *Donaldson* hearing does not provide "constructive notice" to a board that its former employee intends to file a petition of appeal with the Commissioner at a later time. There is simply no legal basis for such assertions made by the petitioner.

The Commissioner clarifies that the petitioner's allegations related to teacher mentoring services do implicate New Jersey school law. All novice teachers – irrespective of whether they are participants in the Alternate Route Program – are required to enroll in and successfully complete the respective district's mentoring program in order to become eligible for a standard teaching certificate. *See N.J.A.C.* 6A:9B-8.4, 8.7. Therefore, whether petitioner received proper mentoring services (or allegedly failed to take advantage of the mentoring services offered to her by the District) falls within the purview of the Commissioner. The record in this matter, however, is insufficient to consider the merits of petitioner's allegations regarding the District's mentoring program. More importantly, petitioner's appeal is time barred pursuant to *N.J.A.C.* 6A:3-1.3(i).[4]

Accordingly, the recommended decision of the ALJ – as modified herein – is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed with prejudice.

IT IS SO ORDERED.[5]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/20/17

Date of Mailing: 4/20/17

[4] The record also indicates that the petitioner did not dispute the contents of her evaluations or raise her concerns about the mentoring program prior to the filing of this untimely petition.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 13150-16

AGENCY DKT. NO. 230-8/6

PATRICIA MCRAE,

Petitioner,

v.

NEWARK STATE-OPERATED SCHOOL DISTRICT,

Respondent.

Hassen Ibn Abdellah, Esq., for Petitioner

Bernard Mercado, Esq., for respondent Newark Public School District

Record Closed: February 16, 2017 Decided: March 9, 2017

BEFORE **LELAND S. MCGEE**, ALJ:

STATEMENT OF THE CASE

Respondent (Board or District) hired Petitioner as a non-tenured second-grade teacher through the Provisional Teacher Program Alternate Route, for the 2015-2016 school year. Respondent gave Petitioner an "Ineffective" mid-year rating, a "Partially Effective" annual rating, and a "Partially Effective" observation rating throughout the

school year. Respondent alleged that Petitioner was also the subject of an incident relating a charge of conduct unbecoming. On May 10, 2016, Respondent gave Petitioner formal notice that her teaching contract was not being renewed for the 2016-2017 school year based on her performance and conduct. Petitioner filed an application for a due process hearing and emergent relief, which the undersigned denied.

PROCEDURAL HISTORY

1. On May 10, 2016, the Board issued a Notice of Non-Renewal.
2. On May 18, 2016, Petitioner requested a Donaldson hearing.
3. On June 27, 2016, the Donaldson hearing was held.
4. On June 29, 2016, the Board issued a letter confirming non-renewal of Petitioner's employment contract.
5. On August 24, 2016, Petitioner filed an application for Emergent Relief.
6. On August 31, 2016, this matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to -15.
7. On September 22, 2016, the undersigned denied Petitioner's application for Emergent Relief.
8. On October 7, 2016 the Department of Education affirmed the September 22, 2016, Order of Denial.
9. On November 22, 2016, the Board filed a Motion for Summary Decision.
10. On December 22, 2016, Petitioner, with new counsel, filed an Answer and Brief in opposition to respondent's Motion for Summary Decision.
11. On January 6, 2017, the Board filed a Reply Brief in Further Support of Summary Decision was received by OAL.
12. The first day of hearing is scheduled for February 21, 2017.

STATEMENT OF FACTS

Petitioner Patricia McRae was hired as a non-tenured second-grade teacher at First Avenue Elementary School through the Provisional Teacher Program Alternate Route (Alternate Route) for the 2015-2016 school year.

Throughout the school year, McRae received teacher evaluations. In her "Teacher Mid-Year Review 15-16" dated February 16, 2016, McRae received a rating of overall ineffective. (Pet'r Pet. for Emer. Relief at Appendix A.) The mid-year review also noted that McRae had not had any issues with tardiness or absenteeism. (Ibid.)

On April 15, 2016, McRae received her "Teacher Annual Evaluation 15-16," dated April 14, 2016, where McRae was rated as overall partially effective. (Ibid.) The annual evaluation indicated that McRae had no issues with tardiness or absenteeism and that McRae had taken two personal days. (Ibid.) This evaluation also noted that McRae had been paired with a mentor and has not used that opportunity to her full advantage. (Ibid.) The evaluation did not specify the name of the mentor or the date that the mentor was appointed to provide guidance to McRae.

On or about May 11, 2016, McRae received notice that her employment as a teacher at First Avenue Elementary would be terminated as of June 30, 2016. (Pet'r Opp. to Summ. Decision at 2.) The letter indicated that McRae's non-renewal was based on teacher performance evaluations and professional conduct. The letter was sent on or before May 15, 2016, as required by N.J.S.A. 18A:27-10. The letter did not indicate any specific instances of conduct that were considered to lead to McRae's non-renewal.

On May 18, 2016, Petitioner McRae requested a Donaldson hearing to take place prior to June 30, 2016, to determine why her employment with the District was not renewed. In a letter dated June 16, 2016, McRae was granted a Donaldson hearing, which took place on June 27, 2016, at 10 a.m. at the District's administrative offices located at 2 Cedar Street, Room 802, Newark, New Jersey. On June 29, 2016, McRae

received a letter from the Board advising her that the non-renewal was upheld following the Donaldson hearing. The District based its non-renewal of McRae's employment on the above-referenced evaluations and unspecified conduct.

On August 29, 2016, McRae filed a Petition for Emergent Relief. The Petitioner alleges that her employment with the Newark Public School District was terminated as a result of ineffective and partially-effective performance ratings and conduct unbecoming. (Pet'r Pet. for Emer. Relief at 1.) McRae asserts that she has the legal right to be mentored pursuant to the state alternate route program requirements and her employment contract. (Id. at 2.) McRae further asserts that she paid one thousand ($1,000) dollars for mentor services through paycheck deductions and that such services were never provided to her. (Ibid.) There are no records of her meeting with a mentor, being observed by a mentor, receiving mentorship during her time teaching in the classroom, or of a mentoring plan. (Ibid.) McRae asserts that this lack of mentoring was intentional and deliberate. (Ibid.) As stated above, the annual performance evaluation notes that she had been assigned a mentor but failed to take full advantage of that opportunity. (Pet'r Pet. for Emer. Relief at Appendix A.) Petitioner asserts that because she never received any mentoring services, her evaluations should be viewed as unfair and considered null and void. (Pet'r Pet. for Emer. Relief at 2.) However, Petitioner never contested her evaluations at or after the time she received them.

The District asserts that McRae's employment contract did not contain any provision or requirement on its face obligating the District to provide specific "mentoring services" to McRae during the 2015-2016 school year as part of the contract. (Resp't Mot. for Summ. Decision at 3.). The District asserts that McRae was the subject of an incident related to unbecoming conduct during the 2015-2016 school year but does not cite any details of the incident, does not offer any disciplinary record, or other information to support this allegation. (Resp't Mot. for Summ. Decision at 2.) McRae argues that any allegations of conduct unbecoming are unfounded as she never had an incident relating to tardiness, absenteeism, behavioral misconduct or interpersonal conflict with a colleague, parent or otherwise. (Pet'r Pet. for Emer. Relief at 1.)

According to an audio file from the New Jersey Department of Labor and Workforce Development (DLWD), when McRae applied for unemployment benefits after her non-renewal, the Board indicated that the reason she was terminated was a reduction in force, rather than poor performance or conduct issues contrary to her letter of non-renewal. (Pet'r Opp. to Mot. for Summ. Decision at 14.) As a result, DLWD did not conduct any fact finding with respect to Petitioner's performance or conduct and McRae was granted unemployment benefits. No date was provided for the unemployment benefit application or when Petitioner began receiving benefits.

On September 22, 2016, the undersigned denied Petitioner's application for Emergent Relief.

LEGAL ANALYSIS AND DISCUSSION

"Ninety-day" Rule

Under N.J.A.C. 6A:3-1.3(i), a "Petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing (ninety-day rule)." As the New Jersey Supreme Court explained,

> Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. See Burns v. West Am. Corp., 137 N.J. Super. 442, 446 (Dist. Ct. 1975). Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. See Apex Roofing Supply Co. v. Howell, 59 N.J. Super. 462, 467 (App.Div.1960). A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. Ochs v. Fed. Ins. Co., 90 N.J. 108, 112 (1982). The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs. Ibid. (quoting Farrell v. Votator Div., 62 N.J. 111, 115 (1973)).

[Kaprow v. Bd. of Educ. of Berkley Twp., 131 N.J. 572, 587 (1993).]

Thus, "[w]hen a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action." Farrell, supra, 62 N.J. at 115.

The ninety-day time period for filing a petition is to be strictly construed and claims that are not timely filed are precluded from review. Raymond v. Bd. of Educ. of the Borough of River Edge, 94 N.J.A.R.2d (EDU) 203, aff'd, 94 N.J.A.R.2d (EDU) 431. If compliance with the ninety-day rule is disputed, that procedural matter should be decided prior to any decision on the merits. Nissman v. Bd. of Educ. of the Twp. of Long Beach Island, 272 N.J. Super. 373, 380-81 (App. Div. 1994).

An agency regulation that focuses on the date of the employer's act as the accrual date for a cause of action, rather than the date on which the consequences of the act is directly felt by the employee (termination), is not inherently arbitrary or capricious. Id. at 381; see Nissman, supra, at 379 (cause of action accrued when principal "knew or should have known" that they were not going to be offered a new contract for the following year); Chardon v. Fernandez, 454 U.S. 6, 8, 102 S. Ct. 28, 29, 70 L. Ed. 2d 6, 9 (1981), rehearing denied, 454 U.S. 1166, 102 S. Ct. 1042, 71 L. Ed. 2d 322 (1982) (Where non-tenured administrator was notified by letter on or before June 18, 1977, that he would be terminated at a specified date between June 30 and August 8, 1977, his cause of action accrued on the date he received the letter, not the date on which his appointment ended.); Delaware State College v. Ricks, 449 U.S. 250, 259-61, 101 S. Ct. 498, 504-06, 66 L. Ed. 2d 431, 440-42 (1980) (Cause of action accrued on the date Ricks was advised that he would be denied tenure rather than on the date when his employment terminated.); Suarez v. State-operated School District of Jersey City, EDU 11077-04, Initial Decision (September 13, 2005), http://njlaw.rutgers.edu/collections/oal/ (where a teacher was not permitted to toll the ninety-day rule while awaiting a statement of reasons pursuant to Donaldson).

It is undisputed that Petitioner received a notice of non-renewal on or about May 11, 2016. As of May 11, 2016, McRae was on notice that the Board did not intend to offer her employment for the 2016-2017 school year. Under N.J.A.C. 6A:3-1.3(i), August 9, 2016, was the ninetieth (90^{th}) and final day that McRae could have timely filed her petition. I **CONCLUDE** that, pursuant to N.J.A.C. 6A:3-1.3(i) and existing case law, the ninety-day rule began to run when Petitioner received notice of non-renewal on or about May 11, 2015.

A request for a Donaldson hearing does not provide the Board with constructive notice of Petitioner's intent to file a petition opposing the non-renewal and does not fulfill the requirements of the ninety-day rule under N.J.A.C. 6A:3-1.3(i). In Lauchenaur v. State-operated School District of the City of Newark, EDU 11820-08, Initial Decision (February 3, 2009), partially adopted, Comm'r (March 18, 2009), <http://njlaw.rutgers.edu/collections/oal/final/edu11820-08.pdf>, the Honorable Jesse Strauss, Administrative Law Judge (ALJ) held that in a non-renewal or a termination, a teacher is required to file his petition within ninety days of the notice of non-renewal, not within ninety days of the exhaustion of other avenues and mechanisms. Ibid. (citing LeMee v. Bd. of Educ. of the Village of Ridgewood, 1990 S.L.D. 663, 667) (the day Petitioner received notice that her contract was not renewed was the date the ninety-day timeline commenced, notwithstanding any efforts to appear before the board to change its decision).

Court decisions in cases similar to the present case have established that it is the first notice of non-renewal—not the letter confirming non-renewal after a hearing or review—that triggers the ninety-day limitation period. See Pacio v. Bd. of Educ. of Lakeland Reg'l '1 High School Dist., 1989 S.L.D. 2060, 2069 (the first written communication provided to a staff member of an action by the Board initiates the ninety-day timeline); Wise v. Bd. of Educ. of the City of Trenton, decided by the Commissioner (September 11, 2000), aff'd, State Bd. (January 4, 2001) (when a teaching staff member receives notice that his contract will not be renewed is when the ninety-day period is initiated).

In the case at bar, the Board issued a letter of non-renewal on May 10, 2016. Thus, Petitioner's cause of action accrued on the date McRae received the letter, which was on or about May 11, 2016. Petitioner's cause of action did not accrue on the date her employment ended nor did it accrue on the date that she requested a Donaldson hearing or when she received notice of non-renewal after the Donaldson hearing. McRae filed her petition on August 24, 2016, one hundred and six (106) days after she received the notice of non-renewal. As such, I **CONCLUDE** that Petitioner's claim is time barred pursuant to N.J.A.C. 6A:3-1.3(i).

Jurisdiction

The Commissioner and the OAL do not have jurisdiction to decide contractual issues that do not arise under the school laws. N.J.S.A. 18A:6-9 states, "[t]he commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner."

The "Non-Tenured Alternate Route Program" is mentioned in two places in the New Jersey Statutes. One mention is in N.J.S.A. 18A-36A:14(c) which states that, "[a]ll classroom teachers and professional support staff shall hold appropriate New Jersey certification. The commissioner shall make appropriate adjustments in the alternate route program in order to expedite the certification of persons who are qualified by education and experience." Second, N.J.S.A. 18A:37-22 states that participants in the Alternate Route Program must satisfactorily complete a program on harassment, intimidation, and bullying prevention within one year of being employed. Neither statute specifies any mentoring requirement or that districts should contract to provide mentoring services as part of the Alternate Route Program.

In general, contractual disputes do not fall within the Commissioner's jurisdictional mandate unless they arise under the school laws or otherwise implicate the agency's special expertise. Dolan v. Centuolo, A-2470-10T4, A-2710-10T4 (App.

Div. July 9, 2012), http://njlaw.rutgers.edu/collections/courts/ (quoting Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 425-26 (App. Div. 2002). The Appellate Division has held that the Commissioner lacks jurisdiction to decide certain contractual issues. See Picogna v. Bd. of Educ. of Cherry Hill, 249 N.J. Super. 332, 334-35 (App. Div. 1991) (holding that jurisdiction over a purely contractual claim of wrongful termination of non-tenured assistant superintendent was properly venued in Superior Court and not before the Commissioner); S. Orange-Maplewood Educ. Ass'n v. Bd. of Educ. of S. Orange and Maplewood, 146 N.J. Super. 457, 462-63 (App. Div. 1977) (holding that the Commissioner did not have jurisdiction over a dispute involving interpretation of sabbatical leave provisions of an agreement entered into by the school board and the teachers' association as there was nothing in the dispute involving interpretation of any specific statute).

In the present case, McRae's claim that she did not receive proper mentoring services pursuant to either the Newark Public School's Mentor handbook or the Non-Tenured Alternative Route Program is a contractual issue that does not arise under the school laws as required by N.J.S.A. 18A:6-9. As a result, I **CONCLUDE** that jurisdiction over whether Respondent had a contractual obligation to provide mentoring services or failed to provide such services does not rest with the Commissioner of Education or with the OAL. Petitioner may be entitled to remedies in a proper venue.

N.J. Department of Labor

Following the non-renewal, Petitioner applied for unemployment insurance benefits with the N.J. Department of Labor and Workforce Development. Petitioner asserts that the DLWD maintained an audio recording of the application process that indicates the reason for Petitioner's termination other than what appears in her non-renewal letter. Petitioner asserts that the audio recording states that the reason she was let go was a result of a reduction in force. This is contrary to the reason stated in the non-renewal letter. The undersigned is persuaded that the audio recording is not germane to the substance of this proceeding. For the Commissioner to have jurisdiction over a controversy or dispute, it must arise under the school laws or under the rules of

the New Jersey Board of Education. N.J.S.A. 18A:6-9. Issues related to unemployment compensation generally arise under N.J.S.A. 43:21. Specifically N.J.S.A. 43:21-11 grants DLWD the duty and power to adopt and amend regulations related to the administration of, appeals, and other issues involving unemployment benefits. As such, the DLWD has jurisdiction over unemployment benefits and any relevant determinations regarding the reasons for termination. This proceeding is not the appropriate venue to revisit the unemployment determination regarding Petitioner. If she wishes to appeal DLWD's determination regarding her benefits, or alternatively to contest the reason that the District provided as to her termination, she must do so through the appropriate DLWD appeals process.

Finally, the issue of why Petitioner was terminated as provided by the Board to DLWD was not raised in McRae's original Petition. Unemployment Insurance Benefits determinations are not properly within the jurisdiction of this proceeding. Therefore, I **CONCLUDE** that McRae's assertion regarding DLWD's determination must be dismissed as a matter of law.

Petitioner Barred From Future Employment

The "non-renewal notice" dated May 10, 2016, states that "your employment with Newark Public Schools will be terminated on June 30, 2016, and **you will not be considered for future employment within the district**." (Emphasis added.) The Board has not offered any evidence of misconduct by McRae. There is no evidence of a disciplinary record with the District, her evaluations indicate timeliness, and there is no issue of absenteeism. Respondent has not offered any legal basis to support its decision to permanently bar Petitioner from employment within the district. N.J.S.A. 2C:51-2(a)(1) states that, "A person holding any public office, position, or employment, elective or appointive . . . who is convicted of an offense shall forfeit such office or position if: [h]e is convicted . . . of an offense involving dishonesty or of a crime of the third degree or above." Similarly, a teacher may be permanently barred from public employment if they are convicted of, "an offense involving or touching on his public office, position or employment shall be forever disqualified from holding any

office or position of honor, trust or profit under this State or any of its administrative or political subdivisions." N.J.S.A. 2C:51-2(d). "Involving or touching on his public office, position or employment" means that the offense was related directly to the person's performance in, or circumstances flowing from, the specific public office, position or employment held by the person. Ibid. "The Legislature intended wide latitude in the employing authority to determine fitness for permanent employment. It is clear that public employment may not be refused upon a basis which would violate any express statutory or constitutional policy." Zimmerman v. Bd. of Educ., 38 N.J. 65, 80 (1962) (where the New Jersey Supreme Court upheld dismissal of a teacher who had not completed three calendar years of employment as required to be considered tenured).

In the present case, the Board has not alleged any facts regarding McRae's conduct except that her teaching evaluations did not indicate her performance was at the desired level. District evaluations explicitly indicate that McRae had no problems with tardiness or absenteeism and do not mention a single issue of conduct. The District has simply alleged that McRae was the subject of an incident related to unbecoming conduct during the 2015-2016 school year. However, it has not provided any details of any incident, or evidence of a disciplinary record, or any additional information to support this allegation. (Resp't Mot. for Summ. Decision at 2.) It is undisputed that McRae has not been convicted of a crime of dishonesty or involving her position as a teacher that would disqualify her from teaching pursuant to N.J.S.A. 2C:51-2(a)(1) or N.J.S.A. 2C:51-2(d). As there is no relevant conviction at issue and respondent District has put forth an allegation with no background or evidence, I **CONCLUDE** that the District may not permanently bar McRae from future employment within the District.

Summary Decision

Under the New Jersey Uniform Administrative Procedure Rules, a party may move for summary decision regarding all or any substantive issues in a case. N.J.A.C. 1:1-12.5(a). Motions for summary decision may be granted if the papers and discovery, together with any supporting affidavits, show there is no genuine issue of material fact

and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). A motion for summary decision is almost identical to the standard used for summary judgment under the New Jersey Rules of Court, which provides that summary judgment should be granted if:

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences there from favoring the non-moving party, would require submission of the issue to the trier of fact.
>
> [R. 4:46-2(c).]

In Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 536 (1995), the New Jersey Supreme Court further refined the standard for summary decision with this analysis: "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Thus, a court should deny a motion for summary judgment only where the party opposing the motion has come forward with evidence that creates a genuine issue of material fact. Id. at 529. The Brill Court stated:

> A determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'
>
> [Id. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose." Brill, supra, 142 N.J. at 541.

For a party opposing summary decision to prevail, that party must file a responding affidavit setting forth specific facts demonstrating the existence of a genuine issue that can only be determined by an evidentiary proceeding. Ibid. The opposing party must demonstrate, moreover, that the disputed issue of fact is material to the adjudication. See Frank v. Ivy Club, 120 N.J. 73, 98 (1990). The genuinely disputed material fact must be essential to the decision in the case. Ibid. In addition, the opposing party must establish the issue with competent evidential materials. Robbins v. Jersey City, 23 N.J. 229, 240-214 (1957). "Bald allegations or naked conclusions" are insufficient to warrant an evidentiary hearing. J.D. ex rel. D.D.H. v. N.J. Div. of Developmental Disabilities, 329 N.J. Super. 516, 525 (App. Div. 2000). If the opposing party fails to raise a material factual issue with competent proofs, then the issue should be resolved on summary decision. Frank, supra, 120 N.J. at 98-99.

A contested case can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts indicate that a particular disposition is required as a matter of law. In re Robros Recycling Corp., 226 N.J. Super. 343, 350 (App. Div.), certif. denied, 113 N.J. 638 (1988). A summary decision must be based on an examination of the totality of circumstances, mitigating and aggravating factors, adequate factual findings and conclusions of law. Ibid.

Respondent Board issued a letter to McRae on May 10, 2016, indicating that her employment would not be renewed for the 2016-2017 school year. McRae received that letter on or about May 11, 2016. It is not disputed that Petitioner filed her petition for emergent relief on August 24, 2016. She filed her petition 106 days later in violation of N.J.A.C. 6A:3-1.3(i). The latest that McRae could have filed a claim would have

been August 9, 2016. There is no genuine dispute of the fact that the Petition was filed after August 9, 2016, and outside the ninety-day requirement.

For the foregoing reasons, I **CONCLUDE** that Respondent is entitled to Summary Decision as a matter of law.

ORDER

It is hereby **ORDERED** that Respondent's Motion to Dismiss is **GRANTED** and Petitioner's requests for relief are hereby **DENIED** except as otherwise decided below.

It is hereby **ORDERED** that Respondent may not permanently bar Petitioner from future employment within the District based upon the **Finding of Facts** of this proceeding.

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

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

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

March 9, 2017
DATE

LELAND S. McGEE, ALJ

Date Received at Agency: March 9, 2017

Date Mailed to Parties: MAR 10 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

LSM/lr

115-17

OAL DKT. NO. EDU 7660-16
AGENCY DKT. NO. 148-5/16

A.T., on behalf of minor child, B.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/20/17

Date of Mailing: 4/20/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 07660-16
AGENCY DKT. NO. 148-5/16

A.T., ON BEHALF OF MINOR CHILD, B.T.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,
Respondent.

A.T., petitioner, pro se

Daniel H. Long, Esq. for respondent (Wade Long Wood & Long, attorneys)

Record Closed: March 2, 2017 Decided: March 8, 2017

BEFORE **SARAH G. CROWLEY**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 23, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

SETTLEMENT AGREEMENT

Petitioner, Alisha Tildon, on behalf of B.T., a minor student and Respondent, Black Horse Pike Regional School District, agree as follows:

(1) Respondent agrees to end B.T.'s suspension and reinstate him back into school effective June 3, 2016.

(2) Petitioner acknowledges that B.T. will not be permitted to go on the Senior Class trip.

(3) Respondent agrees to amend B.T.'s student record to reflect a ten (10) day suspension for the incident that occurred on April 7, 2016.

(4) Respondent agrees to give Petitioner a full refund for the Senior Class trip.

(5) Respondent will permit B.T. to walk at graduation, assuming all other requirements are met.

(6) Petitioner agrees to hereby withdraw her Petition and Request for Emergent Relief, filed with the Office of Administrative Law, under OAL Docket No.: EDU 07660-2016 S, Agency Ref. No.: 148-5/16.

Alisha Tildon

Dated: 8/1/16

Daniel H. Long, Esquire
Attorney for the Black Horse Pike
Regional School District

Dated: 6/30/16

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

116-17

J.T., ON BEHALF OF MINOR CHILDREN, J.T., A.T., AND B.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

In November 2016, *pro se* petitioner appealed the determination of the respondent Board that his children are ineligible for a free public education in respondent's school district. Petitioner contended that he resides at an address in Monmouth Junction, which is within the South Brunswick school district. The Board contended that a residency investigation revealed that petitioner and his children actually reside in Franklin Township. The Board filed a motion to dismiss, asserting that the petition was late filed.

The ALJ found, *inter alia*, that: the facts of this matter were set forth in respondent's brief in support of its motion to dismiss and in a certification from the Superintendent of Schools, and the tuition costs for the 2015-2016 school year were contained in a letter from the New Jersey Department of Education dated February 17, 2017; the facts contained therein were adopted as if set forth at length within the Initial Decision. The ALJ concluded, *inter alia*, that: petitioner failed to timely file a residency appeal in accordance with *N.J.S.A.* 18A:38-1(b); respondent's motion to dismiss should be granted as petitioner failed to file a response thereto; and respondent is entitled to tuition for the period of ineligible attendance. Accordingly, the ALJ denied the petitioner's residency appeal and ordered tuition reimbursement at a rate of $71 per day per child for the period of ineligible attendance.

The Commissioner remanded the matter to the OAL, finding that the ALJ failed to include a factual discussion or make factual findings in this case. As *N.J.A.C.* 1:1-18.3 requires that Initial Decisions include a factual discussion and make factual findings, the Commissioner remanded the matter for inclusion of a factual discussion.

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

Issued 4/20/17

Accordingly, the Initial Decision of the OAL is rejected, and the matter is hereby remanded for the reasons expressed above.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/20/17

Date of Mailing: 4/20/17

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http://www.state.nj.us/education/code/current/title6a/chap22sample.pdf, p. 15.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 19075-16
AGENCY REF. NO. 298-11/16

J.T.. ON BEHALF OF MINOR CHILDREN, J.T., A.T. AND B.T.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDLLESEX COUNTY,

Respondent.

J.T., Petitioner, pro se

Adam S. Herman, Esq., for Respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: March 3, 2017 Decided: March 8, 2017

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges Respondent Board of Education's residency determination.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on December 20, 2016, as a contested case. N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to –13.

A prehearing conference was held on January 6, 2017. A prehearing order, dated January 6, 2017, was entered by the undersigned.

Respondent filed a motion to dismiss the petitioner's appeal with the Bureau of Controversies and Disputes on December 16, 2016, prior to the matter being transferred to the OAL, and before a decision on said motion was made. Respondent simultaneously filed its Answer and Cross Petition with the Bureau of Controversies and Disputes.

Pursuant to the prehearing Order entered on January 6, 2017, Petitioner was permitted ten days from the receipt of said motion to respond. No response was submitted.

On February 24, 2017, Respondent filed a certification of Gary McCartney, Superintendent of the South Brunswick Board of Education.

On March 3, 2017, Respondent's counsel provided a letter from the New Jersey Department of Education setting forth Tuition Costs per Pupil for the 2015-2016 school year.

ISSUES

1. Did Respondent err in its determination that Petitioner's three children did not reside in South Brunswick and were ineligible to attend school in the South Brunswick School District; and, is petitioners claim time barred?

2. Are Respondents entitled to tuition reimbursement?

FACTUAL DISCUSSION

The Preliminary Statement and the Factual Background set forth in Respondent's brief in support of its motion to dismiss are adopted herein as if set forth at length.

The facts set forth in the Certification of Gary McCartney are adopted herein as if set forth at length.

The tuition costs per pupil for the 2015-2016 school year contained in the letter from the New Jersey Department of Education, dated February 17, 2017, are adopted herein as if set forth at length.

LEGAL ANALYSIS AND CONCLUSION

Standard of Review

N.J.A.C. 6A:3-1.5(g) states, "Nothing in this section precludes the filing of a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. Briefing on such motions shall be in the manner and within the time fixed by the Commissioner, or by the ALJ if the motion is to be briefed following transmittal to the OAL."

In ruling on a motion to dismiss:

> The judge considers whether all of the evidence together with all legitimate inferences could sustain a judgment in favor of the party opposing the motion. The judge is not concerned with the weight, worth, nature or extent of the evidence. The judge must accept all evidence supporting the party defending against the motion and accord that party the benefit of all inferences that can and legitimately be deducted therefrom... Myles Hart v. New Jersey State Board of Examiners, 2014 WL 3708621 (citing New Jersey Practice, Administrative Law and Practice, §5, 19, at 259-60).

Petitioner did not file a response to Respondent's motion to dismiss.

N.J.S.A. 18A:38-1 provides that public schools shall be free to the following persons over five and under 20 years of age:

> a. Any person who is domiciled within the school district;
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the resident in writing of his right to contest the board's decision to the commissioner within 21 days. No child shall be denied admission during the pendency of the proceedings before the commissioner. In

> the event the child is currently enrolled in the district, the student shall not be removed from school during the 21-day period in which the resident may contest the board's decision nor during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the resident, parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner.

In the instant matter, Respondent notified Petitioner of the residency hearing by letter dated October 13, 2016. The residency hearing was held on October 24, 2016. By letter dated October 26, 2016, Petitioner was advised of Respondent's determination that his children were not eligible to attend school in the Respondent School District. Petitioner was advised in said letter of his right to contest Respondent School District's decision within twenty-one days. Petitioner did not file the pro se residency appeal until November 22, 2016. Said appeal was dated November 20, 2016. The twenty-one day period in which to file expired on November 15, 2016.

Right to a Free Public Education

N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a) sets forth the right of a student to a free public education, which in pertinent parts states:

> Public schools shall be free to the following persons over five and under twenty years of age:
>
> a. Any person who is domiciled within the school district[.]

Consideration in proving residency for purposes of establishing eligibility for school district placement is found at N.J.A.C. 6A:22-3.4(a),

(a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:

1. Property tax bills, deeds, contracts of sale, leases, mortgages, signed letters from landlords and other evidence of property ownership, tenancy or residency;

2. Voter registrations, licenses, permits, financial account information, utility bills, delivery receipts, and other evidence of personal attachment to a particular location;

. . .

3. Court orders; State agency agreements; and other evidence of court or agency placements or directives;

4. Receipts; bills; cancelled checks; insurance claims or payments; and other evidence of expenditures demonstrating personal attachment to a particular location or to support the student;

. . .

6. Affidavits, certifications and sworn attestations pertaining to statutory criteria for school attendance, from the parent, guardian, person keeping an "affidavit student," adult student, person(s) with whom a family is living, or others as appropriate;

. . .

8. Any other business record or document issued by a governmental entity.

(b) A district board of education may accept forms of documentation not listed in (a) above, and shall not exclude from consideration any documentation or information presented by a person seeking to enroll a student.

(c) A district board of education shall consider the totality of information and documentation offered by an applicant, and

> shall not deny enrollment based on failure to provide a particular form of documentation, or a particular subset of documents, without regard to other evidence presented.

In S.S. ex rel. A.S. and A.S. v. Bd. of Education of the Township of Marlboro, Monmouth County, EDU 192-12, Initial Decision (August 26, 2013), http://njlaw.rutgers.edu/collections/oal, evidence submitted by an investigator hired by the Marlboro New Jersey School District to determine whether certain minor children who were enrolled in the school district in fact were domiciled therein within the meaning of N.J.A.C. 6A:22-3.1(a) was sufficient to establish that the children in fact were not domiciled in the district during the period in question and, instead, supported a conclusion that the minors resided at their grandmother's home in Edison, New Jersey. Even though their mother had submitted documentation of the type described in N.J.A.C. 6A:22-3.4(a) that supported her claim that the minors were domiciled in Marlboro, the circumstances of the mother's employment, which included late hours, was such that the minors were properly found to be residing with their grandmother. On that basis, the administrative law judge recommended that the Department of Education find the mother liable for tuition for the minors.

In the instant matter, it is clear that neither Petitioner, nor his children, resided within Respondent's school district. (See Certification of Gary McCartney and the investigator's report attached thereto as Exhibit A)

N.J.A.C. 6A:22-6.2 states:

> (a) If an appeal to the Commissioner is filed by the parent, guardian, adult student, or school district resident keeping an "affidavit" student and the petitioner does not sustain the burden of demonstrating the student's right to attend the school district, or the petitioner withdraws the appeal, fails to prosecute, or abandons the appeal by any means other than settlement agreeing to waive or reduce tuition, the Commissioner may assess tuition for the period during which the hearing and decision on appeal were pending, and for up to one year of a student's ineligible attendance in a school district prior to the appeal's filing and including the 21-day period to file an appeal.

> 1. Upon the Commissioner's finding that an appeal has been abandoned, the district board of education may remove the student from school and seek tuition for up to one year of ineligible attendance pursuant to N.J.A.C. 6A:22-6.1(a) plus the period of ineligible attendance after the appeal was filed. If the record of the appeal includes a calculation reflecting the tuition rate(s) for the year(s) at issue, the per diem tuition rate for the current year and the date on which the student's ineligible attendance began, the Commissioner may order payment of tuition as part of his or her decision. In doing so, the Commissioner shall consider whether the ineligible attendance was due to a school district's error. If the record does not include such a calculation and the district board of education has filed a counterclaim for tuition, the counterclaim shall proceed to a hearing notwithstanding that the petition has been abandoned.
>
> 2. An order of the Commissioner assessing tuition is enforceable through recording, upon request of the district board of education pursuant to N.J.A.C. 6A:3-12, on the judgment docket of the Superior Court, Law Division, in accordance with N.J.S.A. 2A:58-10.

Cleary, Petitioner has failed to sustain the burden of proof to demonstrate J.T., A.T. and B.T. have the right to attend the Respondent school, and Respondent is entitled to tuition reimbursement.

N.J.A.C. 6A:22-6.3 states in pertinent part:

> a) Tuition assessed pursuant to this section shall be calculated on a per-student basis for the period of a student's ineligible enrollment, up to one year, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23A-17.1. The individual student's record of daily attendance shall not affect the calculation.

Respondent calculates tuition reimbursement for the 2016-2017 school year at $71 per day. (Certification of Gary McCartney, Exhibit C)

I **CONCLUDE** that petitioner failed to timely file a residency appeal in accordance with N.J.S.A. 18A:38-1(b), and therefore the same is time barred.

I further **CONCLUDE** that petitioner's motion to dismiss should be **GRANTED** as Petitioner failed to file a response thereto, and the facts set forth in Respondent's motion to dismiss are adopted herein.

I further **CONCLUDE** neither Petitioner, nor his children, resided within Respondent's District during the 2016-2017 school year and Respondent is entitled to the relief requested in its Answer and Cross Petition: reimbursement for tuition for the period of ineligible attendance for each child.

I further **CONCLUDE** that Respondent is entitled to an order excluding Petitioner's children from the Respondent school district

ORDER

Based upon the foregoing it is **ORDERED** that Respondent's motion to dismiss Petitioner's residency appeal is granted: and,

It is further **ORDERED** that Petitioner's residency appeal is dismissed with prejudice; and,

It is further **ORDERED** that Petitioner's children, J.T., A.T. and B.T. are not entitled to attend school in the Respondent school district and are excluded therefrom; and,

It is further **ORDERED** that Respondent is entitled to tuition reimbursement from Petitioner in the amount of $71 per day per child for each day J.T., A.T. and B.T. attended school in the Respondent school district.

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

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

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

March 8, 2017
DATE

Thomas R. Betancourt
THOMAS R. BETANCOURT, ALJ

Date Received at Agency: March 8, 2017

Date Mailed to Parties: MAR 9 2017

db

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

118-17EL

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

April 24, 2017

Laura A. Siclari, Esq.
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Re: *Christopher Lombardi v. New Jersey State Interscholastic Athletic Association*, Agency Dkt. No. 73-4/17

Dear Counsel:

I have reviewed the materials filed in connection with the petition of appeal and motion for emergent relief filed by the petitioner, Christopher Lombardi, in the above-captioned matter. The petitioner is appealing the decision of the Eligibility Appeals Committee (EAC) of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying the petitioner's request for a waiver of the eligibility rules to allow him to participate in baseball at New Providence High School.

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. The party seeking such relief must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

Upon review of the parties' submissions, I find that the petitioner has failed to meet the standard required for emergent relief. Most notably, the petitioner has failed to demonstrate a likelihood of success on the merits of the underlying appeal. The Commissioner's scope of review in matters involving NJSIAA decisions, including determinations made by the EAC, is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by the NJSIAA in

applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a)(2); *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Nor may the Commissioner substitute her own judgment for that of the NJSIAA, where due process has been provided and where there is sufficient credible evidence in the record as a whole to serve as a basis for the decision reached by the NJSIAA. *N.J.A.C.* 6A:3-7.5(a)(1).

Athletic competition in New Jersey's public schools is overseen by respondent, NJSIAA, a voluntary, non-profit organization which promulgates the rules and regulations governing high school athletics. Article V, Section J of NJSIAA's Bylaws, Rules and Regulations restricts a student's eligibility to play sports to four years. Specifically, the provision known as the Eight Semester Rule provides that, "[n]o student shall be eligible for high school athletics after the expiration of eight consecutive semesters following his or her entrance into the 9th grade. A student becomes ineligible for high school athletics when the class in which he/she was originally enrolled has graduated." The NJSIAA Guidelines set forth the reasons for the Eight Semester Rule in the NJSIAA Handbook:

> This rule is intended to prohibit "red shirting," and is also aimed at preventing athletically gifted pupils who are not meeting academic standards from replacing other students who are maintaining their academic standards but who might not have the same athletic prowess. The rule is also aimed at maintaining a uniform progression among all member schools within a four-year cycle and equalizing competition within these schools.

In appropriate cases, the NJSIAA may grant a waiver of the eligibility rules if the overall objectives of the association and its member schools will not be undermined. The Eight Semester Rule can be waived when a student proves that he cannot comply with the rule due to circumstances beyond his control.

It is undisputed that the petitioner herein was scheduled to graduate high school in June 2016, and as such he is ineligible to participate in interscholastic athletics based on the Eight Semester Rule. The petitioner therefore applied to the NJSIAA for a waiver of the Eight Semester Rule so that he could participate on the New Providence baseball team this spring.[1] Previously, petitioner had participated in baseball at New Providence during the 2012-2013, 2013-2014 and 2014-2015 school years, but did not play during the 2015-2016 school year. The petitioner did not play baseball in 2016 because he had been placed on extended home instruction and was not permitted on school grounds as the result of several behavioral incidents that the New Providence School District deemed to be threatening.[2] In reaching its decision to deny the waiver request, the

[1] The petitioner is currently enrolled in his 5th year of high school at the Shepard School pursuant to an Individualized Education Plan (IEP) for Attention Deficit Hyperactivity Disorder (ADHD), and his education is financed by the New Providence School District. The petitioner received special education services pursuant to an IEP during 9th and 10th grade at New Providence but was declassified for 11th grade. In June 2016 the district re-classified the petitioner and provided him with an IEP and a 5th year of educational services to address his academic deficiencies.

[2] In one incident, petitioner took a "selfie" with a gun. In a second incident, petitioner told another student that he wanted "to shoot up the school," and advised the student to wear red so that petitioner could easily identify him and avoid taking aim at him.

EAC recognized that the petitioner may have academic difficulties that have been exacerbated or caused by his ADHD; however, what led to petitioner not playing baseball in the spring of 2016 were his disciplinary problems. As such, the EAC concluded that the circumstances were not entirely beyond the petitioner's control and, accordingly, he was not eligible for a waiver. The EAC also noted that because disciplinary problems contributed to the petitioner's inability to play baseball in 2016, it would not be appropriate to displace another student by giving the petitioner a waiver to play baseball.

The petitioner asserts that his behavioral issues are directly tied to his diagnosis of severe ADHD as well as other academic and psychological factors. Thus, the petitioner did not have the requisite control over his ability to graduate high school on time and should in turn be granted an eligibility waiver. The petitioner's IEP for 2017 specifically notes that his placement at the Shepard School was to accommodate his behavioral disability. Unlike other cases in which waiver requests have been denied by the NJSIAA, the petitioner stresses that he has not played four years of high school baseball. Finally, the petitioner points out that he does not start on the varsity team, he is not a difference maker, and his ability to play would not pose any safety concerns as baseball is not a contact sport.[3]

Petitioners seeking to overturn decisions of the NJSIAA bear a heavy burden, and – considering the record of this matter in light of the prescribed standard of review – I find that the petitioner has failed to demonstrate a likelihood of success on the merits. Specifically, the petitioner has not made a preliminary showing that the EAC applied its rules in a patently arbitrary or unreasonable manner when it determined that the circumstances that caused the petitioner to miss a season of baseball in 2016 were not beyond his control. The NJSIAA has a duty to ensure fairness and integrity in athletic competition statewide, and there is not enough evidence in the record to establish that the decision to deny petitioner's waiver request was unreasonable.[4]

In light of the fact that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the three remaining factors. Accordingly, the petitioner's request for emergent relief and an Order permitting him to participate in the New Providence baseball program is hereby DENIED.

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

VIA FAX AND REGULAR MAIL

[3] Although petitioner argues that baseball is not a contact sport, NJSIAA rules specifically limit non-contact sports to: bowling, cross-country, fencing, golf, gymnastics, skiing, swimming and diving, tennis, track and volleyball.

[4] Since the petitioner is not entitled to emergent relief in connection with his request for a waiver of the Eight Semester Rule, for purposes of this motion it is not necessary to also analyze the credit rule and its potential applicability to the circumstances in this case.

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OAL DKT. NO. EDU 15489-16
(EDU 02377-16 ON REMAND)
AGENCY DKT. NO. 21-2/16

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATES OF	:	COMMISSIONER OF EDUCATION
ELIZABETH CALDERON, SCHOOL DISTRICT	:	DECISION ON REMAND
OF THE BOROUGH OF FREEHOLD,	:	
MONMOUTH COUNTY.	:	

The record, proposed stipulation of settlement, and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's October 6, 2016 determination that the prior stipulation of settlement could not be approved because it was devoid of affirmation from the parties that the respondent was not employed as a teacher elsewhere during the proposed suspension period. Since the stipulation of settlement now contains a certification of respondent attesting that she has not worked as a teacher during the suspension period, the Commissioner can approve the within settlement agreement in its present form.

Accordingly, the Initial Decision recommending approval of the parties' settlement as the final decision in this matter is hereby adopted, and the matter is dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/24/17

Date of Mailing: 4/24/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 15489-16
EDU 02377-16 (**ON REMAND**)
AGENCY DKT. NO. 21-2/16

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF ELIZABETH CALDERON, SCHOOL DISTRICT OF THE BOROUGH OF FREEHOLD, MONMOUTH COUNTY.

Micci J. Weiss, Esq., for petitioner (Cleary Giacobbe Alfieri Jacobs, LLC, attorneys)

Elizabeth Calderon, respondent, pro se

Record Closed: January 26, 2017 Decided: March 6, 2017

BEFORE **SARAH G. CROWLEY**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on February 9, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

March 6, 2017
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: 3/8/17

Date Mailed to Parties: 3/9/17

/mel

CLEARY GIACOBBE ALFIERI JACOBS, LLC
Micci Weiss, Esq. (Attorney ID 046522005)
Attorneys-at-Law
5 Ravine Drive
Matawan, NJ 07747
Tel.: 732-583-7474
Attorneys for Petitioner

FREEHOLD BOROUGH BOARD OF EDUCATION, Petitioner, vs. ELIZABETH CALDERON, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDU 02377-2016S Agency Ref. No. 22-1/16 **STIPULATION OF SETTLEMENT**

WHEREAS, the Parties appeared in the Office of Administrative Law on July 7, 2016 before the Honorable Sara G. Crowley, A.L.J. for the hearing in this matter; and

WHEREAS, at that time, the Parties reached an amicable settlement of this matter, which was placed on the record, and which shall be memorialized by this Stipulation of Settlement.

NOW, THEREFORE, the Parties hereby stipulate to the following facts and agree to resolve this matter upon the following terms:

1. Freehold Borough Board of Education (the "Board") hired Elizabeth Calderon ("Ms. Calderon") as a Spanish teacher, commencing on Monday, November 16, 2015.

2. Ms. Calderon executed an employment contract with the Board, which, in accordance with N.J.S.A. 18A:26-10, required that she provide the Board with sixty (60) days' notice of any resignation.

3. On Monday, November 16, 2015, at 8:03 a.m., Ms. Calderon emailed a letter of resignation to the Board.

4. Ms. Calderon failed to appear for work, despite the sixty (60) day notice provision in her employment contract and as required by law.

5. The Board initiated this action seeking suspension of Ms. Calderon's teaching certificate for failing to provide sixty (60) days' notice as required by the employment contract and N.J.S.A. 18A:26-10.

6. The Parties have agreed that Ms. Calderon's teaching certificate shall be suspended from November 16, 2015 through November 15, 2016.

7. This is the entire agreement of the Parties and may not be altered or amended, except in writing, with the same formality as this agreement.

8. This Stipulation of Settlement is subject to approval by the Commissioner of Education.

Respondent

By: _____
Elizabeth Calderon

Cleary Giacobbe Alfieri Jacobs LLC
Attorneys for Petitioner

By: _____
Micci J. Weiss

SO APPROVED AND RECOMMENDED:

_____
Hon. Sarah G. Crowley, A.L.J.

Dated: _____

CLEARY GIACOBBE ALFIERI JACOBS, LLC
Micci Weiss, Esq. (Attorney ID 046522005)
Attorneys-at-Law
5 Ravine Drive
Matawan, NJ 07747
Tel.: 732-583-7474
Attorneys for Petitioner

FREEHOLD BOROUGH BOARD OF EDUCATION,
Petitioner,

vs.

ELIZABETH CALDERON,
Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

15489-16
OAL DOCKET NO. EDU 0~~2377-2016~~S
Agency Ref. No. 22-1/16

CERTIFICATION OF ELIZABETH CALDERON

ELIZABETH CALDERON, of full age, hereby certifies and says:

1. I was hired by Freehold Borough Board of Education (the "Board") as a Spanish teacher, commencing on Monday, November 16, 2015.

2. On Monday, November 16, 2015, I emailed a letter of resignation to the Board.

3. I have not worked as a teacher since my resignation of November 16, 2015 and I am still not working as a teacher as of the date of this certification.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

By: Elizabeth Calderon
ELIZABETH CALDERON

Dated: 1/26/2017

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BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

In the Matter of the Tenure Hearing of

JENNIFER ROME

and

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN
CAMDEN COUNTY

Agency Docket No. 32-2/17

The above-entitled matter was submitted to the undersigned Arbitrator by letter dated March 10, 2017 from the Commissioner of Education through the Director of the Bureau of Controversies and Disputes, pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, c. 26. Following a preliminary conference on March 14, 2017, a hearing was held on March 27, 2017 at the office of Brown and Connery, Esqs. in Westmont, New Jersey, during which hearing the parties successfully engaged in settlement discussions and executed a Settlement Agreement and General Release governing the instant tenure dispute and several other ancillary controversies involving Respondent Jennifer Rome; her

brother, Stan T. Stanford III, a/k/a/ Stan Skyrm; the State-Operated School District of the City of Camden; and several named employees of the District. Subsequent scheduled hearings were adjourned pending ratification of the Settlement Agreement and General Release by the State District Superintendent on behalf of the Camden City School District, which ratification occurred on March 31, 2017.

At the arbitration hearing on March 27, 2017, the Arbitrator examined Respondent Jennifer Rome as to her understanding and acceptance of the terms of the Settlement Agreement and General Release. Respondent and her brother Stan T. Stanford III, a/k/a/ Stan Skyrm affirmatively acknowledged on the record in response to questioning by Matthew B. Wieliczko, Esq., of Zeller and Wieliczko, Esqs., counsel for Respondent; by Louis R. Lessig, Esq., of Brown and Connery, Esqs., counsel for the Camden School District in this tenure matter and in the Superior Court action; and by the Arbitrator that they understood that Ms. Rome's attorneys in the tenure matter, Matthew B. Wieliczko and Amy L. Gillette, did not represent either Ms. Rome or Mr. Stanford in the proceedings in Superior Court, Law Division, or before the New Jersey Division on Civil Rights; that they understood and accepted that the Superior Court and New Jersey Division on Civil Rights proceedings, as well as the instant tenure dispute, would be definitively determined by the global settlement they were signing; that they were aware of their

right to seek legal representation regarding the pending Superior Court action and the pending New Jersey Division on Civil Rights proceeding; that they were knowingly waiving their right to engage other counsel regarding these proceedings; that they understood what they were gaining and what they were conceding in the global Settlement Agreement and General Release; and that they were fully satisfied with the representation afforded to them in this tenure proceeding by Zeller and Wieliczko, Esqs. The Arbitrator is satisfied that these acknowledgements by Respondent Jennifer Rome and by Mr. Stan Stanford III that they fully understood and accepted the consequences of their accepting the terms of and signing the Settlement Agreement and General Release and ancillary documents attached as exhibits to the Settlement Agreement and General Release were sincere and constituted informed consent.

On April 4, 2017, the parties submitted to the undersigned Arbitrator for examination and consideration an executed Settlement Agreement and General Release covering any other current proceedings or potential future causes of action arising from any act or failure to act by the Camden School District or its agents or employees that may have occurred before March 27, 2017, and four Exhibits, including a Stipulation of Dismissal with prejudice involving an action pending in the Superior Court of New Jersey, Law Division, Camden County. I have

carefully considered each of these documents, as well as the transcript of the tenure hearing of March 27, 2017 as the basis for issuing the following Award.

AWARD OF ARBITRATOR

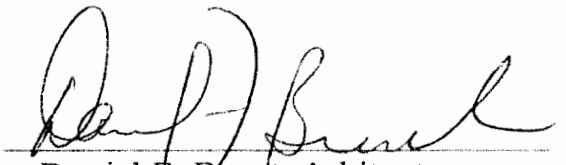
After duly evaluating the nature of the tenure charges over which I had jurisdiction, the Respondent's record of service to the State-Operated School District of the City of Camden, the absence of proven harm to any student for whom the Respondent was responsible, and the advantages and factors cited by the Board as the bases for its decision to enter into the Settlement Agreement and General Release resolving the instant tenure matter and also resolving ancillary proceedings involving the same parties, I hereby find that the terms and conditions agreed upon by the State-Operated School District and by Respondent Jennifer Rome, each of whom has been advised by counsel regarding these tenure proceedings, to resolve the tenure dispute before me to be reasonable and in the best interest of both the parties and the public.

There being no charge against the Respondent of any moral turpitude, the terms and conditions negotiated under the parties' Settlement Agreement and General Release serve the best interests of the public and of the students of the Camden City School District and satisfy

the criteria of N.J.A.C. 6A:P3-5.6 (a). Consequently, I accept the Settlement Agreement and General Release as proposed by the parties, and hereby issue this Consent Award incorporating the terms of the Settlement Agreement and General Release executed by the parties, effective March 31, 2017, provided that Respondent has not revoked her execution of the Settlement Agreement within the statutory time periods described in the Settlement Agreement and General Release.

Based on the facts elicited by the evidentiary record in the instant matter regarding the tenure charges brought by the State-Operated School District of the City of Camden against Respondent Jennifer Rome, and having examined the terms of the Settlement Agreement and General Release executed by Respondent Jennifer Rome on March 27, 2017, I find that the terms and conditions set forth in the parties' Settlement Agreement dated March 27, 2017, ratified by the State District Superintendent on behalf of the Camden City School District on March 31, 2017, appear to me to be reasonable, to be consistent with the terms and intent of the TEACHNJ Statute and applicable regulations, and to reflect that Respondent has not committed any conduct unbecoming a tenured teacher.

I hereby endorse and approve the parties' Settlement Agreement and General Release as appropriate under the circumstances and as satisfying the requirements of the TEACHNJ statute.



April 17, 2017

Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 17th day of April, 2017 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

Kathryn Gallagher

KATHRYN GALLAGHER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 2/18/2021

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This **SETTLEMENT AGREEMENT AND MUTUAL RELEASE** (hereinafter, the "Agreement"), being entered into by and between the **CAMDEN CITY SCHOOL DISTRICT,** for the benefit of the District, and all of its related entities, and all of the District's current, future, and former officers, employees, agents, officials, representatives, attorneys, insurers, successors and assigns, and heirs, both in their official and individual capacities, including but not limited to, Stephen D. Bournes (hereinafter, "Bournes"), Tia Mcintosh, Lana Murray, Nicholas Pillsbury, Hye-Won Gehring, Darrell Staton (hereinafter, collectively, "the District"), **JENNIFER ROME** (hereinafter "Rome"), and **STAN T. STANFORD III, a/k/a STAN SKYRM** (hereinafter, "Stanford")(hereinafter, the District, Rome and Stanford, collectively, the "Parties"), and,

WHEREAS, Rome has been employed in a teaching position by the District;

WHEREAS, Rome filed a complaint, as amended by Rome (hereinafter, the "Complaint"), against the District and Bournes in the Superior Court of New Jersey, Law Division, Camden County, under the caption of "Jennifer Rome v. Stephen Bournes and Camden City School District," Docket No. CAM-L-2260-16 (hereinafter, the "Lawsuit");

WHEREAS, the District filed a Counterclaim against Rome (hereinafter, the "Counterclaim") and a Third Party Complaint against Stanford (hereinafter, the "Third Party Complaint") in the Lawsuit and Stanford filed a Third Party Counterclaim (hereinafter, the "Third Party Counterclaim") against the District in the Lawsuit;

WHEREAS, Rome filed a Verified Complaint against the District with the New Jersey Division on Civil Rights, Docket No.:ED08JE-66054 (EEOC No.: 17E 2016 00373) (hereinafter, the "DCR Action");

WHEREAS, the District served and filed certain tenure charges with the Commissioner of Education for the State of New Jersey, Agency Docket No. 32-2/17 seeking to remove Rome from her teaching position (hereinafter, the "Tenure Charge Proceedings");

WHEREAS, the District is represented by the Law Firm of Brown & Connery, LLP in the Lawsuit, the DCR Action and the Tenure Charge Proceedings (hereinafter, "B&C");

WHEREAS, Rome and Stanford are Pro Se litigants in the Lawsuit, and Rome is a Pro Se litigant in the DCR Action;

WHEREAS, Rome is represented by the Law firm of Zeller & Wielieczko in the Tenure Charge Proceedings;

WHEREAS, the Parties wish to amicably resolve the Lawsuit, the DCR Action and the Tenure Charge Proceeding and any other potential or actual disputes between them of any kind;

WHEREAS, the District and Rome intend to execute an appropriate agreement in addition to this Agreement to resolve the Tenure Charge Proceeding (hereinafter the "Tenure Charge

Agreement"), and the Parties incorporate the terms and provisions of the Tenure Charge Agreement as set forth in Exhibit 1 hereto, into the Agreement as if fully set forth herein;

THEREFORE, in exchange for the mutual promises set forth below, and intending to be legally bound, the Parties hereby acknowledge and agree to the following terms and conditions:

1. **CONSIDERATION**

(a) As to Rome. Rome shall receive the Payment and Medical Coverage as set forth in Sections 2(b) and (c) of the Tenure Charge Agreement, and the withdrawal and/or dismissal of the Tenure Charges, as set forth in Section 2(c) of the Tenure Charge Agreement, and the District shall dismiss the Counterclaim in the Lawsuit and release and waive any and all claims and/or potential claims as set forth in the Section 3(c) of the Agreement, and for other valuable consideration as set forth in this Agreement.

(b) As to Stanford. The District shall dismiss the Third Party Complaint in the Lawsuit, and release and waive any and all claims and/or potential claims as set forth in the Section 3(c) of the Agreement, and for other valuable consideration as set forth in this Agreement.

(c) As to the District. Rome shall provide to the District the Resignation Letter as set forth in Section 2(a) of the Tenure Charge Agreement and Rome shall dismiss and/or withdraw the Complaint in the Lawsuit and the Verified Complaint in the DCR Action, and Stanford shall dismiss as may be necessary the Third Party Counterclaim in the Lawsuit, and Rome and Stanford shall release and waive any and all claims and/or potential claims as set forth in the Section 3(a) and (b) of the Agreement, and for other valuable consideration as set forth in this Agreement.

2. **DISMISSAL OF THE LAWSUIT AND THE DCR ACTION**

The Parties agree to execute any and all documents which may be requested or required to effect the dismissal of the Lawsuit with prejudice immediately upon the execution of this Agreement and the Tenure Charge Agreement, including, but not limited to, a Stipulation of Dismissal with Prejudice, in the form attached hereto as "Exhibit 2" (the "Stipulation") and Rome agrees to execute any and all documents which may be requested or required to effect the withdrawal and/or dismissal of the DCR Action with prejudice immediately upon the execution of this Agreement and the Tenure Charge Agreement, including, but not limited to a letter of withdrawal, in the form attached hereto as "Exhibit 3" (The withdrawal of DCR). This is a material part of the Agreement.

3. **GENERAL RELEASE OF CLAIMS**

(a) Rome. In exchange for the valuable consideration provided in this Agreement and the Settlement Agreement, Rome hereby waives, relinquishes, and forever releases the District from any and all rights or claims, known or unknown, asserted or unasserted, from the beginning of time up to and including the date of full execution of this Agreement, including, but not limited to, those claims asserted by her in the Lawsuit

and/or the DCR Action, and any other claims which arise and/or relate to her employment and/or cessation of employment, including claims for discrimination or harassment with regards to any alleged protected category, status, or class, including, but not limited to, age, sex, religion, race, disability, or national origin, breach of contract, wrongful termination, hostile work environment, wrongful discharge, retaliation, constructive discharge, as well as claims in tort, including, but not limited to, claims for misrepresentation, defamation, libel, interference with contract or prospective economic advantage, intentional and/or negligent infliction of emotional distress, personal injury, lost wages and/or benefits, and any other economic and/or non-economic damages whatsoever. Rome specifically waives any rights that she may have under the National Labor Relations Act; the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Employment Retirement Income Security Act; the Immigration Reform Control Act; the Americans with Disabilities Act; the Age Discrimination & Employment Act; the Older Workers Benefit Protection Act; the Fair Labor Standards Act; the Occupational Safety & Health Act; the Family & Medical Leave Act; the Equal Pay Act; the New Jersey Law Against Discrimination; the New Jersey Wage Payment Law; The New Jersey Minimum Wage Law; the Equal Pay Law for New Jersey; the New Jersey Worker Health & Safety Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; any constitution, statute, regulation, ordinance, executive order, public policy or common law; any written, verbal or implied contract; and any other authority or basis for seeking damages or relief of any kind or any other theories now or hereafter recognized or any claim related to any the District policy, procedure, or plan. This releases all claims, including those of which Rome is not aware and those not mentioned in this Agreement. This releases all claims, including those for counsel fees and/or costs related to any of the pending litigation and/or other matters, and the Parties shall bear their own attorneys' fees and costs. This Agreement applies to claims resulting from anything which has happened up to the execution of this Agreement. Rome hereby acknowledges that she has been and will be fully paid any and all due wages and benefits to which she is entitled pursuant to this Agreement and that she suffered no workers' compensation related injury while employed by the District of which she has not already notified the District and/or its insurer.

(b) Stanford. In exchange for the valuable consideration provided in this Agreement, Stanford hereby waives, relinquishes, and forever releases the District from any and all rights or claims, known or unknown, asserted or unasserted, from the beginning of time up to and including the date of full execution of this Agreement, including, but not limited to, as may be necessary, the Third Party Counterclaim, and those claims asserted by him or which could or should have been asserted by him in the Lawsuit. This includes, but is not limited to, those claims asserted by him in the Lawsuit and/or the DCR Action, and any other claims which arise and/or relate to Rome's employment and/or cessation of employment, including claims for discrimination or harassment with regards to any alleged protected category, status, or class, including, but not limited to, age, sex, religion, race, disability, or national origin, breach of contract, wrongful termination, hostile work environment, wrongful discharge, retaliation, constructive discharge, as well as claims in tort, including, but not limited to, claims for misrepresentation, defamation, libel, interference with contract or

prospective economic advantage, intentional and/or negligent infliction of emotional distress, personal injury, lost wages and/or benefits, and any other economic and/or non-economic damages whatsoever. Stanford specifically waives any rights that he may have under the National Labor Relations Act; the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Employment Retirement Income Security Act; the Immigration Reform Control Act; the Americans with Disabilities Act; the Age Discrimination & Employment Act; the Older Workers Benefit Protection Act; the Fair Labor Standards Act; the Occupational Safety & Health Act; the Family & Medical Leave Act; the Equal Pay Act; the New Jersey Law Against Discrimination; the New Jersey Wage Payment Law; The New Jersey Minimum Wage Law; the Equal Pay Law for New Jersey; the New Jersey Worker Health & Safety Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; any constitution, statute, regulation, ordinance, executive order, public policy or common law; any written, verbal or implied contract; and any other authority or basis for seeking damages or relief of any kind or any other theories now or hereafter recognized or any claim related to any the District policy, procedure, or plan. This releases all claims, including those of which Stanford is not aware and those not mentioned in this Agreement. This releases all claims, including those for counsel fees and/or costs related to any of the pending litigation and/or other matters, and the Parties shall bear their own attorneys' fees and costs. This Agreement applies to claims resulting from anything which has happened up to the execution of this Agreement. This releases all claims, including those for counsel fees and/or costs related to any of the pending litigation and/or other matters, and the Parties shall bear their own attorneys' fees and costs. This Agreement applies to claims resulting from anything which has happened up to the execution of this Agreement.

(c) The District. In exchange for the valuable consideration provided in this Agreement, the District hereby waives, relinquishes, and forever releases Rome and Stanford from any and all rights or claims, known or unknown, asserted or unasserted, from the beginning of time up to and including the date of full execution of this Agreement, including, but not limited to, the Counterclaim against Rome and the Third Party Complaint against Stanford in the Lawsuit, and those claims asserted by the District or which could or should have been asserted by the District in the Lawsuit. This releases all claims, including those for counsel fees and/or costs related to any of the pending litigation and/or other matters, and the Parties shall bear their own attorneys' fees and costs. This Agreement applies to claims resulting from anything which has happened up to the execution of this Agreement.

4. **COVENANT NOT TO SUE**

Rome and Stanford hereby warrant that as of the date this Agreement is signed that they have not filed any other legal complaint, counterclaim, claim, charge, or lawsuit against the District except for the Lawsuit and the DCR Verified Complaint. Further, Rome and Stanford agree that they will not file, charge, claim, sue or cause or permit to be filed any civil action, suit, or legal proceeding seeking personal, equitable, or monetary relief on their behalf in connection with any and all claims, known or unknown, asserted or unasserted, from the beginning of time up to and including the date of full execution of

this Agreement. Rome and Stanford further agree that should any person, organization, or other entity file, charge, claim, sue, or cause or permit to be filed any such civil action, suit, or legal proceeding, they will not seek or accept any personal relief in such civil action, suit, or legal proceeding. In the event of a violation of this paragraph, Rome and Stanford agree that the District shall be entitled to immediate dismissal of such civil action, suit, or legal proceeding and that they shall be responsible for the payment of the reasonable attorneys' fees and expenses incurred by the District's defense. Rome and Stanford further agree that they will not file nor permit any other party to file charges with any governmental agency relating to any matter alleged in the Lawsuit.

Notwithstanding Sections 4 and 6 of this Agreement, it is understood and agreed that Rome and Stanford are not waiving claims filed under any state workers' compensation or unemployment law or challenges to the validity of this Agreement including under the Older Workers Benefits Protection Act or other mandate under law.

Nothing in this Agreement shall preclude the District from forwarding the relevant materials to the Board of Examiners as directed by the applicable Regulations, etc.

5. **NO ADMISSION OF LIABILITY**

The Parties understand that by entering into the Agreement, the District, Rome and Stanford do not admit any liability and expressly deny that they have committed any wrongdoing whatsoever, and that the parties have entered into this Agreement to avoid additional expenses and cost and the aggravation of defending the Lawsuit and/or the DCR Action and/or the Tenure Charge proceeding.

6 **CONFIDENTIALITY**

Rome and Stanford agree that the terms, amount, and fact of this Agreement, and the nature of all claims that were or could have been raised against the other, as well as any information disclosed by the Parties in the negotiations and mediation leading to this Agreement, are confidential. Rome and Stanford agree that they will not, as of the date of execution of this Agreement, communicate or disclose the terms of this Agreement to any person other than their attorney, accountant, or members of their immediate family, each of whom must first be advised of this duty of confidentiality. In the event Rome and Stanford are asked about the Litigation or the incidents which gave rise to the Lawsuit by any person or entity, they agree that they will state only that the matter has been settled and/or resolved to the Parties' satisfaction. Rome and Stanford recognize and agree that the representations, promises, and covenants set forth in this paragraph constitute a material and significant part of this Agreement and the District would not have entered into this Agreement absent such agreement and, therefore, any violation of this paragraph will constitute a material violation and breach of this Agreement. In the event of a judicial finding of a breach of this provision of the Agreement, the District shall have the right to seek liquidated damages in the full amount of the Payment and the value of the Medical Coverage in Section 2 of the Tenure Charge Agreement and to recover all costs and reasonable attorneys' fees incurred related to any such action.

08108 at least fourteen (14) days prior to any return date of any subpoena or upon receipt of any court order. If either is served or receives any notice or court order within the fourteen (14) day period prior to the return date, they agree to immediately notify the other party.

Nothing in this paragraph shall be construed to prevent Rome and Stanford from testifying truthfully as a witness in any other litigation matters which may be pending against the District if compelled to do so in response to a duly issued subpoena.

7. **AGREEMENT NOT TO DISPARAGE**

In further consideration, the District, Superintendent and Bourne, acting in their official capacity, and Rome and Stanford agree to refrain from making any disparaging remarks or comments whatsoever about the District, including, with respect to the District, any of its current or former employees, officers, agents, attorneys, or representatives, and/or its work, schools, facilities, operations, activities, programs, or services. This Agreement includes, but is not limited to, any statements or postings made online, on the internet, or on any social media platform, including but not limited to, any blog, Twitter, MySpace, Facebook, Instagram, Snapchat, Yelp, Tumblr, Flickr, LinkedIn, YouTube, Periscope, or Facebook Live. To the extent such postings exist as of the date of this Agreement, Rome and Stanford hereby agree to immediately and permanently delete or remove such postings at or before the time of their execution of this Agreement. To verify this has been done a Google or similar search may be done by the District or its representatives and must reveal no such information. This is a material part of the Agreement, subject to Paragraph 14 below.

8 **AGREEMENT NOT TO CONTACT OR COMMUNICATE WITH THE DISTRICT**

In further consideration, Rome and Stanford agree upon the execution of the Agreement to refrain from making any contact or communications of any kind with the District, including any of their current or former attorneys (for any reason other than one related to this Agreement), employees, officers, agents or representatives, either personally; face to face contact; by written correspondence, letters, notes or memos; by mailing, delivering, sending and/or forwarding any tangible thing or object; by telephone; or through any electronic form of communication, including, but not limited to, email, text messaging, or any contact or communication through any social media platform, except as may be necessary in the performance of the Parties duties and obligations under the Agreement and/or the Tenure Charge Agreement. This is a material part of the Agreement, subject to Paragraph 14 below. An express exception to this provision of the Agreement allows and permits both Rome and Stanford to remain friends with current employees, maintain Facebook contact with current friends/acquaintances that are employees and communicate by phone, text or in person with current friends/acquaintances that are employees but are prohibited from discussing anything regarding the settlement topics or terms with these individuals.

9. OVERT PROHIBITION ON SPECIFIC IMPROPER ACTIVITY

Rome and Stanford agree and understand that a portion of the claims raised by the District involve assertions related to the alleged improper use of email addresses, software and servers that are District property. Further, assertions were made that Rome and Stanford utilized agents to contact, make representations and take actions against the District. Additionally, there was allegedly improper access to District records for staff as well as students. Rome and Stanford agree that this Agreement and the compensation related to the same is based in part on an absolute prohibition on engaging in, promoting others to engage in or otherwise disclosing any information allegedly obtained via any of the avenues discussed in this paragraph or these Agreements. This includes the directives under section 4 of the Tenure Charge Agreement and a mandate that Rome and Stanford return any and all information, in any form that was allegedly obtained using the above mentioned methods. Further, Rome and Stanford agree that this section includes a mandate to delete any such materials from any and all devices, servers, etc. in either person's possession. This is a material part of the Agreement, subject to Paragraph 14 below.

10. NOT ELIGIBLE FOR RE-HIRE

In further consideration, Rome hereby acknowledges and agrees that her employment with the District shall be deemed irrevocably severed and that she is ineligible for rehire by the District in any position. Rome agrees that she will not apply for, nor accept employment with, the District and, that if she is offered employment that she will refuse the offer. Should she re-apply for employment, the District shall have no obligation to consider or review her application, and rejection of such application shall not be deemed to constitute any form of retaliation or other claim by the District against Rome. This is a material part of the Agreement.

11. ACKNOWLEDGEMENT BY ROME

The releases in Section 3(a) above shall include a waiver and release of all claims under the Age Discrimination in Employment Act ("ADEA") and the Older Workers Benefit Protection Act ("OWBPA"); and, pursuant to the requirements of the ADEA and OWBPA, Rome specifically acknowledges that:

(a) She has been advised to consult with an attorney of her choosing concerning the legal significance of the Agreement and has had the opportunity to do so;

(b) The Agreement is written in a manner that she understands;

(c) The consideration set forth the Agreement set forth in Section 1(a) of the Agreement consists of benefits to which she is not otherwise arguably entitled and is adequate and sufficient to support her promises, covenants and releases as set forth in Section 3(a) of this Agreement;

(d) She has been afforded **twenty-one (21) days** to consider the Agreement before executing it, that any changes thereto subsequently agreed upon by

the parties, whether material or immaterial, do not restart this period for consideration, and that by signing and returning the Agreement before the end of the **twenty-one (21) day** period she will have knowingly and voluntarily waived the right to consider the Agreement for the full consideration period; and

(e) She has been advised that during the **seven (7) day** period following her execution of the Agreement, she may revoke her acceptance of the Agreement by delivering written notice to counsel for the District (set forth below) with a courtesy copy to her counsel (see below), and that the Agreement and the Tenure Charge Agreement shall not become effective or enforceable until after the revocation period has expired:

For the District:	Courtesy Copy to:
Louis R. Lessig, Esquire Brown & Connery, LLP 360 Haddon Avenue Westmont, New Jersey 08108	Matthew Wieliczko, Esquire Zeller & Wieliczko, LLP 120 Haddontowne Court Cherry Hill, NJ 08034

12. ACKNOWLEDGEMENT BY STANFORD

Stanford acknowledges that he has read all of the terms of this Agreement; he has had an opportunity to discuss it with individuals of his own choice who are not associated with the District. He has been advised to consult with an attorney of his own choosing and acknowledges that Zeller & Wieliczko, LLP is not his attorney and has not provided him with legal advice or representation. Stanford understands that by signing this Agreement and accepting the terms set forth above, he is receiving benefits to which he would not otherwise be entitled. Stanford understands that he is receiving such benefits as a result of entering into and complying with the terms and provisions of this Agreement. He hereby acknowledges that he signs this Agreement voluntarily and knowingly in exchange for the consideration described therein, which he acknowledges is adequate and satisfactory; and that he has been provided an opportunity to review and consider this Agreement prior to signing it.

13. CONTINGENT AGREEMENT

The terms and conditions of this Agreement are contingent upon the execution by Rome of the Tenure Charge Agreement, and the terms and conditions of the Tenure Charge Agreement are incorporated into this Agreement as if fully set forth herein.

14. RESTRAINTS FOR ROME AND STANFORD

Rome and Stanford both acknowledge that compliance with this Agreement and the Tenure Charge Agreement is necessary to protect the parties, but more specifically to protect the District and its employees and representatives as well as those specifically identified in this Agreement and that any actual or prospective breach will irreparably cause damage to the District for which money damages may not be adequate. Consequently Rome and Stanford both agree that if either or both breaches or attempts to

breach this Agreement, the District shall be entitled to obtain temporary, preliminary and permanent equitable relief, without bond, to prevent irreparable harm or injury, and to money damages, together with any and all other remedies available under the law. Rome and Stanford acknowledge that the damage to the District from a breach of this Agreement would be difficult to value and hereby agrees that five thousand dollars ($5,000.00) per breach is a reasonable amount to compensate the District for such damages, unless the District is able to prove otherwise. Rome and Stanford further understand and agree that both shall be liable to pay the District's reasonable attorney's fees and costs in any successful action to enforce this Agreement

Rome and Stanford agree and understand that if one or both of them breach this Agreement, that the District and/or B&C, shall have the right to apply to the Superior Court of New Jersey, Law or Chancery Division, Camden County, to obtain a "Order for Restraints" against one or both of them, in the form attached hereto as "Exhibit 4" to enforce the above restraints in their entirety.

15. GOVERNING LAW AND CONSTRUCTION

This Agreement shall be governed by the laws of the State of New Jersey. Any disputes arising out of and/or relating to this Agreement shall be filed only in the Superior Court of New Jersey, Law or Chancery Division, Camden County, New Jersey and the Parties consent to personal jurisdiction in such courts for any such actions.

16. ENTIRE AGREEMENT AND HEADINGS

This Agreement embodies the entire agreement and understanding between the Parties and supersedes all prior agreements and understandings related to the subject matters hereof. The headings in this Agreement are for purposes of reference only and shall not limit or otherwise affect the meaning of this Agreement or its provisions.

17. NOT ADMISSIBLE

This Agreement is not intended to be used and shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the Parties' compromise as set forth herein, or to enforce the terms of this Agreement.

18. MODIFICATIONS AND AMENDMENTS

This Agreement shall not be modified or amended except by writing duly executed and signed by the Parties to this Agreement.

19. SEVERABILITY

In the event that any such provision of this Agreement is deemed invalid, illegal, void, or unenforceable, such provision shall be regarded as stricken from this Agreement and will not affect the validity or enforceability of the remainder of this Agreement.

20. **COUNTERPARTS**

This Agreement may be exercised in more than one counterpart and each counterpart shall be considered an original, but all of which together shall constitute one and the same.

IN WITNESS THEREOF, the Parties have executed this Agreement.

JENNIFER ROME

By _____
Jennifer Rome

Dated 3/27, 2017

STAN T. STANFORD, III, a/k/a STAN SKYRM

By _____
Stan T. Stanford, III, a/k/a Stan Skyrm

Dated: 03/27, 2017

CAMDEN CITY SCHOOL DISTRICT

By: _____
Paymon Rouhanifard
State District Superintendent, on behalf of the Camden City School District

Dated: 3/31, 2017

EXHIBIT "1"

SETTLEMENT AGREEMENT AND RELEASE OF TENURE CHARGE PROCEEDINGS

This Settlement Agreement and Release of Tenure Charge Proceedings ("this Tenure Charge Agreement") is entered into by and between Jennifer Rome ("Rome") and the Camden City School District (the "District"). Together, Rome and the District may be referred to herein as "the Parties."

WHEREAS, Rome is a Computer Teacher with the District;

WHEREAS, the District commenced proceedings with the Commissioner of the New Jersey Department of Education by certifying and filing tenure charges against Rome (the "Tenure Charges");

WHEREAS, Rome wishes to resign from her position effective December 30, 2017;

WHEREAS, the Parties mutually desire to resolve this matter;

NOW, THEREFORE, IT IS HEREBY AGREED by and between the Parties as follows:

1. Effective Date: This Tenure Charge Agreement shall take effect on the date it is fully executed by the Parties, and as such, deemed ratified by the State Superintendent as the authorized representative of the District in accordance with N.J.S.A. 18A:7A-35.

2. Separation from Employment:

(a) Rome shall provide the District immediately, through its counsel, Brown & Connery, LLP, with an irrevocable letter of resignation effective December 30, 2017 (hereinafter, the "Resignation Date"), which shall be attached as Exhibit "A" to this Agreement (hereinafter, the "Resignation Letter");

(b) Rome shall be placed by the District on paid administrative leave retroactive to February 28, 2017 through her Resignation Date and with her current salary, but without any increases for the 2017-2018 school year, to be paid in the normal course of the District's payroll operations subject to all applicable payroll deductions, by direct deposit with the first regular pay on or before April 15 and retro payment on or before May 15, including as set forth in Section 2(c) below (the "Payment"). This includes payroll payments to be made during July and August of 2017;

(c) Rome shall remain eligible for all District medical benefits through her Resignation Date. Her portion of the premium for those benefits shall be deducted from her wages in the normal course of the District's payroll operations. Rome will then be eligible for and offered COBRA insurance coverage in the normal course (hereinafter, the "Medical Coverage"); and

(d) In the event that Rome owes any outstanding sums for her portion of the premium for her Medical Coverage, Rome will be required to reimburse the District for same, in the event that the funds exceed the amount of the final payroll check, otherwise any outstanding amount will be deducted from the same;

(e) The District shall take all steps with the New Jersey Commissioner of Education or their designee to withdraw and/or dismiss the Tenure Charges against Rome bearing agency reference number 32-2/17; and

(f) The District shall provide Rome with a neutral reference including only her position as a teacher, dates of employment, where she was employed, and her final annual salary.

(g) The District reserves its right to object and pursue any appeals, suits, disputes or challenges to any claim or filing by Rome for unemployment benefits compensation at the conclusion of this Agreement. Rome reserves the right to preserve and pursue same benefits.

(h) During Rome's administrative leave she is to have no contact, in accordance with this Agreement with anyone at the District, with the exception of support or information needed by Rome concerning only her continued medical coverage and only if two (2) people are on the call with Rome, which may require advanced scheduling. To facilitate communication, Rome must first email with specific questions and then call if a response is not received within ten (10) business days. Additionally, if Rome is contacted directly by the State Superintendent or his designee and in that event shall make herself reasonably available to complete the requested task. Otherwise Rome is prohibited from being on District property or at any District event, with the exception of attending sporting or other events hosted by the District in which Rome's children are participants. Even in this instance, Rome is precluded from discussing any topics or items in these Agreements.

(i) Nothing in this Agreement shall preclude the District from forwarding the relevant materials to the Board of Examiners as directed by the applicable Regulations, etc.

3. Contingent Agreement: The terms and conditions of this Tenure Charge Agreement are contingent upon the execution by the Parties, and by Stan T. Stanford, III, a/k/a Stan Skyrm, of a Settlement Agreement and General Release ("Agreement"), and the terms and conditions of the Agreement are incorporated into the Tenure Charge Agreement as if fully set forth herein.

4. Safe Return of all District Property: Rome's receipt of the wages as set forth in this Tenure Charge Agreement is expressly contingent upon her safely returning all District property in her possession without damage and in properly working order. The District reserves the right to recoup from Rome the total loss for any District property that is not returned or returned in damaged condition.

5. General Release: Rome releases the District from all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever that Rome has, ever had, or may have had, against the District, whether or not apparent or yet to be discovered, or which may hereafter develop, for any acts or omissions relating to or arising from anything that has happened up to the Effective Date of this Agreement. This includes, but is not limited to, any claims Rome asserted, or may have asserted, under the following: the National Labor Relations Act; the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Employment Retirement Income Security Act; the Immigration Reform Control Act; the Americans with Disabilities Act; the Age Discrimination & Employment Act; the Older Worker Benefit Protection Act; the Fair Labor Standards Act; the Occupational Safety & Health Act; the Family & Medical Leave Act; the Equal Pay Act; the New Jersey Law Against Discrimination; the New Jersey Wage Payment Law; The New Jersey Minimum Wage Law; the Equal Pay Law for New Jersey; the New Jersey Worker Health & Safety Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; N.J.S.A. 18A; The Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act; N.J.A.C. 6A; any constitution, statute, regulation, ordinance, executive order, public policy or common law; any written, verbal or implied contract; and any other authority or basis for seeking damages or relief of any kind. This release is intended to be broadly construed and applies to any and all claims and potential claims whatsoever, including those of which Rome is not aware, resulting from anything that has happened up to the Effective Date of this Agreement.

6. Covenant Not to Sue: Rome hereby warrants that as of the date this Agreement is signed that she has not filed any other legal complaint, counterclaim, claim, charge, or lawsuit against the District except for the Lawsuit and the DCR Verified Complaint. Further, Rome agrees that she will not file, charge, claim, sue or cause or permit to be filed any civil action, suit, or legal proceeding seeking personal, equitable, or monetary relief on her behalf in connection with any and all claims, known or unknown, asserted or unasserted, from the beginning of time up to and including the date of full execution of this Agreement. Rome further agrees that should any person, organization, or other entity file, charge, claim, sue, or cause or permit to be filed any such civil action, suit, or legal proceeding, she will not seek or accept any personal relief in such civil action, suit, or legal proceeding. In the event of a violation of this paragraph, Rome agrees that the District shall be entitled to immediate dismissal of such civil action, suit, or legal proceeding and that she shall be responsible for the payment of the reasonable attorneys' fees and expenses incurred by the District's defense. Rome further agrees that she will not file nor permit any other party to file charges with any governmental agency relating to any matter alleged in the Lawsuit.

Notwithstanding Sections 5 and 6 of this Agreement, it is understood and agreed that Rome is not waiving any claims filed under any state workers' compensation or unemployment law or any claim arising from a breach of this agreement; or challenges to the validity of this Agreement under the Older Workers Benefits Protection Act.

7. Older Workers Benefit Protection Act: The releases in section 5 above include a waiver and release of all claims under the Age Discrimination in Employment Act ("ADEA") and the Older Workers Benefit Protection Act ("OWBPA"). Therefore, pursuant to the requirements of the ADEA and OWBPA, Rome specifically acknowledges that:

(a) She has been advised to consult with an attorney of her choosing concerning the legal significance of the Settlement Agreement and Release and has done so;

(b) The Settlement Agreement and Release are written in a manner that she understands;

(c) The consideration set forth this Settlement Agreement consists of benefits to which she is not otherwise entitled and is adequate and sufficient to support her promises, covenants and releases as set forth in this Release;

(d) She has been afforded **twenty-one (21) days** to consider the Settlement Agreement and Release before executing it, that any changes thereto subsequently agreed upon by the parties, whether material or immaterial, do not restart this period for consideration, and that by signing and returning the Settlement Agreement and Release before the end of the **twenty-one (21) day** period she will have knowingly and voluntarily waived the right to consider the Settlement Agreement and Release for the full consideration period; and

(e) She has been advised that during the **seven (7) day** period following her execution of the Settlement Agreement and the Release, she may revoke her acceptance of this Agreement by delivering written notice to counsel for the District (as identified below) and courtesy notice to Zeller & Wieliczko, LLP, and that the Settlement Agreement and the Release shall not become effective or enforceable until after the revocation period has expired:

For the District:
Louis R. Lessig, Esquire
Brown & Connery, LLP
360 Haddon Ave.
Westmont, NJ 08108

Courtesy Copy to:
Matthew Wieliczko, Esquire
Zeller & Wieliczko, LLP
120 Haddontowne Court
Cherry Hill, New Jersey 08034

8. Not Eligible for Rehire: Rome acknowledges and agrees that her employment with the District is irrevocably severed upon the effective date of the letter of resignation and that she is ineligible for re-hire as an employee of the District in any position. Rome agrees not to apply for re-employment with the District. If, for some reason, the District receives an application for Rome's employment, the District shall have no obligation to consider or review her application for employment.

9 No Admission of Liability: This Tenure Charge Agreement is not, and may not be construed as, an admission of liability by either Party.

10. Entire Tenure Charge Agreement: This Tenure Charge Agreement encompasses the sole and entire agreement between the Parties and fully supersedes any and all prior agreements or understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to represent an amendment or supersession to this Tenure Charge Agreement.

11. Severability: If any portion of this Tenure Charge Agreement is deemed unenforceable, the remainder will be fully enforceable.

12. Applicable Law and Construction: This Tenure Charge Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey; however, since each party to this Tenure Charge Agreement and their counsel have reviewed and negotiated this Tenure Charge Agreement, the general rule of construction that any ambiguity or uncertainty in a writing shall be interpreted against the party drafting the writing shall not apply to any action relating to this Tenure Charge Agreement. Any action to enforce or interpret this Tenure Charge Agreement shall only be brought in a court of competent jurisdiction in Camden County, New Jersey.

13. Counterparts: This Tenure Charge Agreement may be exercised in more than one counterpart and each counterpart shall be considered an original, but all of which together shall constitute one and the same.

14. Individuals Bound: This Tenure Charge Agreement and General Release is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, personal or legal representatives, successors and/or assigns.

15. Notices: Any notice given or demand made pursuant to this Tenure Charge Agreement shall be made by certified mail, return receipt requested, to the following persons at the following addresses:

If to Rome:

Ms. Jennifer Rome
830 S. Kings Highway
Cherry Hill, New Jersey 08034

With a copy to:

Matthew B. Wieliczko, Esquire
Zeller & Wieliczko, LLP
120 Haddontowne Court
Cherry Hill, New Jersey 08034

If to the District:
Camden City School District
Business Administrator/Board Secretary
201 N. Front Street
Camden, New Jersey 08102

With a copy to:

Louis R. Lessig, Esquire
Brown & Connery, LLP
360 Haddon Avenue
Westmont, New Jersey 08108

16. Facsimile or Electronic Signature Fully Binding: The Parties agree that a facsimile or electronic signature herein shall be deemed to have the same force and effect of an original.

BY SIGNING THIS AGREEMENT, THE PARTIES ACKNOWLEDGE:

A. THEY HAVE READ IT;
B. THEY UNDERSTAND IT AND KNOW THEY ARE GIVING UP IMPORTANT RIGHTS;
C. THEY AGREE WITH EVERYTHING IN IT;
D. THEIR RESPECTIVE ATTORNEYS NEGOTIATED IT WITH THEIR KNOWLEDGE AND CONSENT;
E. THEY HAVE CONSULTED WITH THEIR RESPECTIVE ATTORNEYS ABOUT IT AND ARE FULLY SATISFIED WITH THEIR RESPECTIVE REPRESENTATION; AND
F. THEY SIGN IT KNOWINGLY AND VOLUNTARILY.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereby execute this Tenure Charge Agreement.

Jennifer Ronne

Jennifer Ronne

Date: 3-27-2017

Paymon Rouhanifard
State Superintendent
Camden City School District

Date: 3/31/17

EXHIBIT "A"

March 27, 2017

Paymon Rouhanifard, State District Superintendent
Camden City School District
201 N. Front Street
Camden, New Jersey 08102

Dear Superintendent Rouhanifard

I, Jennifer Rome, hereby submit this irrevocable letter of resignation from my tenured position as a Computer Teacher with the Camden City School District. This irrevocable letter of resignation from my position will become effective on December 30, 2017.

Sincerely,

Jennifer Rome

EXHIBIT "2"

EXHIBIT 2 TO SETTLEMENT AGREEMENT AND GENERAL RELEASE

BROWN & CONNERY, LLP
Louis R. Lessig, Esq. (ID No. 006561997)
360 Haddon Avenue
P.O. Box 539
Westmont, New Jersey 08108
(856) 854-8900
Attorneys for Defendant Stephen Bournes and Camden City School District

JENNIFER ROME, Plaintiff, vs. STEPHEN BOURNES, and CAMDEN CITY SCHOOL DISTRICT Defendant. --- STEPHEN BOURNES, and CAMDEN CITY SCHOOL DISTRICT Third-Party Plaintiff, vs. STAN SKYRM a/k/a STAN STANFORD Third-Party Defendant.	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION CAMDEN COUNTY Docket No. CAM-L-2260-16 Civil Action **STIPULATION OF DISMISSAL WITH PREJUDICE AS TO ALL CLAIMS PURSUANT TO R. 4:37-1(a)**

The matters in dispute having been amicably resolved and adjusted between the parties, it is stipulated that any and all claims in the above captioned matter are dismissed with prejudice and without costs or fees to any party.

JENNIFER ROME
Plaintiff

Jennifer Rome
Date: 3-22-2017

BROWN & CONNERY, LLP
Attorneys for Defendants/Third Party Plaintiffs

Louis R. Lessig, Esquire
Date: 3/21/17

STAN T. STANFORD, III, a/k/a STAN SKYRM
Third Party Defendant

Stan T. Stanford, III, a/k/a Stan Skyrm
Dated: 03/27/2017

EXHIBIT "3"

March 27, 2017

RECEIVED BY
CONTROVERSIES & DISPUTES

2017 APR 21 A 11: 21

John Beauchamp, Regional Director
Department of Law & Public Safety
Division on Civil Rights
Southern Regional Office
5 Executive Campus, Suite 107
Cherry Hill, NJ 08002

Re: Jennifer Rome v. Camden City School District
Docket No.: ED08JE-66054
EEOC No.: 17E 2016 00373

Dear Mr. Beauchamp:

Please be advised that pursuant to N.J.A.C. 13:4-8.1(a), I hereby withdraw the Verified Complaint since the parties have amicably resolved the matter.

Very Truly Yours,

Jennifer Rome

cc: Louis Lessig, Esquire (via regular mail)

EXHIBIT "4"

EXHIBIT 4 TO SETTLEMENT AGREEMENT AND GENERAL RELEASE

BROWN & CONNERY, LLP
Louis R. Lessig, Esq. (ID No. 006561997)
360 Haddon Avenue
P.O. Box 539
Westmont, New Jersey 08108
(856) 854-8900
Attorneys for the Camden City School District and/or Brown & Connery, LLP

CAMDEN CITY SCHOOL DISTRICT, and/or BROWN & CONNERY, LLP Plaintiffs, vs. JENNIFER ROME and/or STAN T. STANFORD, III, a/k/a STAN SKYRM Defendants	**SUPERIOR COURT OF NEW JERSEY** _____ DIVISION CAMDEN COUNTY Docket No. CAM-L-_____-__ Civil Action **ORDER FOR RESTRAINTS AGAINST STAN T. STANFORD, III, A/K/A STAN SKYRM AND/OR JENNIFER ROME [FORM]**

THIS MATTER having come before the Court upon the motion of the Plaintiff Camden City School District (hereinafter, the "District") and/or Brown & Connery LLP (the "B&C"), by and through their counsel, Brown & Connery LLP; and

WHEREAS, the Defendant Jennifer Rome (hereinafter, "Rome"), a former employee of the District, filed a lawsuit against the District and Stephen Bournes in the Superior Court of New Jersey, Law Division, Camden County, under the caption of "Jennifer Rome v. Stephen Bournes and Camden City School District," Docket No. CAM-L-2260-16 (hereinafter, the "Lawsuit");

WHEREAS, the District filed a Counterclaim against Rome and a Third Party Complaint against the Defendant Stan T. Stanford, III a/k/a Stan Skyrm (hereinafter, "Stanford") in the Lawsuit, and Stanford filed a Third Party Counterclaim against the District in the Lawsuit;

WHEREAS, pursuant to a Settlement Agreement and General Release (the "Agreement"), the District, Rome and Stanford, settled any and all claims by and between them arising out of the Lawsuit;

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T.F., on behalf of minor child, T.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In June 2016, *pro se* petitioner appealed the determination of the respondent Board that her daughter, T.N., was ineligible for a free public education in respondent's school district. Petitioner contended that she resides at an address within the Ocean City school district. The Board contended that a residency investigation revealed that petitioner and her daughter actually reside at an address in Margate, New Jersey – outside of the respondent's school district. The Board filed a counterclaim seeking tuition for the period of T.N.'s ineligible attendance in the district. A hearing in this matter was held on December 27, 2016. However, petitioner failed to appear and offered no explanation for her non-appearance.

The ALJ found, *inter alia*, that: the facts of this matter indicate that petitioner applied through the school choice program to have T.N. attend Ocean City Schools for the 2015-2016 school year; when T.N. was not accepted into the program, petitioner enrolled her in the Ocean City school district using an apartment address in Ocean City; subsequently, a residency investigation revealed that the lease for the Ocean City apartment had expired, and that petitioner and her daughter were actually living in Margate, at the home of petitioner's mother; as petitioner failed to appear at the hearing, the testimony and evidence presented by the respondent Board was uncontroverted; and the tuition cost for the period of T.N.'s ineligible attendance totaled $15,537. The ALJ concluded that T.N. was ineligible to attend school in Ocean City for the 2015-2016 school year, ordered petitioner to pay respondent in the total amount of $15,537, and dismissed the petition.

The Commissioner adopted the Initial Decision as the final decision in this matter, for the reasons expressed therein. The petitioner was ordered to pay tuition as set forth above. The petition was dismissed.

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

April 28, 2017

OAL DKT. NO. EDU 10336-16
AGENCY DKT. NO. 166-6/16

T.F., on behalf of minor child, T.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Initial Decision as the final decision for the reasons set forth therein. Accordingly, the petitioner shall pay the Board $15,537.00 in tuition costs for T.N.'s ineligible enrollment in the District for the 2015-2016 school year.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/28/17
Date of Mailing: 4/28/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10336-16
AGENCY DKT. NO. 166-6/16

T.F., ON BEHALF OF MINOR CHILD, T.N.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,
Respondent.

No appearance by or on behalf of petitioner

Michael P. Stanton, Esq., for respondent (McCrosson & Stanton, P.C., attorney)

Record Closed: February 1, 2017 Decided: March 16, 2017

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

Petitioner, T.F., the mother of T.N., challenges the determination made by the Board of Education of the City of Ocean City (District) that she did not reside in the City of Ocean City School District. The District filed a counterclaim seeking payment of tuition for the number of days T.N. attended school in the district.

PROCEDURAL HISTORY

On April 7, 2016 and May 19, 2016, the District notified the petitioner that her daughter, T.N., was ineligible to attend the schools of the district due to non-residency. Petitioner appealed the decision. On July 13, 2016, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A conference call was held on September 2, 2016, in an attempt to settle the case between the parties. A hearing was thereafter scheduled on December 27, 2016, and the petitioner did not appear. Petitioner was marked as "Failed to Appear". The District presented its proofs for the counterclaim but the record remained open for the petitioner to explain her nonappearance. When no explanation was received from petitioner regarding her failure to appear, the record was closed on February 1, 2017.

FACTUAL DISCUSSION

The facts of this case are not in dispute as they are reflected in the exhibits and as such, I **FIND** the following facts:

1. Petitioner's daughter, T.N., was being schooled by the District for the 2015-2016 school year.

2. Ocean City is a school choice school and T. F. who applied for T.N. to attend as a school choice student for the 2015-2016 school year, but T.N. was not accepted into the program.

3. After not being accepted in the school choice program, T.N. then enrolled in the District using an apartment address in Ocean City, New Jersey.

4. Thereafter, the District received information that T.N. was not actually residing and domiciled at the Ocean City address, but was actually residing at a Margate address.

5. The District engaged the services of DiJoseph Investigations, L.L.C. to conduct an investigation into T.N.'s actual residence.

6. Surveillance was conducted on the Margate address. It was determined at the conclusion of the investigation that petitioner and T.N. did not reside at the Ocean City address. (R-3).

7. On May 19, 2016, a Notice of Request for Disenrollment, along with the supporting documents, was delivered to plaintiff, at both the Ocean City and Margate addresses, via regular mail, Certified Return Receipt mail and hand delivery.

8. On May 25, 2016, a residency hearing was conducted before the Board of Education (Board).

9. The Board determined that T.N. was not domiciled or a resident of Ocean City, which would have entitled her to attend a school with the District without a tuition obligation.

10. On June 20, 2016, petitioner filed an appeal from the District's determination of ineligibility.

11. Tuition for the 2015-2016 school year was $86.38 per day for 180 days, equaling $15,537 per annum.

TESTIMONY

Investigator Lou DiJoseph testified on behalf of the respondent. Prior to becoming a private investigator, he spent twenty-five years in the Intelligence Unit of the New Jersey State Police. He has participated in thirty to forty prior residency hearings.

In this case, on April 22, 2016, he initiated an investigation from a complaint that the Board received indicating that T.F. resided outside of the sending district. The

information was that although there was a lease from an Ocean City residence, she actually resided at 29 South B. Avenue in Margate.

His initial investigation involved looking at all of the documents for the 2015-2016 year pertaining to T.F. and her family. He was provided with student registration information sheets from the District regarding the student. Several searches were conducted with emphasis on the student's parent's residency.

According to the student information sheet provided by the District, the student's parent and legal guardian is identified as T.F. with an apartment address in Ocean City, New Jersey. The student information sheet lists it as her primary address. The owner of record for this property is listed as H.A and C.A. of Margate, New Jersey.

He also reviewed other documents including the student information sheet, an expired rental lease agreement between T.F. and H.A., as well as an account agreement between T.F. and H.A. from Cape Bank in Linwood, New Jersey.

T.N.'s father is not listed on the student information sheet and his name remains unknown to the investigator. T.N.'s grandmother is identified as R.F. R.F. resides at South B. Avenue in Margate. An internet based searches for T.F. and R.F. showed a listed address of Doylestown, Pennsylvania and the South B. Avenue address in Margate.

Surveillance was conducted from April 24, 2016 through May 14, 2016, on the South B. Avenue address in Margate. On those occasions, a silver Ford Focus registered to R.F. was observed parked in the driveway. During the course of this surveillance, T.F., R.F. and T.N. were consistently observed at the residence. T.N. was observed letting two small dogs inside the residence and assisting R.F. bringing groceries into the residence. Also, landscapers cut the grass and prior to leaving, spoke with T.F.

It was his conclusory opinion that T.F. is the biological mother of T.N. R.F. is T.N.'s grandmother. The three are living together at South B. Avenue in Margate. As such, she resides outside the confines of the sending district for the District.

FINDINGS OF FACT

Therefore, based upon the uncontroverted testimony and evidence, I **FIND** that T.N. and her mother were domiciled in Margate, which is outside the District. Accordingly, I **FIND** that T.N. was ineligible to attend school in the District for the 2015-2016 school year. I **FURTHER FIND**, by a preponderance of the credible evidence, that the Board filed a counterclaim seeking tuition for the days T.N. attended the District while she was ineligible for the 2015-2016 school year.[1] As such, the District must establish the cost of tuition and the number of days T.N. attended the District's schools when she was ineligible to do so. The testimony was uncontroverted and therefore, I **FIND** that the per-pupil cost for a student to attend school in the district for the 2015-2016 school year was $86.38 per day multiplied by days of attendance, which was 180, equaling $15,537 per annum.

CONCLUSIONS OF LAW

At issue is whether T.N. was entitled to a free education under N.J.S.A. 18A:38-1, which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom. Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education).

---

[1] Although the Respondent's Answer does not include a titled "Counterclaim", the Wherefore clause clearly requests relief for tuition reimbursement. As such, the undersigned believes that the Appellants have been afforded proper notice of the request for tuition reimbursement.

A person who meets age requirements and is domiciled within a school district may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). A person may have many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). A child's domicile is normally that of his or her parents. Ibid. The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999).

The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

The record reflects that T.N. attended school within the district for the 2015-2016 school year while domiciled outside of the District. Accordingly, I **CONCLUDE** that T.N. was not entitled to a free public education in the district. N.J.S.A. 18A:38-1(b)(1) provides that when the evidence does not support the claim of the resident, the resident shall be assessed tuition "for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per-pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced." The uncontested record reflects that the actual cost of T.N.'s attendance in-district was $86.38 per day equaling $15,537 per annum. Accordingly, I **CONCLUDE** that the District is entitled to reimbursement for tuition by the petitioner in the amount of $15,537. I further **CONCLUDE** that petitioner's appeal should be dismissed.

ORDER

It is, therefore, **ORDERED** that petitioner, T.F., pay respondent, Board of Education of the City of Ocean City, tuition in the total amount of $15,537 for unauthorized attendance in the District schools for the periods stated above. It is further **ORDERED** that the District's determination that T.N. was ineligible to attend school while domiciled outside the district is hereby **AFFIRMED**. Petitioner's appeal is **DISMISSED**.

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

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

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

March 16, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 3/16/17

Date Mailed to Parties: 3/17/17

/vj/lam

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

Lou DiJoseph, Investigator

EXHIBITS

For petitioner:

None

For respondent:

R-1 Investigation Report by DiJoseph Investigations

R-2 Notice of Request for Disenrollment, dated April 7, 2016

R-3 Notice of Request for Disenrollment, dated May 19, 2016

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OAL DKT. NO. EDU 10129-16
AGENCY DKT. NO. 167-6/16

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CATHERINE KAZAN,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the respondent, Catherine Kazan, does not have a conflict of interest pursuant to *N.J.S.A.* 18A:12-2 that precludes her from serving on the Board. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein and the petition is hereby dismissed.[1]

IT IS SO ORDERED.[2]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/28/17

Date of Mailing: 4/28/17

[1] There is currently a related matter pending before the School Ethics Commission that is being held in abeyance pursuant to *N.J.S.A.* 18A:12-32. This final decision is not dispositive of the school ethics complaint. The School Ethics Commission will determine how to proceed with the related school ethics matter.

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

123-17

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CATHERINE KAZAN,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioning Board of Education of the Wayne Township Public Schools (Board) sought to remove and disqualify the respondent as a member of the Board for alleged breaches of *N.J.S.A.* 18A:12-2, which – in pertinent part – provides that no member of a board of education shall be interested directly or indirectly in any contract with or claim against the board. The Board based its claim against respondent upon an alleged inconsistent interest involving Ms. Kazan's ongoing support for a full day kindergarten program within petitioner's school district after a proposal for funding the program was defeated in a public referendum. Specifically, respondent was among a group of citizens who petitioned the Superior Court to review and invalidate the election results, alleging that the outcome of the vote was tainted by illegal political activity at the polling places. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner sought to disqualify and remove the respondent from the Board for holding an opinion on a public issue over which reasonable people could disagree, and for speaking in defense of her position while sitting in Board meetings; while the Board argued that words spoken and actions taken by the respondent violated *N.J.S.A.* 18A:12-2 because of an alleged inconsistent interest, it has failed to support its argument with evidence that respondent was involved in any contract with or claim against the Board; respondent did not sue or file a complaint against the Board, but rather was among a group of citizens who sought a Superior Court review of the election process in the referendum, only the subject matter of which implicated Board interests. The ALJ concluded that the respondent has the right to remain on the Board on behalf of the citizens who voted for her, and for her platform in favor of full day kindergarten. Accordingly, the ALJ granted respondent's motion for summary decision and denied the Board's cross motion for summary decision.

The Commissioner concurred with the ALJ's determination that respondent has no conflict of interest pursuant to *N.J.S.A.* 18A:12-2 that precludes her from serving on the Board. Accordingly, the recommended decision of the Office of Administrative Law was adopted as the final decision for the reasons expressed therein. The petition was dismissed.

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

Issued 4/28/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED INITIAL DECISION
ON CROSS MOTIONS FOR
SUMMARY DECISION
OAL DKT. NO. EDU 10129-16
AGENCY DKT. NO. 167-6/16

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,
Petitioner,
v.
CATHERINE KAZAN,
Respondent.

Isabel Machado, Esq., on behalf of petitioner the Board of Education of the Township of Wayne (Machado Law Group, attorneys)

Robert J. DeGroot, Esq., on behalf of respondent Catherine Kazan (Law Offices of Roger J. DeGroot, attorneys)

Record Closed: February 10, 2017 Decided: March 16, 2017

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about June 17, 2016, petitioner Board of Education of the Township of Wayne (Board) filed an action with the Commissioner of the Department of Education

against respondent Catherine Kazan (respondent) seeking her removal and disqualification as a member of the Board for violating N.J.S.A. 18A:12-2.

The matter was transmitted by the Department of Education to the Office of Administrative Law (OAL), where it was filed on July 11, 2016, for plenary hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On or about September 23, 2016, the Board filed an Amended Ethics Complaint with the School Ethics Commission (SEC) within the Department of Education, which alleged ten violations under N.J.S.A. 18A:12-21 et seq. The petitioners in the latter matter are six of the other members of the Board. The SEC did not transmit that matter over but is retaining the matter until this action is decided by the Department.[1]

I convened a telephonic case management conference with the parties on September 29, 2016, to discuss the potential issues in the case, scheduling, and other case management concerns. It became apparent that the matter was amenable to dispositive motion practice and a briefing schedule was agreed upon. Respondent filed a Motion for Summary Decision on or about October 18, 2016. On or about January 13, 2017, petitioner filed a Cross-Motion for Summary Decision. Responses and replies were thereafter submitted. Those motion submissions having been received, the matter is now ripe for decision.

[1] I initially was under the impression that the matters were to be consolidated and entered my Initial Decision accordingly. While I am no longer in possession of the physical record filed, I do not recall ever being provided with the SEC Letter of October 25, 2016, until the "clarification" letter filed by Isabel Machado, Esq., on March 16, 2017. I note that in one of her briefs, she wrote:

> While we recognize that this instant petition concerns Respondent's qualifications to continue to serve on the Board of Education and not her ethics, the same principals apply. Respondent's First Amendment freedoms do not allow her to act on behalf of her personal interests, when such interests conflict with the will of the majority of the voters of Wayne Township and are inconsistent with the Board's interests.
>
> [Cross-Motion Brief at 15]

This Amended Initial Decision is intended to correct the jurisdictional error.

ISSUE PRESENTED ON THE MOTION

Whether respondent should be found disqualified and removed from her elected position on the Board of Education due to alleged breachs of N.J.S.A. 18A:12-2, because of an alleged inconsistent interest. That statute provides in pertinent part: "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, . . ."

UNDISPUTED MATERIAL FACTS

1. In 2013, Respondent ran on a political platform pledging to institute a Full Day Kindergarten Program within the District. See Certification of Isabel Machado, Esq. ("Machado Cert."), Exhibit A.

2. Respondent has been a sitting member of the Wayne Township Public Schools Board of Education since January 2, 2014.

3. On or about November 3, 2015, a public question was posed to the residents of Wayne Township asking whether, if a Full Day Kindergarten were to be established in the District, they would support raising the 2% cap. The public question was defeated 5,071 to 4,500. See Machado Cert., Exhibit D and F.

4. In or about November 2015, respondent donated $100 to a GoFundMe page in support of Full Day Kindergarten. See Machado Cert., Exhibit B.

5. On or about December 3, 2015, fifteen citizens, including respondent filed suit naming the Township Clerk, Paul V. Margiotta, as the official responsible for certifying the election results of the township as the respondent and sought to have the results of the public question set aside due to alleged illegal electioneering on the part of poll workers. See Machado Cert., Exhibit C ("Complaint").

6. On January 7, 2016, at the Board Organizational Meeting, six of the eight Board members voted to approve a motion to implement full-day kindergarten in all nine elementary schools for the 2016/2017 school year within the 2016/2017 budget. The motion was offered by Christian Smith and seconded by respondent. In stating her reasons for supporting the motion, respondent advised that it "is our job, that is what you voted for us to do, and that is the administration's job to find a way" to implement Full Day Kindergarten and cut "whatever we need to cut" to keep the program within the 2% tax levy cap. Id. Furthermore, she stated "it is our job to inform the administration the needs and wants of the community, as boards and trustees." See Machado Cert., Exhibit D.

7. At the January 21, 2016, Board meeting, both the Wayne Superintendent and the Interim Executive County Superintendent spoke to the members concerning budgetary constraints. Both expressed opinions that full-day kindergarten could not be implemented within the cap without impacting mandatory and other programs.

8. At the March 3rd and 14th meetings of the Board, the budget was presented and debated. There was concern expressed about some loss of State funding. Respondent questioned the priorities within the budget and some specific line items. See Machado Cert., Exhibits F and G.

9. After hearing administration's concerns, at the March 14th meeting, the Board voted seven to two to rescind the earlier vote to implement full-day kindergarten within the then-current proposed school budget. See Machado Cert., Exhibit G.

10. On March 17, 2016, the Board ultimately agreed to again place a question on the ballot regarding adding the cost of full-day kindergarten above the then-current school budget funding limit, by a unanimous vote. See Machado Cert., Exhibit H.

11. On or about April 16, 2016, Robert DeGroot, Esq., filed an Order to Show Cause, Certification, and accompanying Petition, identical to the December 2015

Petition, seeking redress to invalidate the November 2015 election results. Prior thereto, DeGroot had concluded that the Complaint was moot as a result of the January vote. The Order to Show Cause was filed because of the vote of the Board rescinding that action. Respondent did not have direct knowledge that an Order to Show Cause would be filed.

12. On or about June 8, 2016, the Board was served with a copy of the Complaint and a Summons. See Machado Cert., Exhibit I. Several days later, the Board was served with a copy of the Order to Show Cause and Petition, filed by the Superior Court under a separate docket number. See Machado Cert., Exhibit K. The service of these court papers was undertaken at the request of the Court Clerk. See Certification of Roger DeGroot, Esq., ¶ 7.

13. At no time relevant to these events did respondent advise the Board that she had been a signatory on the original Complaint to rescind the prior full-day kindergarten ballot question due to improper electioneering.

14. At a June 16, 2016, the Board passed a resolution directing counsel to file a complaint with the School Ethics Commission and a Petition with the Commissioner of Education to disqualify respondent from membership on the Board. Respondent notes that the resolution was passed without giving an opportunity for the respondent to answer any concerns or accusations of the Board members. Additionally, it appears the vote was taken under the mistaken premise that respondent filed an action against the Board.

15. On or about June 17, 2016, a Petition for Disqualification was filed with the Commissioner of Education, which was then transmitted to the OAL as the within matter.

16. Plaintiffs voluntarily withdrew the Complaint on June 26, 2016, after the decision was made to place the question again on the ballot. See Machado Cert., Exhibit O.

17. Respondent filed an answer to said Petition to Disqualify on July 6, 2016. See Machado Cert., Exhibit N.

18. On or about June 24, 2016, respondent was photographed with members of a Facebook group named "Wayne Say OK to Full Day K" at a fundraising event open to the public at an art studio named "Pinot's Palette." See Machado Cert., Exhibit M.

To the extent that the parties have not expressly admitted to all the material facts, I add the following which are material but are established as a matter of documentation and public record and should not be deemed in dispute:

1. The Board of Education of the Township of Wayne was not a party to nor named in the complaint filed to set aside the results of the public ballot question.

2. Neither respondent nor her counsel have any control over the Superior Court's Clerk Office or automated case management system.

LEGAL DISCUSSION

It is well-established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Brill guides us thusly:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential

> materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Id. at 540]

In explaining the standard to be applied in summary motion practice, the Brill Court explained:

> The same standard applies to determine whether a prima facie case has been established by the party bearing the burden of proof in a trial. . . . If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party.
>
> [Id. at 536-37]

As a result of the agreement on the material facts, I **CONCLUDE** that the issue of any disqualifying offense by respondent can be decided as a matter of law.

The Board asserts ethics violations in the companion dispute, of which it has also provided supporting documentation notwithstanding that it was not consolidated herein, under two statutory provisions applicable to Board members, which provide as follows:

> N.J.S.A. 18A:12-24. Conflicts of interest
>
> a. No school official or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest;
>
> b. No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others;
>
> c. No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a

direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

d. No school official shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties;

e. No school official, or member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the school official has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the school official in the discharge of his official duties;

f. No school official shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated;

g. No school official or business organization in which he has an interest shall represent any person or party other than the school board or school district in connection with any cause, proceeding, application or other matter pending before the school district in which he serves or in any proceeding involving the school district in which he serves or, for officers or employees of the New Jersey School Boards Association, any school district. This provision shall not be deemed to prohibit representation within the context of official labor union or similar representational responsibilities;

h. No school official shall be deemed in conflict with these provisions if, by reason of his participation in any matter required to be voted upon, no material or monetary gain accrues to him as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of that business, profession, occupation or group;

And:

N.J.S.A. 18A:12-24.1. Code of Ethics for School Board Members

A school board member shall abide by the following Code of Ethics for School Board Members:

a. I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures.

b. I will make decisions in terms of the educational welfare of children and will seek to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race, creed, sex, or social standing.

c. I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

d. I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

e. I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

f. I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.

g. I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board

> members, interpret to the staff the aspirations of the community for its school.
>
> h. I will vote to appoint the best qualified personnel available after consideration of the recommendation of the chief administrative officer.
>
> i. I will support and protect school personnel in proper performance of their duties.
>
> j. I will refer all complaints to the chief administrative officer and will act on the complaints at public meetings only after failure of an administrative solution.

Frankly, I am shocked at the level of vitriol that has been on display just in the papers filed in this matter. I am also shocked at the suggestion that a citizen who has been elected to a Board is expected to leave his or her opinions at the door notwithstanding he or she campaigned on specific concerns and issues, and notwithstanding the retention of free speech rights under the First Amendment. Respondent is passionate about full-day kindergarten for Wayne's children. Petitioner is correct that this case is not about the correctness of that position; nor will this matter reach any conclusion on that local subject. Yet, no member who is part of a minority of persons holding a certain viewpoint on an issue of local concern is stifled from expressing those views by any ethical code so long as those views are expressed in an appropriate manner, i.e., without profanity or libelous speech, or for an inappropriate reason, i.e., personal gain.

Petitioner seeks to disqualify and remove respondent from the Board for holding an opinion on a public issue over which clearly reasonable people could disagree, and for speaking her mind on that issue while sitting in Board meetings. Query what was the point of being elected to the Board if holding the minority or even an unpopular point of view is prohibited? No other Board member who voted similarly to respondent has been subjected to charges of unethical behavior before the Commission so far as I can discern. For example, the allegations of the Amended School Ethics Complaint would have findings of violations entered for the acts of debate and vote as a Board member during a Board meeting – Violations Four, Five, Six, Seven, and Eight. Other allegations split hairs or puff up repetitive charges, including Violations Two, Three and

Six. Violation One alleges unethical conduct on the part of respondent because she privately contributed money for a campaign to support full-day kindergarten; she visited a booth in support of full-day kindergarten at Wayne Day; and she was at a public art studio for a fundraising event for full-day kindergarten and was photographed with a pro-full-day kindergarten group of citizens. None of those actions is alleged to have occurred as a result of respondent representing herself as a Board member as opposed to acting as a private citizen. Violation Ten cites hearsay contained in newspaper reports of the dispute between the parties hereto and statements of her attorney as evidence of negative comments attempting to smear other members of the Board. Violation Nine is an allegation that she failed to properly serve her pro se request for an advisory opinion from the Commission (after this dispute had already ripened).[2]

While the Board argues that the enumerated words spoken and actions taken by respondent violates N.J.S.A. 18A:12-2, because of an alleged inconsistent interest. That statute provides in pertinent part: "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, . . .," it has failed to support its argument with evidence of any contract with or claim against. In fact, the ethics proscriptions in Section 24.1 includes the statement "I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends." Respondent retained her independent judgment and nothing to the contrary presented by the Board indicates that she abdicated it for her gain or the gain of others. The only change respondent was seeking to make was to establish full-day kindergarten in Wayne and she tried to do so by exercising her right to lobby her fellow members through debate and discussion.

With respect to the issue of respondent signing on to the Complaint, petitioner has also exaggerated both the facts and their significance. Respondent correctly asserts that she was just one of the fifteen citizens who signed the Complaint, the number needed to mount an election challenge under Title 19. She is also correct in

[2] While Wayne separates the Board disqualification petition from the SEC ethics complaint, these facts are all set forth in the certifications and documents supporting the present cross-motions.

stating that the Board was not a party to that litigation, no matter what a clerk might say or a computerized summary might display. This was not a lawsuit filed to force the Board to install full-day kindergarten. This was a lawsuit to invalidate the results of a public question on the ballot. That the subject matter of the public question involved the school budget and its 2% cap is not relevant to that lawsuit or this one.

I could reach the conclusion that respondent should have erred on the side of caution and not become a signatory plaintiff to the Complaint, but in no other manner or fashion did she violate the ethical restraints upon Board members. The Commission has recognized that "board members do not surrender the rights that they have as citizens such as freedom of speech" due to their board membership but, in exercising those rights, a board member must comply with the standards set forth in the School Ethics Act. SEC Advisory Opinion, A02-06 (March 10, 2006). I **CONCLUDE** as a matter of law and undisputed facts that petitioner has failed to support these allegations. Moreover, even if it had, the relief sought by petitioner should be seen as extreme and extremely inappropriate.

Again, the Board seeks to disqualify and remove respondent on the basis of N.J.S.A. 18A:12-2, because of alleged inconsistent interests. That statute provides in pertinent part: "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, . . ." The Supreme Court of New Jersey has interpreted Section 2 to require a "substantial conflict" in order to support a removal of a duly-elected member of a Board of Education:

> Accordingly, the Commissioner's decisions examining claims by board members have discussed the relevance of determining whether the member was pursuing a claim in the public interest rather than "personal aggrandizement and enrichment," Bd. of Educ. of Newark v. Brown, 1984 S.L.D. 671, 680 (Comm'r of Educ.), aff'd, 1984 S.L.D. 683 (St. Bd. of Educ.), and such other considerations as whether the claim giving rise to the conflict of interest promised "substantial and material benefit" to the claimant. Id. at 681 (internal quotation marks omitted). We note further that, in one decision, the Commissioner specifically rejected the argument that N.J.S.A. 18A:12-2 requires automatic

> disqualification for "any" claim against a board. See id. at 679, 681 (citing Hogan v. Bd. of Educ. of Kearny, 1982 S.L.D. 329(ALJ), aff'd, 1982 S.L.D. 354 (Comm'r of Educ.) (permitting abstention to remedy circumstances where "claim" against board involved reimbursement of legal fees incurred in Open Public Meetings Act lawsuit filed by member), aff'd, 1982 S.L.D. 356 (St. Bd. of Educ.)).
>
> In sum, we find that the Commissioner's applications of N.J.S.A. 18A:12-2 demonstrate a willingness to engage in a careful examination of a board member's asserted conflicting interest in a claim against a board and, further, to find that not all claims in which a board member has an interest constitute a "substantial conflict" requiring removal from office as the sole remedy.
>
> [Bd. of Educ. of City of Sea Isle City v. Kennedy, 196 N.J. 1, 15-16 (2008)]

Here, respondent did not sue or file a complaint against the Board of which she was a member. She and fourteen other citizens sought Superior Court review of the election process on the public question. She gained nothing and had no pecuniary interest, such as a family business, adverse to the Board. Nothing I have read requires respondent to sit home from Wayne Day or other cultural events in the community. Moreover, a more careful inquiry by the Board would have revealed that the Complaint was an election law challenge to obtain an order to the municipal clerk to void the election results. Only the subject matter of the public question implicated Board interests. Nevertheless, respondent might have appeared to be challenging her Board in this litigation by the general public of Wayne. It is a very weak claim by petitioner that I **CONCLUDE** should be thrown out entirely. Respondent has every right to remain on the Board on behalf of the citizens who voted for her, no doubt because they agree with her passionate stance about kindergarten.

I would remind all parties that "[d]iscussion in America means dissent." James Thurber. We should welcome different views on important school policies such as full-day kindergarten because "[f]reedom is hammered out on the anvil of discussion, dissent, and debate." Hubert H. Humphrey

ORDER

It is **ORDERED** that the motion of respondent Catherine Kazan for an Order Granting Summary decision is hereby **GRANTED**. It is further **ORDERED** that the cross-motion of petitioner Board of Education of the Township of Wayne for an Order Granting Summary Decision is hereby **DENIED**.

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

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

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

March 16, 2017
DATE

Gail M. Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency: 3-16-2017

Date Mailed to Parties:

id

124-17

AGENCY DKT. NO. 188-7/14

S.L., ON BEHALF OF MINOR CHILDREN., J.L., J.L., AND O.L.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	ORDER
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	
RESPONDENT.	:	

On July 8, 2015, a final agency decision was rendered in this matter, wherein the Commissioner found S.L. liable for tuition in the amount of Sixty Four Thousand Four Hundred Ninety Nine Dollars and Forty Cents ($64,499.40), representing tuition for a period of ineligible attendance by her children, J.L., J.L., and O.L., in the Board's school district during the 2013-2014 and 2014-2015 school years. The Board subsequently notified the Commissioner that S.L. had failed to comply with the decision and it requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. S.L. offered no reasons why the judgment against her should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Sayoka Lewis is now subject to entry of a judgment by the court in the amount of $64,499.40, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/28/17

Date of Mailing: 4/28/17

125-17

AGENCY DKT. NO. 253-9/16

IN THE MATTER OF THE TENURE	:	
HEARING OF LAURITHA LANE,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF	:	DECISION
THE CITY OF NEWARK, ESSEX COUNTY.	:	

The record of this matter, along with the parties' proposed Settlement Agreement and General Release, have been reviewed. The Commissioner finds that the proposed Agreement – a term of which is respondent's resignation from employment in petitioner's district – is consistent with the established standards governing settlement of tenure matters contained within *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, and as incorporated in *N.J.A.C.* 6A:3-5.6.

The Commissioner notes that the settlement indicates respondent will resign effective February 10, 2017. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

In light of the foregoing, the parties' settlement is hereby approved and the tenure matter dismissed – subject to compliance with the terms of the Agreement – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

Kimberley Harrison

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/28/17

Date of Mailing: 4/28/17

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139
Attorneys for State-Operated School
District of the City of Newark

IN RE LAURITHA LANE and the STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,	:	SETTLEMENT AGREEMENT

The parties involved herein have voluntarily resolved all disputed matters and enter into the following Settlement Agreement (the "Settlement") that fully disposes of all issues in controversy between Lauritha Lane ("Lane") and the State-Operated School District of the City of Newark ("the District"):

1. Lane hereby agrees to resign from her tenured position effective February 10, 2017. Attached is a copy of Lane's signed Letter of Resignation (Exhibit A). Lane's separation from employment will be deemed a voluntary resignation in good standing. Upon inquiry from any third parties, the District will only confirm Lane's employment, position, title, salary and dates of employment.
2. Lane also agrees to withdraw with prejudice any and all claims or suits that he may have previously filed against the District that are still pending in any and all courts and/or before any and all agencies, with the exception of workers compensation claims. The Settlement is intended to be the final resolution of all outstanding matters between the District and Lane. Should Lane fail to submit letters of withdrawals for any such pending claims or suits, this Settlement Agreement will serve as Lane's formal written notice of withdrawal of those pending claims or suits, except for workers' compensation claims.

3. In exchange, commencing November 1, 2016, Lane will be placed on administrative leave with pay until the date of her effective resignation. Should Lane obtain employment with another entity prior to her date of effective resignation, the District will remove Lane from administrative leave with pay status and process her resignation to be effective the date she obtained subsequent employment and Lane will cease receiving any salary from the District thereafter. Other than the salary that she receives until the date of her resignation, Lane will not receive any further monies from the District in exchange for this Settlement Agreement.
4. The District also agrees not to pursue any disciplinary action, including termination of Lane's employment so long as this Settlement Agreement remains in effect and is not voided by any court or administrative agency of competent jurisdiction. However, if the Settlement Agreement is voided, the District retains the right to pursue disciplinary action against Lane including termination from the District.
5. As of the date of her resignation, all of Lane's employment rights, including, but not limited to salary, insurance coverage, tenure and seniority, will permanently end.
6. Lane agrees that she will not apply for reemployment with the District at any time. Specifically, Lane will be considered to have permanently retired from her tenured position as a result of this Settlement Agreement. If Lane does apply for reemployment with the District and is approved for employment, the terms of this Settlement shall control and be grounds for immediate termination of Lane's employment.
7. This Settlement shall not constitute a precedent in any matters involving other employees.
8. Except as noted above, Lane waives all claims of any nature against the District with regard to her employment with and/or separation from the District including fees, or other monetary relief, with the exception of workers' compensation claims.

9. By entering into this Settlement, and in exchange for the good consideration set forth in Paragraph 3 and 4 above, the sufficiency of which is hereby acknowledged by the parties, Lane releases and discharges the District, the State District Superintendent, its Advisory Board of Education and its Advisory Board members, and any and all other District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that he has or may have against the District regarding her employment. This release and discharge includes, without limitation, any and all actions, claims and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Lane's employment with the District and separation from the District. It specifically includes, without limitation, all claims which Lane may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Workers Benefit Protection Act; Title VII of the Civil Rights Act of 1964; as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employment Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employment Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to

the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on her employment by and the termination of her employment with the District, including, but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys fees, costs, and/or future wage loss, except for worker compensation claims.

10. Notwithstanding Paragraph 9 of this Settlement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 9, Lane agrees not to seek or accept any resulting relief whatsoever.

11. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advised Lane of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Lane acknowledges that he: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has seven (7) days from the date of the execution of this Agreement to revoke it. Lane understands that she may rescind this Agreement within seven (7) calendar days of signing it and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the seven-day period.

12. The parties respectively acknowledge that counsel has advised them regarding this Settlement and that each is signing this Settlement freely and voluntarily, without duress, coercion or pressure from the other party.

13. This Settlement constitutes the full agreement of the parties and shall be construed and enforced in accordance with New Jersey law.

14. If any provision or portion of a provision of this Settlement is held by a court of competent jurisdiction or determined under applicable federal or state law to be invalid, void or unenforceable, the remaining provisions or remaining portions of a provision will continue and remain in full force and effect.

15. This Settlement is subject to final approval by the State District Superintendent of the State-Operated School District of the City of Newark and will only become effective upon the approval of the Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue this matter further.

Dated: Nov. 9 2016

LAURITHA LANE

Dated: Nov 9 2016

EUGENE G. LISS, ESQ.
Attorney for Lauritha Lane

Dated: 11/9/16

CHRISTOPHER CERF
State District Superintendent

Dated: Nov 9, 2016

BERNARD MERCADO, ESQ.
Attorney for Newark Public Schools

CERTIFICATION

I, LAURITHA LANE, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: NOV. 9 2016

LAURITHA LANE

Bernard Mercado, Esq.
Newark Public Schools
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102

RE: LAURITHA LANE
NOTICE OF RESIGNATION - FEBRUARY 10, 2017

Dear Mr. Mercado:

Please be advised that I wish to inform you that I will be resigning from employment with the Newark Public Schools effective February 10, 2017. I wish to thank you for the opportunity I have had to teach the students of Newark.

Dated: Nov 9 2016

Lauritha E Lane
LAURITHA LANE

Exhibit A

126-17L

126-17

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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

KIMBERLEY HARRINGTON
Acting Commissioner

May 1, 2017

Colin M. Lynch, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
One Riverfront Plaza, Suite 320
Newark, New Jersey 07102-5410

Ramon E. Rivera, Esq.
Scarinci Hollenbeck
1100 Valley Brook Avenue
P.O. Box 790
Lyndhurst, New Jersey 07071-0790

Re: *Newark Teachers Union and John Abeigon, President v. Edward Hui, Gabrielle Ramos-Soloman, Sunne-Ryse Smith, Nana Ofosu-Amaah, Samantha Messer, Nick Romagnolo, Jill Wohrle, and the State-Operated School District of the City of Newark, Essex County*
Agency Docket No. 41-2/17

Dear Counsel:

I have reviewed the Petition for Declaratory Ruling in the above-captioned matter, together with the respondents' answer to the petition.

Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a), and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq.*

Accordingly, petitioners' request for declaratory ruling is declined; this matter shall be transmitted forthwith to the Office of Administrative Law.

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

KH/MKD/BON

128-17

OAL DKT. NO. EDU 1682-17
(EDU 11405-16 ON REMAND)
(EDU 12005-14 ON REMAND)
AGENCY DKT. NO. 223-8/14

SERGIO CALAFIORE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
UNION COUNTY EDUCATIONAL SERVICES COMMISSION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/10/17

Date of Mailing: 5/10/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1682-17
AGENCY DKT. NO. 223-8/14

ON REMAND
OAL DKT. NO. EDU 11405-16
OAL DKT. NO. EDU 12005-14

SERGIO CALAFIORE,

Petitioner,

v.

UNION COUNTY EDUCATIONAL SERVICES COMMISSION, UNION COUNTY,

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

Bradley D. Tishman, Esq. for respondent (Cleary, Giacobbe, Alfieri, Jacobs, attorneys)

Record Closed: March 23, 2017 Decided: March 23, 2017

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 3, 2017, as a remand of OAL Docket No. EDU 11405-16, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

March 23, 2017
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: 3-28-17

Mailed to Parties: MAR 28 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

CLEARY | GIACOBBE | ALFIERI | JACOBS LLC

BRADLEY D. TISHMAN, Associate
btishman@cgajlaw.com

Reply to: Oakland Office

December 14, 2016

Via Facsimile [(973) 648-6124] and
First Class Mail
Hon. Danielle Pasquale, ALJ
State of New Jersey
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Calafiore v. Union County Ed. Serv. Comm.
OAL Docket No. EDU 11405-2016N
Agency Ref. No. 223-8/14

Dear Judge Pasquale:

As you know, our firm represents the Respondent Union County Educational Services Commission ("Commission") in the above matter. During our telephone conference held on November 16, 2016, it was agreed that the Commission would file its Motion to Dismiss by today. The parties have amicably settled this case following the telephone conference. Pursuant to this tribunal's November 21, 2016 prehearing order, we enclose a copy of the settlement agreement for your Honor's file. Based upon the terms of the agreement and discussions with Petitioner's counsel (Nicholas Poberezhsky, Esq.), it is our understanding that Petitioner will be promptly withdrawing his pending Amended Petition.

Thank you for your attention to this matter.

Respectfully Submitted,

Bradley D. Tishman

Bradley D. Tishman

Enclosure

Cc: Nicholas Poberezhsky, Esq. [Via E-mail (NPoberezhsky@carusosmith.com)]
Terry Foppert, Superintendent [Via E-mail (TFoppert@ucesc.org)]

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 7th day of December 2016, between the Union County Educational Services Commission (hereinafter referred to as the "Commission") and Sergio Calafiore (hereinafter referred to as "Calafiore").

WHEREAS, Calafiore was employed as a Teacher of Food Services by the Commission prior to the abolishment of his position effective July 1, 2014; and

WHEREAS, Calafiore filed a retirement application with the Division of Pensions and Benefits that became effective on November 1, 2014; and

WHEREAS, on August 13, 2014, Calafiore filed a Petition with the Commissioner of Education to challenge the Commission's reduction in force and abolishment of his position [OAL Docket No. EDU 12005-14, Agency Ref. No. 223-8/14]; and

WHEREAS, on April 15, 2015, Calafiore moved to amend his Petition to include a seniority rights claim; and

WHEREAS, on June 16, 2016, the Hon. Irene Jones, ALJ granted the Commission's Motion for Summary Decision upholding the Commission's decision to abolish Calafiore's position, and denied Calafiore's motion to amend his Petition to include a seniority rights claim; and

WHEREAS, on July 28, 2016, the Commissioner of Education affirmed Judge Jones's decision regarding the Commission's abolishment of Calafiore's position, but reversed Judge Jones's determination on Calafiore's motion to amend his Petition, and remanded Calafiore's claim to the Office of Administrative Law for a determination as to whether Calafiore is entitled

to a position with the Commission by virtue of his seniority rights; and

WHEREAS, on remand the matter was assigned to the Hon. Danielle Pasquale, ALJ [OAL Docket No. EDU 11405-16, Agency Ref No. 223-8/14]; and

WHEREAS, on September 16, 2016, Calafiore resubmitted his Amended Petition for Relief; and

WHEREAS, on November 8, 2016, Calafiore filed his Second Amended Petition; and

WHEREAS, the Commission disputes Calafiore's claim of entitlement to a position with the Commission by virtue of his alleged seniority rights; and

WHEREAS, the parties are desirous to amicably resolve the matter without further litigation.

NOW, THEREFORE, in consideration for the premises and conditions set forth herein, the Commission and Calafiore agree as follows:

1. **TERMS.**

A. Calafiore will immediately dismiss with prejudice the Second Amended Petition currently pending against the Commission [OAL Docket No. EDU 11405-16, Agency Ref No. 223-8/14]. Calafiore further agrees not to file a new claim, in any forum, regarding any of the allegations raised in his original and/or amended petitions against any individuals or entities affiliated with the Commission, as further detailed in the "Complete Release" section below.

B. Calafiore will receive the total sum of $3,750.00, inclusive of attorneys' fees in settlement of this matter. The Commission's payment to Calafiore will be subject to applicable tax withholdings, and the Commission will issue a W-2 form to Calafiore for this payment.

C. The parties agree that they are only responsible for their respective attorneys' fees

incurred to date. Calafiore agrees that if he should file a claim in a court of competent jurisdiction and/or administrative action relating to the terms set forth in this Agreement (with the exception of any action necessary to enforce the terms of this Agreement), the Commission may seek reasonable attorneys' fees incurred in defending against said litigation, as further provided for in subsection 2b below.

D. The Commission agrees to provide Calafiore with a neutral letter of reference by providing his title and dates of service only.

E. The terms of this Agreement are subject to formal acceptance and ratification by the Commission.

2. COMPLETE RELEASE.

a. In consideration of the settlement hereinabove, Calafiore, his heirs, assigns and agents hereby agree to release, waive and discharge the Commission, its affiliated departments, and its officers, trustees, agents, employees, former employees, current and former elected officials, current and former attorneys, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, or action or writ of any kind, nature, character or description that Calafiore had, now has, or may in the future have against the Releasees on account of or arising out of the Petition or any matter that, has happened, developed or occurred prior to the date of this Agreement. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, claim for damages of any kind, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law),

rule, regulation, executive order or guideline, and any and all claims for attorney's fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (LAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, gender identity or expression, familial status, disability or nationality, or liability for service, in the Armed Forces of the United States.

ii. Any federal claim, cause of action demand or complaint arising out of or under the Federal Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex, or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA), which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child; spouse or parent who has a serious health condition and any claim, cause

of action, demand or complaint arising out of under the New Jersey Family Leave Act (NJFLA).

vi. Any claim, cause of action demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

ix. Any claim, cause of action, demand or complaint arising out of or under the Federal Fair Labor Standards Act (FLSA) or the New Jersey Equal Pay Act.

x. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA).

b. Calafiore specifically acknowledges he has not filed and shall not hereafter file any claim, charge or complaint of any nature against Releasees with the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local court or agency against the Commission or the Releasees for any events preceding the ratification of this Agreement. If Calafiore violates this Complete Release by filing any claim, charge or complaint as prohibited by this Agreement, Calafiore agrees to pay all costs

and expenses of defending against the suit incurred by the Commission and/or the Releasees, including reasonable attorneys' fees.

3. **CONSULTATION WITH ATTORNEY.**

Calafiore has consulted with his legal counsel with respect to this Agreement, and has reviewed with his attorney all of the terms and conditions of this Agreement prior to executing this Agreement.

4. **COMPLETE AGREEMENT.**

This Agreement contains the entire agreement between Calafiore and the Commission with respect to the subject matter and supersedes all prior agreements, understandings and/or dealings whether written or otherwise with respect to the same subject matter. There is no agreement on the part of the Commission to do anything other than what is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

5. **MODIFICATION.**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

6. **SEVERABILITY.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

7. ATTESTATION.

Calafiore represents and warrants that he has carefully read each and every provision of this Agreement and that he fully understands all of the terms and conditions contained in each provision of this Agreement. Calafiore represents and warrants that he enters into this Agreement voluntarily, of his own free will, without any pressure or coercion from any person or entity including, but not limited to, the Commission and the Releasees.

8. NON-ADMISSION OF LIABILITY.

This Agreement is executed and all consideration is given in final settlement of disputed claims and shall not be construed as an admission of any allegation or of liability by the Commission, and any such liability is expressly denied.

9. FUTURE EMPLOYMENT.

Calafiore acknowledges that his relationship with the Commission has been permanently and irrevocably severed. Calafiore agrees that he will not at any time hereafter apply for employment or reemployment with the Commission, nor shall he accept any employment with the Commission.

10. NON-PRECEDENTIAL.

It is understood between and among all parties hereto that the terms of this settlement shall not have any precedential effect or constitute binding practice by the Commission.

11. REVOCATION.

Calafiore may revoke this Agreement within seven days after the date this Agreement is signed by Calafiore. This revocation must take the form of written notice by Calafiore that he intends to revoke the Agreement. The revocation must be provided directly to the

Commission. This seven day revocation period may not be waived by Calafiore.

12. REASONABLE PERIOD OF TIME.

Calafiore agrees that he has been given a reasonable period of time of at least 21 days within which to review and consider this Agreement prior to executing this Agreement, but that Calafiore may waive this 21 day period by signing in the space provided at the end of this Agreement.

IN WITNESS WHEREOF, and intending to be legally bound hereby, I, Sergio Calafiore, execute the foregoing Agreement this 7th day of December, 2016.

Sergio Calafiore
SERGIO CALAFIORE

Sworn and subscribed to before me
this 7th day of December 2016.

Notary Public of the
State of New Jersey

CLARE T. PELLEGRINI
A Notary Public of New Jersey
My Commission Expires November 10, 2020

UNION COUNTY EDUCATIONAL
SERVICES COMMISSION

Date: 12/07/16

By: Helen E Grant

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the twenty-one (21) day period referred to in the 12th recital on page 8 of this Agreement.

Date: 12/07/16

SERGIO CALAFIORE

Minutes of the U.C.E.S.C.
Representative Assembly Meeting
March 1, 2017

PERSONNEL:

It was moved by Ms. Byrne, seconded by Dr. Clancy and carried by roll call vote, to approve the following Agenda items:

D. Motion to approve the following resolution:

WHEREAS, at its meeting on December 7, 2016, the Board approved the draft Settlement Agreement and Release ("Agreement") in the following matter: OAL Docket No. EDU 12005-14, Agency Ref. No. 223-8/14; and

WHEREAS, the Board must submit a resolution approving the final Agreement and designating a Board member to sign the Agreement on its behalf; and

NOW, THEREFORE, BE IT RESOLVED that the Board formally approves the Agreement signed December 7, 2016; and

BE IT FURTHER RESOLVED, that the Board authorizes the signature of Board President Helen Kirsch as the Board's representative.

Ayes: Mesdames; Kirsch, Aklonis, Duda, Villani, Fabrizio, Powers, Clancy, Root, Byrne; Messr: Watkins, Donner, Arminio

Nays: None Abstain: None

I certify that this is a true and accurate copy of the unofficial minutes of the Union County Educational Services Commission's Representative Assembly Meeting of March 1, 2017.

Robert A. Behot, Ed.D. / Board Secretary

129-17

OAL DKT. NO. EDU 03904-17
(EDU 14271-16 ON REMAND)
AGENCY DKT. NO. 188-7/16

A.V., ON BEHALF OF MINOR CHILD, L.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS IN THE COUNTY OF BERGEN	:	DECISION
RESPONDENT.	:	

The record, proposed settlement agreement and release, and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's March 17, 2017 determination that the settlement agreement previously submitted did not comply with *N.J.A.C.* 6A:3-1.13, as it was neither signed by the Board's attorney, nor contained a copy of the Board's resolution approving the settlement. Since there is now a Board resolution approving the settlement, the Commissioner can approve the within settlement agreement in its present form.

Accordingly, the Initial Decision recommending approval of the parties' settlement as the final decision in this matter is hereby adopted, and the matter is dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/10/17
Date of Mailing: 5/10/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03904-17

A.V. ON BEHALF OF MINOR CHILD L.P.,

Petitioner,

v.

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS IN THE COUNTY OF BERGEN,

Respondent.

REMAND OF

OAL DKT. NO. EDU 14271-16

Jerry L. Tanenbaum, Esq., for Petitioner (Mattleman, Weinroth & Miller, P.C., attorneys)

William C. Soukas, Esq., for Respondent (Nowell, P.A., attorneys)

Record Closed: March 31, 2017 Decided: March 31, 2017

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The within matter, captioned under OAL Dkt. No. EDU 14271-16, was remanded by the Department of Education Bureau of Controversies and Disputes to the Office of Administrative Law (OAL) due to the absence of a Board resolution approving the settlement. On March 21, 2017, the Clerk of the OAL received and filed this remanded matter and thereafter the undersigned acquired from the Board's attorney the original

Board Resolution which is attached hereto along with the Stipulation of Settlement indicating the terms of agreement.

Having reviewed the Board Resolution and Stipulation of Settlement terms, I **FIND:**

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

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

I **CONCLUDE** that this Board Resolution along with the Settlement Agreement meets the requirements of N.J.A.C. 6A:3-1.13 and N.J.A.C. 1:1-19.1 and that settlement should be approved. Accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 31, 2017
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: March 31, 2017

Date Mailed to Parties: APR 5 2017
db

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

17-F-133T **APPROVAL – AUTHORIZING SETTLEMENT OF LITIGATION**

Resolution

WHEREAS, the Board of Education ("Board") is respondent in an administrative action brought before the Commissioner of Education bearing Agency Ref. no. 188-7/16 and OAL Dkt. No. EDU 14271-16 taking issue with discipline imposed by the school district;

WHEREAS, the Board's attorney has negotiated a settlement of the matter involving no payment of monies to petitioner and without any admission of fault or wrongdoing on the part of the Board, which settlement was accepted by petitioner's counsel and approved by the Administrative Law Judge handling the action; and

WHEREAS the Board is desirous of avoiding the cost and expense of further litigation or hearing and, also, desires to resolve all disputed claims between the parties by entering into a Settlement Agreement and Release with Petitioners; and

NOW, THEREFORE, BE IT RESOLVED, that the settlement of this lawsuit be and is hereby approved, accepted and ratified in the form memorialized in the Settlement Agreement and Release on file with the Board Secretary; and

BE IT FURTHER RESOLVED that the Superintendent of Schools be and hereby is authorized to execute the Settlement Agreement and Release on behalf of the Board of Education, and the Superintendent, Business Administrator, and Board Attorney be and hereby are authorized and directed to take all necessary and appropriate action to effectuate the settlement; and

BE IT FURTHER RESOLVED that the recitals are hereby incorporated as if restated herein in full, and this Resolution shall take effect immediately.

I John Susino, Business Administrator/Board Secretary, certify this resolution was presented and approved at the Board of Education meeting on February 28, 2017.

John Susino, Board Secretary
Bergen County Board of Vocational-Technical Schools

NOWELL, P.A.
155 Polifly Road
Hackensack, New Jersey 07601
By: William C. Soukas, Esq. (ID No. 034761994)
(201) 343-5001
Attorneys for Respondent,
Board of Education of the Vocational Schools in the County of Bergen i/p/a Bergen County Specials Services School District, Board of Education

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

MS. ANNA VLADI, ON BEHALF OF HER MINOR DAUGHTER, LEENA PRAKHINA, **Petitioner,** **v.** **THE BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS IN THE COUNTY OF BERGEN,** **Respondent.**	**AGENCY DKT. NO. 188-7/16** **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release ("Agreement") is entered into by and between Ms. Anna Vladi on behalf of her minor daughter, Leena Prakhina (hereinafter "Petitioners" or "Student") and the Board of Education of Vocational Schools in the County of Bergen (hereinafter "District").

WHEREAS the Student has filed a Petition for review with the Commissioner of Education against District, with the Petition bearing Agency Docket No. 188-7/16; and

WHEREAS, the Parties desire to resolve their differences rather than proceeding forward with any further litigation, or incurring any further attendant costs of any litigation as well as any hearing and appeal, and without any admissions of wrongdoing by either Party; and

WHEREAS the parties have consulted with their respective attorneys prior to executing this Agreement and have had an adequate opportunity within which to consider the Agreement; and

WHEREAS, in consideration of the mutual covenants and promises contained herein and intending to be legally bound, the parties mutually agree as follows:

(1) The District shall within 15 days of the date of this Agreement revise the appropriate entry in the District's Powerschool system so that the sole reference therein to the alleged disciplinary infraction in any file or document relating to the Student will state as follows: "The student received a 2 day out-of-school suspension because she admitted to momentary possession of a piece of marijuana brownie handed to her by another student on school premises. No evidence of distribution or use of the substance was found."

(2) The District shall provide Petitioners with a written copy of the revised Powerschool entry within 15 days of the date of this Agreement. The District agrees that in the event that it is contacted by, or receives any request for student records from, any college or post-secondary institution, it shall provide only the statement set forth in Paragraph 1 herein.

(3) Subject to the limitations set forth in this Paragraph, the Petitioners hereby waive release any and all claims they had or may have had against the District on the date of this Settlement Agreement and Release, known or unknown, arising from the beginning of time to the date of this Agreement, under Federal or State statutory or common law. This Release inures to the benefit of, and is binding on, all agents, subsidiaries, successors, heirs or any other related entity of the Parties and shall specifically apply only to claims resulting from the following:

> Any and all claims, demands, damages, etc. that Petitioners asserted or could have asserted against the District in the matter of Anna Vladi o/b/o L.P. v. Board of Education of the Vocational Schools in the County of Bergen filed with the Commissioner of Education and bearing Agency Dkt. No. 188-7/16

(4) Each Party is responsible for their own costs and attorney's fees. Each party waives any and all claims for attorneys' fees, costs and expenses against District which Petitoners or their counsel have/has incurred in connection with this action or in connection with any claim against the District.

(5) The Parties have consulted with counsel with respect to this Settlement Agreement and Release and enter into this Agreement under their free will without duress of any kind.

(6) This Settlement Agreement and Release represents the full understanding of the Parties and supersedes any other written or oral understandings. This Agreement can only be modified by a writing that is executed by both Parties.

(7) This Agreement can be signed in counterparts, with each counterpart having the full force and effect of a fully executed original.

(8) The District warrants that the individual designated to sign this Agreement on behalf of the District has full authority to sign for and bind the District to this Agreement.

(9) Petitioners acknowledge that the settlement of this matter is contingent upon foregoing any litigation relating to this claim and upon the execution, by Petitioner(s), of a Withdrawal of Petition in the form attached herewith as Exhibit "A."

(10) The individuals executing this Agreement represent and warrant that each is authorized to make, execute and deliver this Agreement, that each has been represented by counsel and has been fully apprised of and understands all of the terms of this Agreement and the legal ramifications of the entry into the same.

Execution of this document constitutes agreement with all of the terms and conditions above:

Board of Education of Vocational Schools in the County of Bergen

By: _____ Date: _____

Print name and Title-

Ms. Anna Vladi, O/B/O her minor daughter, Leena Prakhina

_____ Date: 1/4/2016

Anna Vladi

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C.G., on behalf of minor child, E.J.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LAKELAND REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her son, E.J.G., seeking a determination that E.J.G. is entitled to a free public education in the Lakeland Regional High School District. The respondent Board alleged that petitioner resides in Lincoln Park, which is not a part of the Lakeland Regional High School District.

The matter was transmitted to the Office of Administrative Law (OAL) and a pre-hearing conference was scheduled for March 28, 2017. Petitioner failed to appear at the scheduled hearing. The OAL sent a notice of petitioner's failure to appear to the Commissioner on March 30, 2017, and subsequently returned the file to this agency. Correspondence from petitioner explaining her failure to appear was received by the Commissioner on April 13, 2017.

Upon review, the Commissioner found that the petitioner asserted that she had called the OAL on March 28 when she did not receive a call from the OAL for the 3:30 prehearing telephone conference. Petitioner asserted that she was told that she would receive a notice by mail with a new prehearing conference date. When no notice was received, she contacted the OAL and was told the file had been returned to the Department of Education. Based on the petitioner's timely written explanation for her nonappearance and her assertion that she had called regarding the status of the conference, the Commissioner determined to re-transmit the matter to the OAL for further disposition pursuant to *N.J.A.C.* 1:1-3.3(b).

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

Issued 5/11/17

OAL DKT. NO. EDU 1924-17
AGENCY DKT. NO. 323-12/16

C.G., on behalf of minor child, E.J.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LAKELAND REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the advisement by the Office of Administrative Law (OAL) – pursuant to *N.J.A.C.* 1:1-14.4 – of petitioner's failure to appear at a March 28, 2017 prehearing conference have been reviewed.

Petitioner filed a hand-written explanation asserting that she called the OAL on March 28, 2017 at 3:38 when she did not receive a call from the OAL for the 3:30 prehearing conference. The petitioner contends that someone from the OAL informed her that the OAL was experiencing problems with the phone system and that she would receive a notice in the mail with a new date for the prehearing conference. When the petitioner did not receive a notice with a new prehearing conference date, she contacted the OAL and was told that the file had been returned to the Department of Education (Department). The petitioner further states the Administrative Law Judge Bedrin Murray advised the petitioner that she should contact the Department and request that the file be returned to the OAL.

Based upon the petitioner's timely written explanation for her nonappearance and her assertion that she called the OAL on the date of the prehearing conference to inquire about

the status of the conference, this matter is being retransmitted to the OAL for further disposition, pursuant to *N.J.A.C.* 1:1-3.3(b).

IT IS SO ORDERED.

N.J.A.C. 1:1-3.3(b).

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/11/17

Date of Mailing: 5/11/17

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

SYNOPSIS

On December 5, 2016, T.M. – the mother of J.R. – filed a *pro se* petition appealing the determination of the respondent Board that her son is not entitled to a free public education in West Orange schools. Petitioner contended that J.R. resided in West Orange with his stepfather, M.M., during the school year and resided with her in East Orange during the summer months. Subsequently, T.M. was informed that the appeal must be initiated by M.M., since it is his home in which J.R. was allegedly domiciled. On December 9, 2016, M.M. filed a *pro se* petition asserting that J.R. lives with him, but visits his mother at her East Orange residence. The respondent argued that the Board had not received any legal papers or court orders that appointed petitioner M.M. as J.R.'s legal guardian or parent/legal guardian of primary residence; accordingly, the Board requested that the petition be dismissed with prejudice. The Board did not seek tuition reimbursement from petitioner.

The ALJ found, *inter alia*, that: pursuant to *N.J.A.C.* 6A:22-3.2(a)(1), a student is a resident of a school district if his parent or guardian has a permanent home in the district; the domicile of an unemancipated child is that of his or her parent, custodian or guardian; in the instant case, M.M. contested the Board's decision that J.R. was not properly domiciled in West Orange; based on the testimony and evidence, T.M. and J.R. lived with petitioner M.M. in West Orange when J.R. was registered for school in August 2015; M.M. and T.M. described their relationship as boyfriend and girlfriend when they resided together in West Orange, and believed that this was enough to establish M.M. as J.R.'s legal guardian; however, M.M. is neither a parent or legal guardian of the J.R., nor does he have any written agreement giving him permission to have J.R. reside with him in West Orange. The ALJ concluded that J.R. has not been a domiciliary of West Orange since July of 2016, and is therefore ineligible for continued attendance in the West Orange public schools.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

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

May 11, 2017

OAL DKT. NO. EDU 4-2017
AGENCY DKT. NO. 313-12/16

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

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons stated in the Initial Decision – that J.R. is no longer domiciled in the district and that the Board's decision denying J.R. the ability to attend school in the district was not arbitrary, capricious or unreasonable.

Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/11/17
Date of Mailing: 5/11/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00004-2017
AGENCY DKT. NO. 313-12/16

M.M. on behalf of MINOR CHILD, J.R.,
Petitioner,
v
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

M.M., petitioner, pro se

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

Record Closed: March 20, 2017 Decided: March 30, 2017

BEFORE **ELISSA MIZZONE TESTA,** ALJ:

STATEMENT OF THE CASE

Petitioner, M.M., challenges the determination by the Board of Education of the Township of West Orange, Essex County ("BOE" or "respondent") that the minor child,

J.R., should be removed from the West Orange School District because the BOE determined that he does not reside in West Orange, pursuant to N.J.S.A. 18A:38-1.

PROCEDURAL HISTORY

On December 5, 2017, T.M. the mother of J.R., filed a residency petition on behalf of J.R., a student at Kelley Elementary School, West Orange. On December 9, 2017, the State Department of Education (DOE), advised T.R. that because she was alleging J.R. resided with his stepfather, M.M. in the West Orange School District, M.M. would have to initiate the appeal of the Board's residency determination. On December 9, 2016, M.M. filed the residency petition on behalf of J.R. On December 27, 2016, the BOE filed an Answer with the State Department of Education (DOE). The pleading did not seek reimbursement from the Petitioner for the tuition incurred by the attendance of the minor child in the BOE's district. On December 30, 2016, this matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to 13. A hearing was held on March 20, 2017, on which date the record was closed. It was confirmed on the record with Ms. Fabres, counsel for the BOE, that her client is not seeking tuition reimbursement from Petitioner, M.M.

FINDINGS OF FACT

Based upon the testimonial and documentary evidence presented at the hearing, I **FIND**:

On August 25, 2015, T.M. registered her minor son, J.R. in the West Orange School District. (R1). Pursuant to the testimony of T.M., she and her son J.R. were residing with M.M. in West Orange. Thereafter, in or about July of 2016, T.M. moved to East Orange. Respondent's residency inspector, David Zawacki, credibly testified that the first notice that was received by the BOE that J.R. was not residing in West Orange was at the end of the 2015-2016 school year. This original investigation was never completed since the school year had ended. The investigation was re-initiated in October

of 2016. On at least fifteen occasions between October and November of the 2016-2017 school year, the minor child, J.R. was observed leaving a residence in East Orange and being driven to a West Orange school bus stop. The student was never observed leaving in the morning from the West Orange address on file with the West Orange School District (R2) or any other West Orange address. A residency hearing was conducted on November 14, 2016, wherein the West Orange BOE voted to remove J.R. from the West Orange School District. Notice of the BOE's action was forwarded and addressed to T.M., the mother of J.R. (R4).

Mr. Zawacki further testified that all documents presented to the West Orange School District upon J.R.'s registration on August 25, 2015 list T.M. as "Legal Guardian 1" and C.R. (the biological father), as "Legal Guardian 2." (R1). These forms were never modified to add and/or change any of the information provided. The address of residency provided for the minor child J.R. at that time was a West Orange address. Mr. Zawacki further produced a Statement of Landlord which was provided on August 25, 2015 to the West Orange School District. M.M. was not listed as an owner and/or tenant at that property. (R1).

M.M. averred in his petition that he is J.R.'s step-father, and he referred to the minor child J.R. as his son. But it was established through the testimony of M.M. and T.M. that M.M. is not J.R.'s step-father, biological parent or legal guardian nor does he have any written agreement with T.M. and/or C.R. giving him permission to have J.R. reside with him in West Orange. M.M. stated that T.M. and J.R. lived with him in West Orange when J.R. registered for school in the West Orange School District on August 25, 2015 and they then subsequently moved to East Orange. Both M.M. and T.M. described their relationship as boyfriend and girlfriend when they were residing together in West Orange. They believed this was enough to establish M.M. as J.R's legal guardian.

T.M. corroborated Mr. Zawacki's investigative findings by indicating that because of M.M.'s work schedule during the months of September through December, J.R. had to

sleep at her house in East Orange every night and then he would get picked up by M.M. in the morning and get dropped off at the bus stop in West Orange.

LEGAL DISCUSSION AND CONCLUSION

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

In the case at hand, M.M. contested the Board's decision that J.R. was not properly domiciled in the West Orange school district, having filed the Petition with the Board. Based on the testimony provided and the evidence submitted, I **CONCLUDE** that

M.M. is neither a parent or legal guardian of the minor child J.R. Moreover I **CONCLUDE** that J.R.'s biological mother and legal guardian is a domiciliary of East Orange, and that in accordance with N.J.S.A. 18A:38-1, J.R.'s education is the responsibility of the East Orange school district. Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that the minor child J.R. was not a domiciliary of the West Orange School District since July of 2016, and is thus ineligible for continued attendance in the West Orange public schools.

ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that the minor child J.R. is not a resident and domiciliary in West Orange, New Jersey, and was not domiciled within its school district and should be removed is hereby **AFFIRMED**.

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

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

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

March 30, 2017 *Elissa Mizzone Testa*

DATE **ELISSA MIZZONE TESTA**, ALJ

Date Received at Agency: March 30, 2017

Date Mailed to Parties: MAR 31 2017

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Petitioner:

M.M.

T.M.

For Respondent:

David Zawacki

LIST OF EXHIBITS

For Petitioner:

None

For Respondent:

R-1 West Orange School District Registration Forms

R-2 Residency Investigative Report dated November 14, 2016

R-3 Letter from superintendent dated November 9, 2016

R-4 Letter from superintendent dated November 15, 2016

R-5 Petition from T.M. dated 12/1/16

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132-17JO

OAL DKT. NO. EDU 9007-15
AGENCY DKT. NO. 102-5/15

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
C.P., on behalf of minor child, E.V.,	:	
RESPONDENT.	:	

On February 3, 2016, a final agency decision was rendered in this matter, wherein the Commissioner found that E.V. was not a domiciliary of Hamilton for the 2014-2015 school year and was, therefore, not entitled to a free education in the District's schools during that time period. The Commissioner assessed respondent, Cristina Pineda, $13,113.28 in tuition costs, to be reimbursed to the Hamilton Board of Education for E.V.'s period of ineligible attendance in the District's schools pursuant to *N.J.S.A.* 18A:38-1. The Board subsequently notified the Commissioner that respondent had failed to reimburse petitioner as directed in the final decision, and requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Respondent offered no reasons why the judgment against her should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Cristina Pineda is now subject to entry of a judgment by the court in the amount of $13,113.28, which represents the total payment ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/10/17
Date of Mailing: 5/11/17

136-17

AWARD APPROVING SETTLEMENT AGREEMENT

In the Matter of the Tenure Hearing of Richard Chambers and the Camden City Public Schools	*	Department of Education Docket No. 46-3/17

Before: Joel M. Weisblatt, Arbitrator

Appearances: For the Teacher
Mellk, O'Neill
By: Arnold M. Mellk, Esquire
Edward Cridge, Esquire

For the District
Adams, Gutierrez & Lattiboudere
By: Adam S. Herman, Esquire

AWARD

At the arbitration proceeding commenced on April 12, 2017, the parties reached a resolution of the issues presented in the above-captioned matter. The Arbitrator finds that the terms of that settlement are clearly in the public interest. Therefore the Arbitrator issues this Award approving the terms of the parties' settlement.

Specifically, the Arbitrator has reviewed the record evidence, including: the charges, the answer, and documented materials in support of the charge. Additionally, there was consideration of the parties' proffer of proofs to be presented at hearing and the overall circumstances of the context of the conduct at issue.

The settlement provides for the withdrawal of the charges and the resignation of the charged party. It was achieved with the consent of both the charged and charging parties. The Stipulation of Settlement reflects a full explanation to the charged party of his rights and the implications of the resolution. The settlement represents a fair and equitable resolution of the parties' dispute and reflects a result serving the public interest as well as that of the parties.

Skillman, New Jersey
May 12, 2017

Joel M. Weisblatt, Arbitrator

On this 12th day of May, 2017, before me personally came and appeared Joel M. Weisblatt, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Attorney-at-law

ADAMS GUTIERREZ & LATTIBOUDERE, LLC.
The Legal Center
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Camden City Public Schools

In the matter of	:	
RICHARD CHAMBERS	:	AGENCY REFERENCE NO.: 46-3/17
CAMDEN CITY PUBLIC SCHOOLS	:	**STIPULATION OF SETTLEMENT**

The Camden City Public Schools (the "Board"), whose principal office is located at 201 North Front Street, Camden, New Jersey, and its successors, assigns, officers, employees, agents and representatives (collectively, "School Board"), and Richard Chambers, residing at 83D Bellhaven Court, Whiting, New Jersey 08759 ("Respondent") (collectively, the "Parties") have voluntarily resolved all disputed matters and enter into the following Stipulation of Settlement, which fully disposes of all issues in controversy between them in full and complete settlement of all outstanding issues as detailed below.

WHEREAS Respondent is a tenured teaching staff member employed by the Board as a teacher; and

WHEREAS the State District Superintendent ("Superintendent") certified tenure charges of conduct unbecoming and other just cause to the Commissioner of Education of the State of New Jersey, captioned *In the Matter of Tenure Charges Against Richard Chambers, State-Operated School District of the City of Camden* ("Tenure Charges"), under Agency Reference Number 46-3/17-12/14; and

WHEREAS, Respondent filed an answer opposing the charges; and

WHEREAS the Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation, and accordingly referred the matter to Arbitrator Joel Weisblatt ("Arbitrator") for a hearing; and

WHEREAS, Respondent has denied the allegations set forth in the tenure charges; and

WHEREAS, the Parties are aware of the uncertainty of the outcome of arbitration; and

WHEREAS, the Board with stringent budget limitations and due to the expenditure of resources due to multiple days of hearings with numerous witnesses; the concern that school personnel will be removed from their educational duties and responsibilities during that time; and the concern of having several young pupils participate in the litigation and being removed from instructional time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration; and

WHEREAS the proposed Stipulation of Settlement is in the best interest of the Parties and the public because Respondent resigns from his employment without litigation and avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, subject to approval by the Arbitrator, the Parties hereby agree as follows:

1. Concurrent with the execution of this Stipulation, Respondent shall submit an irrevocable letter of resignation to the Board, which shall provide for his resignation from the Board effective June 30, 2017, ("Effective Date"). (See Exhibit "A," to the Stipulation, a copy of Respondent's signed letter of resignation).

2. Upon final approval of the signed Stipulation by the Arbitrator, the Board shall and hereby does withdraw the instant Tenure Charges. The Board agrees to not pursue the subject Tenure Charges against Respondent as long as this Stipulation remains in effect and is not voided by any court or administrative agency of competent jurisdiction. In the event the Stipulation is voided, the Board retains the right to file and consider for certification, tenure charges against Respondent, including those tenure charges which have been previously filed against him by the Board, and Respondent reserves the right to defend same.

3. Upon final approval of the signed Stipulation by the Arbitrator, Respondent will be returned to the payroll retroactively to March 6, 2017 and will remain on the payroll through June 30, 2017. All salary paid for said period shall be subject to all applicable and mandatory salary withholdings and deductions, including, but not limited to health insurance premium contributions. Respondent will be recorded as an employee on administrative leave with pay between March 6, 2017 and June 30, 2017.

4. The Board shall provide Respondent with health insurance coverage until August 31, 2017. Pursuant to Chapter 78, Respondent shall be responsible for his employee contribution for all health insurance provided pursuant to this Stipulation of Settlement. Respondent's required Chapter 78 contributions shall be deducted from the payments he will receive pursuant to Paragraph 3 of this Stipulation of Settlement.

5. This Stipulation is based upon the understanding that Respondent's separation from employment with the Board, effective June 30, 2017, will be deemed a voluntary resignation-in good standing. Upon inquiry from any third party to authorized employees or representatives of the Board, those employees or representatives will provide no information other than to confirm

Respondent's employment, position, salary and dates of employment, and state that the reason for his separation from employment was his voluntary resignation.

6. The Board expressly reserves the right to oppose any application by Respondent for unemployment benefits. Notwithstanding any other term or condition of this Agreement, Respondent does not waive or release his right to seek unemployment compensation, his entitlement to which shall be determined by the State of New Jersey, Department of Labor and Workforce Development.

7. In accordance with N.J.A.C. 6A:3-5.6 (a) 6, Respondent has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners. Additionally, pursuant to N.J.A.C. 6A:9B-4.4(a)1, Respondent has been advised of the Board's duty to notify the State Board of Examiners he has resigned. The Board is legally required to participate in proceedings initiated against Respondent's license by the State Board of Examiners resulting from the Commissioner's referral. Aside from such requirements, pursuant to the above-referenced regulation, the Board agrees to not independently seek the suspension or revocation of Respondent's teaching certification or license or seek to prevent him from applying for or receiving pension benefits on any grounds related to the Tenure Charges or his resignation pursuant to this Stipulation of Settlement.

8. As of the Effective Date, except as specifically provided in paragraph 5, all of Respondent's rights of employment with the Board, including but not limited to accrued salary, benefits, tenure and seniority, will permanently end.

9. Respondent will not apply for reemployment with the Board at any time. If Respondent does apply for reemployment with the Board and is approved for employment, the terms of this Agreement shall control and shall be grounds for termination of Respondent's employment.

10. In exchange for the consideration set forth in paragraphs 2, 3, 4 and 5 above, the sufficiency of which is hereby acknowledged, Respondent, through the date of his resignation, hereby waives, releases and discharges any and all claims or rights that he has or may have against the Board, the Superintendent, its Board of Education and its Advisory Board members, and any and all other Board officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Respondent's employment with the Board or separation from employment with the Board. It specifically includes, without limitation, all claims which Respondent may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey

Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on his employment by and/or termination of her employment with the Board, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, wages, attorneys' fees, costs, and/or future wage loss. Respondent agrees to withdraw any and all other pending complaints or actions that have been filed against the Board or any of its employees or representatives.

11. To comply with the Older Workers Benefit Protection Act, if applicable, this Stipulation of Settlement advises Respondent of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Stipulation of Settlement. Accordingly, by executing this Stipulation, Respondent acknowledges that he: (i) fully understands the terms and conditions of this Stipulation of Settlement; (ii) has consulted with an attorney to review the Stipulation of Settlement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Stipulation of Settlement; and (v) has seven (7) days from the date of the execution of this Stipulation of Settlement to revoke it. Respondent understands that he may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven (7) day period.

12. Respondent warrants that he has not commenced any legal proceedings of any type (including but not limited to charges filed with any governmental agency) against the Board or School Board. Further, Respondent agrees that he will not commence any legal proceedings against the Board or School Board arising from or relating to anything that has happened up to his date of resignation. Should any such legal proceedings be commenced on Respondent's behalf, Respondent agrees that he will not seek or accept any relief or recovery therefrom. In the event of a violation of this paragraph, Respondent agrees that the Board and School Board shall be entitled to immediate dismissal of the legal proceedings, and that he shall be responsible for the Board and School Board's attorneys' fees and costs incurred in connection with those legal proceedings. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the Board or School Board based upon any of the above-released claims in Paragraph 3, Respondent agrees not to seek or accept any resulting relief whatsoever, in accordance with this paragraph.

13. This Stipulation and all of its terms, are and will remain confidential to the maximum extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et al. Respondent is expressly forbidden from discussing this Stipulation with any person, other than his accountant, tax advisor and attorney ("permitted disclosures") and any other individual or entity as necessary to implement the Stipulation or to which he is legally obligated to respond ("legally-required disclosures"). In making any permitted disclosure, Respondent agrees that he will inform the person to whom it is making the permitted disclosure that the existence and substance of this Stipulation, the settlement giving rise to this Stipulation and the sum of money paid pursuant to this Stipulation are to be held strictly confidential to the fullest extent permitted by law. Respondent specifically agrees not to discuss the nature, terms, conditions of this

Stipulation with others, any representative of the media, or any past, present, or prospective employee of the Board, or its agents or attorneys. Respondent understands that this provision is not a simple recital but is an important, integral part of this Stipulation. The Board agrees that it will keep this Stipulation confidential to the extent permitted by law, including the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"). In the event that the Board receives an OPRA request, for which this Stipulation would be responsive to, the Respondent understands that the Board is legally obligated to disclose same under OPRA and that such disclosure would not be a breach of this Stipulation.

14. This agreement shall not constitute a precedent in any matters involving other Board employees.

15. The Parties each acknowledge that counsel has advised them regarding this Stipulation and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party, with full understanding of its terms and conditions and consents to the terms contained herein.

16. Each signatory to this Stipulation understands, acknowledges and agrees that this Stipulation constitutes the full agreement of the parties and may not be altered, amended, modified, or otherwise changed in any respect whatsoever except by a duly executed writing signed on behalf of both Parties.

17. This Stipulation shall be construed and enforced in accordance with New Jersey law. The Commissioner of Education and/or federal and state courts of the State of New Jersey, as applicable in accordance with such law, shall have exclusive jurisdiction over any dispute arising from, in connection with, or related to this Stipulation.

18. This Stipulation may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

19. This Stipulation or any uncertainty or ambiguity therein shall not be construed against any party, but shall be construed as if both Parties to this Stipulation jointly prepared this Agreement.

20. Each party acknowledges that this is the entire agreement of the Parties concerning the subject matter of the foregoing paragraphs, and that there are no written or oral representations, understandings or agreements directly or indirectly connected with this Stipulation.

21. If any provision of this Stipulation is held by a court of competent jurisdiction or determined under applicable law to be invalid, void, or unenforceable, the remaining provisions will continue and remain in full force and effect.

23. Additionally, this Stipulation is subject to final approval by the Arbitrator pursuant to N.J.A.C. 6A:3-5.6(c), and will become effective only upon approval by the Arbitrator. Counsel for the Parties shall jointly request the Arbitrator's approval of this Agreement and each shall take any and all necessary steps to effectuate dismissal of the Tenure Charges.

Dated: April 28, 2017

Richard Chambers

RICHARD CHAMBERS

CAMDEN CITY PUBLIC SCHOOLS

Dated: 5/10/17

By: PAYMON ROUHANIFARD
STATE DISTRICT SUPERINTENDENT

CERTIFICATION

I, Richard Chambers, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: April 28, 2017

RICHARD CHAMBERS

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b):

Dated: 5/11/17

Adam S. Herman, Esq.
ADAMS GUTIERREZ & LATTIBOUDERE
Attorneys for the City of Camden Public Schools

APPROVED:
Dated: 5/12/17

Joel Weisblatt, Arbitrator

EXHIBIT A

RICHARD CHAMBERS
83D Bellhaven Court
Whiting, New Jersey 08759

May 3, 2017

Paymon Rouhanifard
State District Superintendent
Camden City Public Schools
201 N. Front Street
Camden, NJ 08102

Dear Superintendent Rouhanifard:

Please accept this letter as my irrevocable resignation, effective at the close of business on June 30, 2017, from employment with the Camden City School District, for personal reasons, as resolved by the District's attorney, union attorney, and the Arbitrator appointed by the Commissioner of Education.

Very truly yours,

Richard Chambers

Cc: Arnold M. Mellk, Esq.
Adam Herman, Esq.
Emily Nielson, Chief Talent Officer

137-17

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing:

FREEHLD BORO REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION
PETITIONER
AND
BRETT D. HOLEMAN
RESPONDENT

Arbitrator's
Opinion
and
Award

Agency Docket No. 249 – 9/16

Before: Stephen J. Rosen, Arbitrator

APPEARANCES:

For the Petitioner:
Comegno Law Group, P.C.
By: Jeffrey R. Caccese, Esq.
By: Mark G. Toscano, Esq.

For the Respondent:
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
By: James R. Zazzali,Jr., Esq.
By: Aileen O'Driscoll, Esq.
By: Kaitlyn Dunphy, Esq.

This matter arises out of tenure charges filed with the Commissioner of Education by the Freehold Regional High School District against the Respondent, Brett D. Holeman, dated September 15, 2016. After determination that the charges warranted further action, the Bureau of Controversies and Disputes forwarded the applicable documents to me on or about October 11, 2016. Shortly thereafter, the parties were officially notified of my selection.

The first hearing via a conference call occurred on October 22, 2016. A second conference call with attorneys Aileen O'Driscoll, Jeffrey Caccese and James Zazzali took place

12, 2016. In addition to the attorneys of record, the meeting also included Superintendent Charles Sampson , Director of Human Resources, Dr. Jennifer Sharp and Dr. Brett Holeman. The meeting failed to bring about a settlement.

In response to the tenure charges, Attorney O'Driscoll contended that the Petitioner was unable to show just cause. Ms. O'Driscoll argued that the Petitioner had failed to comply with N.J.S.A. 18A: 6-17. Namely, the Petitioner's submission of evidence and a complete list of witnesses with a complete summary of their testimony was deficient. In addition, the parties had disagreed over the Petitioner's intent to issue subpoenas. The Respondent argued that the Board had not adhered to the timelines prescribed under the Statute and asked that the charges be dismissed. Based upon the positions of the parties, I concluded the matter should proceed. Attached is my decision concerning the dismissal of the Tenure Charges and the Petitioner's attempt through subpoena to obtain information from Respondent's previous employer.

Hearings were held on January 12, 2017, January 19, 2017, January 24, 2017, January 30, 2017, February 6, 2017, February 17, 2017, February 22, 2017, February 27, 2017, March 1, 2017, March 2, 2017, March 11, 2017 and March 16, 2017. A transcript was prepared for each hearing. Both parties elected to submit post-hearing briefs after receipt of the transcripts.

BACKGROUND

The Respondent, Brett D. Holeman, began his employment as a school psychologist with the Freehold Regional High School District in 2004. He holds a Doctorate in Psychology (Psy D) from New York University. In his capacity as a school psychologist, Dr. Holeman provided counseling, cognitive testing and individual educational plans as a case manager. A

school psychologist also serves as a member of child study teams and interacts with administrators, parents and colleagues.

In the Spring 2016, the administration was made aware of allegations concerning Dr. Holeman's behavior. The issues brought to the attention of Respondent's superiors were cited in an April 25, 2016 memorandum sent to Dr. Holeman by Director of Personnel Sharp. The memorandum was in reference to an April 26, 2016 investigatory conference which listed six (6) allegations made against Dr. Holeman. Dr. Sharp listed the following:

- Engaged in inappropriate behavior (inappropriate comments, language and expressions), including the use of profanity, reference to sexual activity in front of students; as well as the use of extreme volume with students and parents within a confidential counseling environment;
- Made repeated derogatory and demeaning remarks about and to colleagues and supervisors;
- Engaged in erratic and concerning behaviors that intruded into and unnecessarily disrupted the workplace of colleagues;
- Jeopardized the State mandated testing environment to which he was assigned;
- Demonstrated an overall lack of respect for authority; and
- Disregarded the District's organizational plan and failed to observe or use proper chain of command when raising issues or concerns.

A summary of the April 26, 2016 conference was drafted by Dr. Sharp (Board Exhibit 8) and submitted to Superintendent Sampson. In her summary, the Director of Personnel questioned Dr. Holeman regarding the District's concerns. Also in attendance were the Freehold Education Association President (FREA), the FREA Vice President and Mrs. Linda Jewell, Principal, Freehold Boro High School.

The April 26th meeting dealt with the allegations made against the Respondent. Dr. Holeman responded to several of the allegations and emphasized that he had received very

positive evaluations during his thirteen (13) years with the District. He refuted the validity of the allegations and commented he was "very passionate about his work."

Dr. Sharp informed Dr. Holeman that "given his erratic and concerning behaviors" he was advised to get a full psychiatric and medical evaluation that included appropriate blood tests to ascertain the presence of any mood altering drugs or metabolic steroids. The directive concerning medical and psychiatric examination reflected suspicion that Dr. Holeman may have used metabolic steroids, an inference denied by the Respondent. Director Sharp thought it best that Dr. Holeman initiate testing immediately. Although it was noted that a final decision regarding his status had not been made, the Respondent was placed on administrative leave. A similar directive was contained in a letter from Superintendent Sampson dated April 26, 2016. Dr. Holeman was informed his employment status would be discussed at the May 16, 2016 meeting of the Freehold Regional High School District Board of Education.

On August 12, 2016, Sworn Tenure Charges and a Written Statement of Evidence for conduct unbecoming an employee....were filed by the Board Secretary pursuant to N.J.S.A 18A: 6-11 et seq. One month later, on September 12, 2016, the Board reviewed and considered the evidence in support of the Sworn Tenure Charges against Dr. Holeman and determined there was sufficient evidence, "if true in fact, to warrant dismissal or reduction in salary."

In both email and regular mail dated September 12, 2016, Counsel for Dr. Holeman urged the Board to abstain, if considering the Notice of Tenure Charges, from voting on the charges. As an alternative, a request to approve a transfer to a different position within the District was made in behalf of Dr. Holeman.

The Board referred to a number of incidents which it alleged warranted suspension and further investigation into his conduct. In particular, the District characterized Dr. Holeman's

behavior prior to his suspension as troubling. It was alleged that Dr. Holeman had raised his voice during a counseling session prompting a supervisor to interrupt the session "to ensure the student's safety." Dr. Holeman, it was alleged, repeated this behavior with another student and parent. The Petitioner also referred to a due-process petition initiated by a parent against the Board in reaction to Dr. Holeman's management of a case and his interaction with the parent.

Dr. Holeman is also alleged to have spoken inappropriately to a student distraught over his break up with a girlfriend. The Board contended Dr. Holeman told the student the girlfriend was a "slut" and that he would soon leave for college and could "fuck 40 girls." The student had also allegedly conveyed to a staff member that Dr. Holeman had recommended a book titled, "F*ck Feelings," which is described as a "profanity-filled self-help book" that argues one should "value your actions over your emotions." It should be noted that Dr. Holeman denied these allegations.

Another accusation concerned Dr. Holeman's actions and demeanor during the administering of the state mandated PARCC test. The Petitioner described the Respondent's manner during the test session as disruptive. He allegedly was "cursing, talking loudly" to the extent he made his colleagues "uncomfortable." He supposedly expressed dissatisfaction with the "administration" and showed considerable annoyance when the test was delayed because computers for the students were not in the test room. The Petitioner contended that Dr. Holeman's behavior had a potential negative impact while the students were taking the PARCC test.

Apart from behavioral matters, the Board had also expressed dissatisfaction with Dr. Holeman's alleged failure to complete IEP's (Individual Education Plan) in a timely manner. It was charged that a number of reports were delinquent at the time Dr. Holeman was placed on suspension.

The Petitioner's investigation included a review of Dr. Holeman's email account. An examination of the Respondent's email account, the Board charged, revealed that Dr. Holeman had spent "a substantial amount of time nurturing his private counseling practice." It was also alleged that Dr. Holeman accepted pay for time counseling current and former students. It was noted Board policy prohibits accepting payment from a current student for services due to a teacher's employment in the District

In regard to Dr. Holeman's private practice, the Petitioner contended that Freehold Boro High School had been used as his official and registered business address. It was alleged that Dr. Holeman created a separate email address for his emails to private clients that were sent through the District system.

An additional charge proffered by the Petitioner concerned the allegation Dr. Holeman "solicited" students for private counseling from internal and administration confidential lists that identified students withdrawing from school. It was alleged that Dr. Holeman directly solicited these students for private counseling. Although some of these actions took place in 2013, if the Administration had known of this at the time, they would have initiated tenure charges. The Petitioner indicated it did not have knowledge if this solicitation has continued.

The Board identified emails that it charged violated confidential student information. One email cited was sent to Dr. Holeman's wife. The Petitioner alluded to the nature of this email as a violation of Board policy as well as disrespectful of the student and his family.

Additional allegation raised by the Board was the nature of emails sent to students which were interpreted as "overly familiar, even intimate." While there was no evidence of improper behavior, the Petitioner believed Dr. Holeman had failed to maintain an appropriate boundary with past and present students.

Petitioner also made reference to an incident concerning a student who was suspected of drug dealing. It was alleged that Dr. Holeman advised the student when confronted not to answer any questions concerning the matter. The Administration believed the advice not to cooperate was interference of the investigation. This 2013 incident was considered an example of previous "insubordinate and inappropriate conduct toward District Administration...."

The Board's submission to the Department of Education included a charge that Dr. Holeman had failed to disclose his previous employment with the West Morris Regional High School District as an interim School Psychologist and his abrupt termination from this position effective April 10, 2004. Freehold Regional High School's Professional Employment Application required a list of prior teaching and administrative experience. Dr. Holeman's failure to list his employment in the West Morris Regional High School District negated the opportunity to investigate the circumstances that resulted in his termination.

The Administration had taken into consideration the concerns expressed by Dr. Holeman's colleagues. Staff members stated that Dr. Holeman was "unprofessional and uncomfortable to be around." Dr. Sharp's Summary of the Investigatory Conference included comments submitted by colleagues that he "seemed erratic lately, speaking loudly in the office.... I feel like I have been walking on eggshells around him.... I feel very uneasy around him."

Among the charges were that Dr. Holeman had made derogatory and demeaning remarks about both colleagues and supervisors. According to the Administration, he ignored and disregarded the chain of command and the District's organizational plan. He was described as an individual who did not respect authority.

The District's submission to the Department of Education stated that Dr. Holeman was not truthful when asked about yelling incidents while counseling a student. The District's

submission contended that when the student was asked by the Guidance Supervisor if he was OK he did not respond, as claimed by Dr. Holeman, "Of course, I am OK. Why would you think I am not OK?" Furthermore, the Petitioner did not accept Dr. Holeman's assertion that the student commented that he "loved Dr. Holeman."

The Respondent denied that he demonstrated the behavior described by the Petitioner. Dr. Holeman, through his legal counsel, essentially contended the charges were not accurate and, in some instances, a misinterpretation of his counseling tactics. In certain situations, Dr. Holeman explained, it is necessary and appropriate to raise your voice.

Dr. Holeman contended his conference with Dr. Sharp on April 26, 2016, did not provide a "true opportunity to respond" to the allegations. He also denied he fabricated his responses to any questions put forth by Dr. Sharp.

In response to the reference to steroid use, the Respondent disputed the allegation that he told a colleague "that his wife asked him if he was using steroids again." Dr. Holeman's lab tests did not reveal any trace of steroids.

Dr. Holeman denied that he had admitted recommending the book the administration considered inappropriate. He also did not agree with the Petitioner's rendition of the distraught and suicidal student's counseling experience with Dr. Holeman.

The PARCC testing outcome was never in jeopardy as suggested by the Petitioner. The reference to a colleague being uncomfortable around him was something Dr. Holeman was unable to address.

Dr. Holeman disputed that he used school time or facilities in his private practice. He also denied privately counseling current District students for a fee and acknowledged he was familiar with Board Policy. Dr. Holeman indicated that he understood he was not able to offer private

counseling for pay until after a student had graduated. Furthermore, he denied directly soliciting students for professional services.

Dr. Holeman admitted temporarily registering 2 Robertsville Road, Freehold, NJ (District address) with the State Board of Examiners for his private business. However, this was only for a brief period of time while relocating his private practice. He always provided a private work phone number with the Board of Examiners as his official business contact number and never provided the school address for purposes of private counseling.

In one instance, the Petitioner charged, Dr. Holeman utilized the Board issued email account to contact a non-school related recipient. Board policy stipulates that its email system is restricted to messages that are school related. Dr. Holeman did not agree with the charge.

Dr. Holeman acknowledged being employed as an interim School Psychologist at the West Morris Regional High School District. In Dr. Holeman's submission to the Department of Education, Controversies & Disputes, he denied being terminated abruptly from this interim position. The Respondent also denied that he intentionally withheld employment information on his application to the Freehold Regional High School District. A newspaper article (Observer-Tribune) that stated he was asked to leave the West Morris Regional High School District was described as opinion or conjecture by the Respondent.

In many of the charges put forth by the Petitioner, the Respondent's legal counsel responded they were legal questions their client was unable to answer. A number of the charges, it was argued, were described as redundant.

POSITION OF THE PETITIONER

After the administration became aware of Dr. Holeman's inappropriate, insubordinate, erratic and volatile behavior in the Spring of 2016, it was determined that a thorough investigation of both his behavior and performance was warranted. The investigation in the Spring of 2016 revealed "a trail of lies, willful deceit, manipulation and frightening conduct...."

In spite of the statements submitted and testimony of co-workers and administrators, Dr. Holeman "steadfastly refused to acknowledge that his conduct either occurred or was inappropriate." Dr. Holeman, the District argued, has shown an inability to work collaboratively with colleagues.

In formulating the Tenure Charges, the Board considered a number of incidents and occurrences that supported removal from the District. Dr. Holeman was deemed to have violated several Board policies including the "Code of Ethics of the Education Profession along with elements of the New Jersey Administrative Code." Given these violations, the District can no longer trust him or his judgment.

Among the allegations was the charge Dr. Holeman after school hours, in late February/early March, sent text messages to Supervisor Rosalia Minervini. Ms. Minervini reported her concerns about the texts to Principal Linda Jewell. Ms. Minervini found Dr. Holeman's texts inappropriate. "For example, he would refer to colleagues as 'mentally ill' and 'not stable to work with children.' He called them evil and sick. He once labeled staff members 'fucking bitches.' "

In an IEP team meeting with a parent around March 23, 2016, Dr. Holeman became 'noticeably volatile.' Marla Reich, the District's Speech Language Pathologist testified that Dr.

Holeman inappropriately raised his voice during the meeting. Dr. Sharp testified Dr. Holeman advised the parents on "working around" the administration. Superintendent Sampson testified Dr. Holeman's conduct in the March 23rd meeting escalated an already uneasy situation with the parents and ultimately led to litigation.

District Guidance Counselor Holly Fabian testified that a student informed her Dr. Holeman told him that he would go to college and fuck many girls. Dr. Holeman also told the student his ex-girlfriend was a slut banging other guys. Ms. Fabian testified that Dr. Holeman's comments were "extremely inappropriate" and she would no longer refer students to Dr. Holeman.

The Petitioner's concerns included Dr. Holeman's volatile behavior directed toward students. "On April 18, 2016, Student QH reported to Principal Jewell that Dr. Holeman yelled at her." Dr. Holeman did admit he "raised" or elevated his voice when he spoke to QH on the telephone. While Dr. Holeman explained he had served as the student's counselor for a long period of time and believed it was necessary to be firm. Although Dr. Holeman suggested QH call him back, she never called back and complained about Dr. Holeman's behavior to Principal Jewell.

District Supervisor Suzanne Gallo testified that on the same day as the QH incident she found it necessary to instruct Dr. Holeman to lower his voice because students and parents outside his office were able to hear him. After leaving his office, Dr. Holeman resumed speaking in a loud voice that prompted Ms. Gallo to report the matter to Ms. Jewell.

Principal Jewell testified that she spoke to the student who had been in Dr. Holeman's office at the time Ms. Gallo had asked that the Respondent to lower his voice. The student told

Ms. Jewell that "he deserved to be yelled at," a comment that Principal Jewell found disturbing. In her opinion, Ms. Jewell felt "she was sitting across from a battered woman."

When Principal Jewell addressed the matter with Dr. Holeman, he admitted he spoke in a raised voice but not loud enough for others to discern what he said. Dr. Holeman testified that it was sometimes necessary to speak in a loud voice to inspire students and to convey his passion. However, Dr. Holeman's own witness and mentor Samuel Grove, a retired Freehold Boro psychologist, testified that raising one's voice was not something he would recommend.

The District had regarded Dr. Holeman's behavior during the PARCC test and his interaction with colleagues as inappropriate and disruptive. Talking in an elevated and loud voice while complaining about the administration was not conducive to a test environment.

The Board also gave weight to the tone and substance of emails sent by Dr. Holeman. In particular, the Respondent's criticism of the administration and colleagues was unprofessional. Dr. Holeman had accused Ms. Minervini of "caving" in to a parent and used profanity in his email to her. Dr. Holeman had expressed to Ms. Jewell that he was disappointed in her. The Petitioner characterized the emails as "insubordinate, inappropriate, and disparaging of other professionals."

When Supervisor Minervini had addressed in a meeting Dr. Holeman's loud voice with a student, she described Dr. Holeman's reaction as uncooperative. He told Ms. Minervini that the administration did not have "a clue as to what effective counseling is." Ms. Minervini testified that Dr. Holeman was very "disrespectful, inappropriate and volatile toward her and, as such, she had to end the meeting."

The District had stressed the importance of completing IEP reports on a timely basis. Dr. Holeman shifted responsibility and blame for the backlog in submission of the IEP's to others

and took no responsibility for not having his IEP's completed. When questioned about the submission of IEP's, Dr. Holeman told Ms. Minervini he was up to date. Despite the fact he was informed in a 2013 performance review that he was not in compliance with IEP timeliness, he expressed surprise the issue (Exhibit 12) was raised by the Petitioner.

In a meeting with Ms. Jewell and Freehold Regional Education Association President Deborah Gates-Kane, on or about April 22, 2016, Dr. Holeman was informed there were concerns about his behavior. Told that he would be placed on administrative leave, he became very upset. Ms. Gates-Kane testified in a telephone conference call that at one point Dr. Holeman stood up and was alarmed there was going to be a physical confrontation with Ms. Jewell. Ms. Gates-Kane confirmed that Dr. Holeman also "threatened" Principal Jewell stating, "You better sleep with one eye open."

Dr. Sampson testified that he would have sought tenure charges in 2013, if he had known at the time Dr. Holeman had accepted a counseling fee of $130 from the parents of a student enrolled in the District. Although the student was on home instruction, Dr. Holeman failed to ask a supervisor or administrator if accepting a fee was permissible. The student's parents had informed Dr. Holeman that they were waiting to meet with Superintendent Sampson. The Respondent did not admit that he was in violation of a policy that prohibited accepting a fee for counseling a student on home instruction.

The charges also listed the use of the District's resources to advance his private counseling business. Dr. Holeman admitted he used the District email for his private business. He acknowledged that he signed the District email using his company's name, "Psyched Up," rather than creating a separate business email address.

In correspondence to the New Jersey State Board of Examiners, Dr. Holeman used the address of Freehold Borough High School. Dr. Holeman explained that he did not want to use his home address for privacy reasons, yet was willing to provide an address where students are located.

Staff member Lindsay Pantaleo testified she was "uncomfortable" when she learned Dr. Holeman had placed her name and school email address on a pregnancy website without her consent.

In the course of the investigation, the District discovered inappropriate emails sent to parents of students and current and former students. Dr. Holeman revealed confidential information in an email to his wife. Dr. Holeman had referred to a former student as "my little girl." In another email exchange with a former student, he discussed a then current student. Superintendent Sampson alluded to student privacy as a "sacred trust" that had been violated by Dr. Holeman.

The District made reference to Dr. Holeman's interference with a prior investigation involving a student discipline matter. In the course of the investigation for alleged drug involvement, Dr. Holeman advised the student not to answer any questions. The accusation was confirmed by credible witnesses who observed the incident.

Superintendent Sampson stated that Dr. Holeman does not respect authority. In addition, he does not take responsibility for his behavior, blames others and "exhibits narcissism in the extreme." The Superintendent testified that he did consider Dr. Holeman's employment history, but concluded the Respondent's "other behaviors were too extreme," to be overlooked. The District cannot trust Dr. Holeman as a professional, cannot expect he will keep student confidentiality, or maintain "appropriate ways with staff members, with school community

members and follow rules and procedures." Superintendent Sampson concluded that there is no way that Dr. Holeman will be fit to return to either the Freehold Regional High School or any position in the District.

POSITION OF THE RESPONDENT

The Respondent argued that the charges were flawed on several levels. These included a failure to interview individuals who were identified and quoted by the Petitioner. Director of Personnel, Dr. Jennifer Sharp, failed to provide Dr. Holeman with the opportunity to adequately respond to the allegations and speak directly with colleagues and administrators who were regarded as central to the decision reached by the Board. Furthermore, Dr. Holeman's many years of exemplary service and excellent evaluations were ignored.

Doubt concerning Dr. Sharp's expertise to conduct the investigation was called into question by the Respondent's legal representative. "Other than learning 'general interviewing,' and 'affirmative action investigation'... her training was limited to classes taken in 2004 for her Principal's certificate." Neither Dr. Sharp or Principal Linda Jewell interviewed staff members or students connected to the allegations. Instead, they relied upon written statements requested by Ms. Jewell. Dr. Sharp never "truly attempted to find additional witnesses" or corroborate statements.

Dr. Sharp testified that the first time she was alerted to a concern regarding Dr. Holeman was on or after April 18, 2016. Those concerns were brought to her attention by Principal Jewell who had questions about Dr. Holeman's conduct in the guidance suite. Ms. Jewell specifically stated that colleagues informed her Dr. Holeman was erratic and loud with students. Shortly thereafter, Dr. Sharp put Dr. Holeman on suspension.

At this point Dr. Sharp reported her concerns to Superintendent Charles Sampson who authorized her to look into Dr. Holeman's emails. Ms. Jewell was instructed to collect statements from staff prior to a meeting on April 21, 2016 between the Principal, Union Vice-President Debbie Gates Kane and Dr. Holeman. A second meeting was convened on April 26th that included Dr. Sharp and Union President James Huebner. It was from the April 26th meeting that Dr. Sharp wrote her Investigation Summary (Exhibit 8).

In answer to the charge Dr. Holeman had failed to complete IEP's in a timely fashion, the Respondent noted the heavy caseload he was assigned. He also argued that the IEP's identified could not be completed since he had been placed on Administrative Leave. In addition, the completion of IEP's were dependent on the input and collaboration of other staff members in addition to Dr. Holeman. The Respondent explained that as the School Psychologist there were occasions when he had to deal with emergencies and crises.

One such crisis was the death of a Freehold Boro High School student. In response to the tragedy, Dr. Holeman visited classrooms and spoke to staff members. The time spent in grief counseling diverted him from preparation of reports. His efforts in providing support to the school community were recognized by Principal Jewell as well as others.

Supervisor Rosalin Minervini commended Dr. Holeman for the emotional support he provided. Ms. Minervini wrote that Dr. Holeman's classroom visits were well received. "She wrote that she was personally settled and calmed by Dr. Holeman's approach."

Dr. Holeman contended when employed at the District, Secretary Fran Ellner was the only person authorized to submit IEP's. Ms. Ellner was responsible for the "final step" for over 400 students in two high schools. Apart from Ms. Ellner's clerical burdens, delays could occur due to rescheduling meetings with parents or conflicts with staff members.

Ms. Minervini never discussed non-compliance of IEP reports with Dr. Holeman nor did she issue him any warning that he was delinquent in the completion of reports. Ms. Minervini testified that it was her practice, if a problem persists, to issue a written memo and, if necessary, prepare a corrective action plan.

Dr. Holeman did bring the extended lunchtime taken by guidance counselors to the attention of Principal Jewell. The extended lunchtime counselors had taken was addressed by the administration.

The inappropriate behavior charge was without merit. The characterization of 'overly familiar, even intimate' emails was misinterpreted. A number of the emails were from former students who had reached out to Dr. Holeman. These former students used their private email addresses and sent messages to Dr. Holeman's Freehold Boro High School address, the only address they possessed. Any purported policy violations were under a policy that was enacted after those identified by the Petitioner. Principal Jewel conceded that the content of certain emails, in her opinion, did not violate District policy.

The allegation concerning a lunch invitation to a student at the on-campus, Five Star student culinary restaurant was with his two daughters. Dr. Holeman wanted to recognize the "very quiet" student who had won a "Senior of the Month" award. When accompanied by a faculty member, students are permitted to have lunch at the Five Star restaurant.

One email identified by the Petitioner was sent after Dr. Holeman was suspended. Dr. Holeman had counseled the student for a few years and he thought she should understand why he could no longer work with her. The Petitioner contended that Dr. Holeman was instructed not to have contact with students. Dr. Holeman believed the student would have regarded his

disengagement as another rejection in her difficult life and wanted her to be aware of the reason he no longer could offer counseling.

Dr. Sharp testified that Dr. Holeman had identified his FRHS email account as "Psyched Up LLC Company" in an effort to acquire a "Labrada" shirt. "This was the sole email or evidence produced by the District to reflect Dr. Holeman spending a 'substantial' amount of time during his school day regarding his private practice." Dr. Sharp was unable to ascertain if this email was written on school time or during the Respondent's lunch period. Dr. Holeman testified that the shirt he requested from a nutrition/health company was a possible motivational influence for athletic teams he worked with at Freehold.

The emails in Exhibit 25 purported to have been sent during the workday in 2014 and 2015 were mostly transmitted during the summer or during non-work hours. Dr. Sharp acknowledged the emails were not likely violations of Board Policy. In fact, several emails were parent initiated and dealt with student related issues.

Both Superintendent Sampson and Principal Jewell acknowledged staff often worked during the time they were not scheduled to be on duty. Dr. Holeman testified he often worked during his lunch period and break time in addition to evenings and weekends. It was not uncommon for Dr. Holeman to work beyond his contractual hours.

Dr. Holeman explained that the one private patient (although without pay) he counseled on school grounds was Ms. Jewell's niece. Dr. Holeman was asked to counsel Principal Jewell's niece at her request and the session was held at the school due to a transportation problem. The niece was not a student at Freehold Boro Regional High School. However, Dr. Holeman saw the niece pro bono at the school after his scheduled workday until she was able to meet him in his Springfield office. As a private patient in Springfield, the Respondent received payment for his

services. Ms. Jewell's request to him was a reflection of her confidence in Dr. Holeman's professional competence. Furthermore, Superintendent Sampson stated there was no Board policy that prohibited counseling students who did not attend Freehold Boro Regional High School.

The charge Dr. Holeman accepted a counseling fee in regard to a student on suspension and home instruction, identified as A.V., was not improper. The student was suspended for allegedly putting visine into a staff member's drink. Mr. Sampson stated he did not know if A.V. returned to the District. Ms. Jewell claimed not to have any recollection of the student. Dr. Holeman stated that previous school administration had informed him that he was not prohibited from seeing a student who was on home instruction or designated as an out-of-district placement. Only, if a current student was on campus was he prohibited from counseling a student in his private practice.

Dr. Holeman testified that A.V. was awaiting a pending expulsion hearing, a situation known to both Dr. Sharp and Superintendent Sampson. It was understood that A.V. would not return to the school. Furthermore, A.V.'s parents were in accord with Dr. Holeman's private counseling role.

The hearing record confirmed that Dr. Holeman did not violate the prohibition against accepting compensation for services provided in behalf of students enrolled at Freehold Regional. Exhibit 22 shows that Dr. Holeman informed a parent that he could not accept a fee until after the student graduates. As an alternative, he offered the parents a referral to another therapist. The offer to provide the name of other therapists was made to parents who requested private counseling when there was a question of violating Board Policy.

Three witnesses with knowledge of Dr. Holeman as a therapist testified that he never suggested private counseling. One witness was not even aware Dr. Holeman had a private practice until after her son graduated.

The charge that Dr. Holeman had used his position as a School Psychologist to promote or profit in his private practice was unsubstantiated. The suggestion Dr. Holeman had access to confidential lists that he used for personal gain was neither documented nor supported by any evidence. In addition, the Petitioner did not establish such a list even existed.

The Respondent addressed the allegation that he had omitted a previous position on his application to the District in 2004. Dr. Sharp testified that the Respondent's application that a prior employment section had been whited out. The application was 14 years old and described by Respondent's legal counsel as stale. Dr. Holeman denied he had been terminated from a previous, short-term position. The Board witnesses had acknowledged that applications submitted by current employees were never examined.

The reference to the Due Process Complaint filed by a parent was prompted by the legitimate decision to declassify her child. The decision to declassify the student was based upon valid reasons and supported by Dr. Holeman's colleagues. Contrary to Dr. Sharp's incorrect assertion, a formal Due Process complaint had not been filed against the District by the parent.

An additional erroneous charge was the accusation Dr. Holeman was yelling at the meeting with the parent. Ms Minervini admitted declassification meetings are often difficult. Furthermore, the Due Process complaint letter to the State was "type written, unsigned, undated and no author or parent was ever produced to authenticate or verify" the conclusions reached by Dr. Sharp.

The Respondent disputed the insubordination charge. It was not uncommon for staff members to express their frustrations and criticisms of administrators to each other. However, at no time did Dr. Holeman refuse to perform his duties. Ms. Jewell did not file a complaint or report alleging that Dr. Holeman was insubordinate. He testified that he had a good relationship with Ms. Jewell who "welcomed open discussion." On occasions Ms. Jewell and others would come into Dr. Holeman's office to discuss personal issues. Yet this positive relationship changed just prior to Dr. Holeman's suspension.

Dr. Holeman denied that he had made a "threatening gesture" toward Ms. Jewell in a meeting attended by former Union President Gates-Kane. The Respondent denied he threatened Ms. Jewell and testified that as a psychologist and father of two daughters he would never threaten a woman.

Legal counsel for the Respondent identified and submitted numerous positive evaluations that he received throughout his "unblemished 13 year career in the District." His evaluations refer to professionalism, cooperation, dedication and enthusiasm. Despite the absence of any negative evaluations, Dr. Holeman was not afforded the benefit of progressive discipline.

In its Legal argument, the Respondent's representative alluded to the Tenure Act, N.J.S.A., 18A: 28-1 through 18. A tenured teacher may be dismissed or reduced in compensation only for "inefficiency, incapacity, unbecoming conduct, or other just cause." The District failed to meet its burden of proof by a preponderance of credible evidence that these stipulations applied to Dr. Holeman.

The Respondent further argued that the credibility of the witnesses was questionable. Dr. Sharp failed to properly interview witnesses and present their statements and allegations to Dr. Holeman. Dr. Sharp was inconsistent in her testimony and showed a lack of understanding of

Dr. Holeman's duties. The Administration did not take into account the possibility Guidance staff colleagues may have been disturbed when Dr. Holeman reported their extended lunch period to Ms. Jewell.

Principal Jewell was unable to remember facts, dates and reference to certain students. Ms. Jewell's reliance on "uncorroborated, non-supported, hearsay by unproduced witnesses" discredited her testimony.

Although Superintendent Sampson signed the tenure charges, he demonstrated a lack of familiarity of the facts. Mr. Sampson acknowledged he was not personally familiar with Dr. Holeman or the events that constituted his removal.

The charges and allegations were considered minor by Respondent's counsel. Except for the use of an elevated voice, none of the charges amounted to just cause.

Upon instructions from the District, Dr. Holeman submitted to both a psychological exam and a blood test. The laboratory report found no evidence of steroids. A Psychiatric Consultant, Daniel Gollin, M.D. concluded that Dr. Holeman was fit to resume his duties as a School Psychologist. After requiring an employee to undergo a fitness for duty examination, the Board cannot "arbitrarily reject both the physician's conclusion" and the result of the blood test.

"The District investigation was never about determining the truth of a matter or ascertaining both sides of a story. Rather, the investigation was about tailoring its process, its collection of selective 'facts' and framing its results for one simple objective: "remove Dr. Holeman from the District."

DISCUSSION AND FINDINGS

The matter addressed in this award differs from many of the tenure decisions arbitrated under the TEACHNJ Act. The intent of the Statute is to "raise student achievement by improving instruction through the adoption of evaluations that provide specific feedback to educators, inform the provision of aligned professional development, and inform personnel decisions:"

The Statute addresses the development of a corrective action plan "to correct deficiencies and improve a teacher's effectiveness" in the classroom. Under the Act the employee receives an annual summative evaluation rating of "ineffective, partially effective or effective." Since Dr. Holeman is not a classroom teacher, the provisions regarding classroom effectiveness are not applicable. However, one might argue that a counselor has an impact on student achievement.

The responsibilities of a School Psychologist include providing counseling services, obtaining appropriate services for student mental problems, diagnostic assessment of pupils with educational disabilities, individual and group therapy, preparation and submission of required reports and interaction with school personnel and community mental health and social welfare agencies.

Under the District's job description, the School Psychologist reports to his or her Appropriate Supervisor, Principal and, or Central Administrator as designated by the Superintendent. The duties of the School Psychologist specify that he or she "upholds and enforces school rules, administrative regulations, and Board policies." The requirements of the School Psychologist include "makes an effort to establish and maintain cooperative working relationships with students, parents, peers, employees and community."

The Petitioner charged that Dr. Holeman's behavior was in violation of several requirements for that of a School Psychologist and that of a District staff member.

Charge 1. Dr. Holeman engaged in inappropriate behavior as a school counselor and a professional, habitually made disparaging and demeaning remarks about colleagues, staff members, and administration, and failing to meet his professional obligations to special education students.

The hearing record supports the charge. While the Respondent contended that it was not uncommon for the staff to criticize administrators it does not negate the fact that he made disparaging comments about his superiors and colleagues. Principal Jewell and Supervisor Minervini cited comments that were inappropriate and considered disrespectful by both administrators.

Although Ms. Jewell believed AV reminded her of a "battered woman," the student's state of mind cannot be confirmed. However, Psychologist Samuel Grove, a counselor with considerable experience, testified he would not recommend yelling when counseling a student. Thus, I have determined this charge had been sustained.

Charge 2. Dr. Holeman engaged in inappropriate and unethical conduct by soliciting former and current students for his private practice.

The evidence did establish that Dr. Holeman accepted a counseling fee from the parents of a then current student in 2013.

Dr. Holeman's explanation he was told that receiving a fee for counseling a student on home instruction was acceptable is not credible. At a later date he informed a parent he could not accept a fee if a student was currently enrolled at Freehold Boro Regional High School. There was no evidence, except for the 2013 fee, that established Dr. Holeman received a fee for

counseling a current District student. Furthermore, There is no policy prohibiting the acceptance of a counseling fee for services rendered in behalf of a former student.

Charge 3. Dr. Holeman spent a substantial amount of time during the school day working at his private counseling practice, and even utilized his school office for his private practice; all of which resulted in a severe dereliction and failure to complete his assigned responsibilities and obligations to the students he was assigned to evaluate and/or case manage.

The District was unable to prove that Dr. Holeman spent a substantial amount of time conducting private business on school time. The Respondent testified that he often sent emails before his workday began or on lunch break or during non-assigned periods. While the allegation may have merit, the District did not establish Dr. Holeman utilized "substantial" work time when conducting non-school activities.

The Respondent did use the school mailing address in his correspondence with the New Jersey State Board of Examiners. Dr. Holeman admitted he did use his Freehold Borough High School email address on occasion to set up or manage appointments for his private counseling practice. It is understandable why for numerous reasons, including liability, the District would prohibit the use of its email system for non-school activities. Dr. Holeman's use of the District's email system both during and after school hours in the conduct of his private counseling practice was ill advised.

The District had also charged that Dr. Holeman had been delinquent in the completion and submission of IEP's. Ms. Minervini testified that she was led to understand that the Respondent's IEP's were compliant with State requirements. This ceased to be correct after January 2016.

Dr. Holeman stated that he was not the only staff member responsible for completion of IEP's. He testified that other members of the Child Study Team had time restraints and that the final button was "pushed" by the guidance department secretary. This reference to the secretary was not accurate in that he actually "pushed" the button. Although it was correct that the student load had increased over time, the secretary was not responsible for the delay. Dr. Holeman had an obligation to apprise Ms. Minervini of any delay in submission of IEP's.

Charge 4. Dr. Holeman inappropriately and unethically shared confidential student information outside the District.

Dr. Holeman did share information concerning a student with his wife. His wife is a social worker employed in a neighboring school system. There is no evidence the email was read by any other individuals. While it is a violation of confidentiality and according to confidentiality requirements should not have been shared. If sensitive information is shared with a spouse, it is more prudent not to email this information.

Charge 5. Dr. Holeman interacted with students in an inappropriate and unethical manner.

While there is no evidence that Dr. Holeman had an inappropriate relationship with any student the content of emails could have been more carefully thought out. One might conclude that Dr. Holeman did not always exercise good judgment, especially in regard to comments concerning colleagues and administrators.

Although the Petitioner signaled out emails exchanged with former students, contact with former students is not addressed by District Policy.

Charge 6. Dr. Holeman failed to disclose a former employer on his application, ostensibly because he was terminated from his position.

The charge that Dr. Holeman omitted his brief employment with the West Morris Regional High School on his application is correct. On examination of the application, it appears that a section listing previous experience may have been covered with white out liquid. It is difficult to ascertain why the Freehold District did not explore the question of any omissions at the time Dr. Holeman submitted his application.

Dr. Holeman testified he was not terminated by the West Morris District. The evidence obtained through a local newspaper and West Morris District Board of Education minutes confirm that he was abruptly dismissed from the District. Given the failure on the part of the Freehold District to question Dr. Holeman when he submitted his application in June of 2004, and the number of years that he had been employed by the District, I believe the application matter is "stale."

An additional concern dealt with suspicion Dr. Holeman had taken steroids. Staff member Lindsay Pantaleo stated that Dr. Holeman had told her that his wife had expressed concern about his use of steroids. Ms. Pantaleo repeated Dr. Holdman's comment to Susan Guercio. The result of a blood test required by the Petitioner revealed no evidence of substance abuse.

The District requested that Dr. Holeman also undergo a psychiatric exam. The psychiatrist concluded that Dr. Holeman could return to his position as a School Psychologist.

However, of particular concern are the repercussions generated by Dr. Holeman's behavior. The statements and testimony contained in the hearing record show a breakdown in Dr. Holeman's relationship with colleagues and administrators.

As previously noted, several individuals testified that in his interaction with students and parents Dr. Holeman was excessively loud to the extent he was asked to lower his voice.

Supervisor Gallo testified that although she asked Dr. Holeman to lower his voice he continued to be heard outside his office by both parents and students.

Ms. Pantaleo alleged that during the PARCC exam Dr. Holeman talked negatively about administrators in a voice she believed could be heard by students. She noted in her written statement that she found Dr. Holeman visibly agitated and erratic. Ms. Pantaleo commented that she also found Dr. Holeman's language inappropriate.

It is important that the guidance department, teaching staff and administration maintain a cooperative relationship. The hearing record reveals the relationship between Dr. Holeman and others had been damaged.

Dr. Holeman sent an email containing profanity to Supervisor Minervini stating that she "caved." He also "inappropriately and insubordinately" told Ms. Minervini in an email to tell a co-worker, Lisette Salguero, not to refer him any cases. Para professional Susan Guercio alleged that Dr. Holeman had mistreated and talked down to her. Supervisor Minervini stated she found it necessary to abruptly end a meeting with Dr. Holeman due to his "disrespectful, inappropriate and volatile[behavior] told her...."

Dr. Holeman testified that he had a very good relationship with Principal Jewell. After Ms. Jewell was informed that Dr. Holeman's behavior had become erratic, their relationship changed. It became especially tenuous in a meeting attended by Freehold Boro Regional High School Union President Debbie Gates-Kane and Principal Jewell. Ms. Gates-Kane stated that she found it necessary to move in between Ms. Jewell and Dr. Holeman for concern of a physical confrontation. Ms. Gates-Kane testified she was "called in" because his colleagues "were afraid of him...." She also stated that Dr. Holeman said to Ms. Jewell that she should "sleep with one eye open." Rarely does an Association representative provide potentially negative testimony. It

is also unusual for colleagues to criticize a fellow staff member in writing and through testimony.

There is reason to conclude that it would be inadvisable to reinstate Dr. Holeman. The record indicates irrevocable differences between the administration, staff members and Dr. Holeman. In order to effectively serve the needs of students it is important the school Guidance Department function free of conflict.

AWARD:

For the reasons described above, the Tenure Charges submitted by the Freehold Boro Regional School District against Dr. Brett Holeman are sustained.

5/12/17
Date

Stephen J. Rosen

State of New Jersey}
County of Essex}

On this 12th day of May 2017 before me personally came and appeared Stephen J. Rosen, to me known to be the individual described in foregoing instrument, and he acknowledged to me he executed the same.

Susan G. Rosen
SUSAN G. ROSEN
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 8/4/2019

ADDENDUM

In the Matter of the Tenure Hearing
Brett D. Holeman
and
Freehold Boro Regional High School District
Agency Docket No. 249 – 9/16

Ruling on Respondent's Motion to Dismiss

For the Respondent: Zazzali, Fagella, Nowak, Kleinbaum & Friedman
By: Aileen O'Driscall, Esq.

For the Petitioner: Comegno Law Group, P.C.
By: Jeffrey R. Caccese, Esq.

Stephen J. Rosen, Arbitrator

Background:

The matter concerns the dismissal of Brett D. Holeman, Psy.D., a tenured psychologist employed by the Freehold Regional School District and assigned to the system's high school.

At its September 12, 2016 meeting, the Board of Education considered allegations made against Dr. Holeman and voted to support the Sworn Tenure Charges submitted by Superintendent of Schools, Charles B. Sampson. The Board decided that Dr. Holeman's behavior warranted removal and revocation of his tenure status.

As required under New Jersey law, the allegations were forwarded to the Commissioner of Education. After review of the allegations, the Commissioner of Education determined that the matter should be referred to arbitration.

Specifically, the Board identified a number of allegations that were contained in its submission to the Commissioner. The Board characterized Dr. Holeman as unprofessional, unethical and engaging in illegal activities. The contentions prepared by Superintendent Charles B. Sampson included the following accusations:

a) Dr. Holeman engaged in inappropriate behavior as a school counselor, and a professional, habitually made disparaging and demeaning remarks about colleagues, staff members, and the Administration, and failing to meet his professional obligations to special education students.

b) Dr. Holeman engaged in inappropriate and unethical conduct by soliciting former and current students as patients for his private counseling practice.

c) Dr. Holeman spent a substantial amount of time during the school day working at his private counseling practice, and even utilized his school office for his private counseling practice; all of which resulted in a severe dereliction and failure to complete his assigned responsibilities and obligations to the students he was assigned to evaluate and/or case manage.

d) Dr. Holeman inappropriately and unethically shared confidential student information outside of the District.

e) Dr. Holeman interacted with students in an inappropriate and unethical manner.

f) Dr. Holeman intentionally failed to disclose a former employer on his application, ostensibly because he was terminated from his position.

g) Dr. Holeman does not suffer from any psychological defect or condition that explains or justifies his conduct.

h) Dr. Holeman does not have a substance abuse problem that contributed to his conduct.

The submission filed by the Board contained very specific allegations that it argued justified Respondent's removal from his tenured position.

Through his attorneys, Respondent answered each of the Tenure Charges filed by the Board. Dr. Holeman denied the accusations made against him by the Board through his legal counsel Aileen O'Driscoll, Esq. In response to the Tenure Charges, Attorney O'Driscoll contended that the Petitioner had failed to sufficiently show just cause. Ms. O'Driscoll argued that based upon deficiencies in the Board's case the charges be dismissed.

In addition to the failure to establish just cause, the Respondent charged the Petitioner had failed to comply with the provision of N.J.S.A. 18A: 6-17. The language cited by the Petitioner is that the District:

> "shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses."

Attorney O'Driscoll argued in the instant matter the District "produced a wholly deficient witness list which includes a large number of individuals, and unacceptable summaries of the testimony each person will offer." The intent of the statute, Ms. O'Driscoll stated, requires hat pertinent documents held by the Petitioner are to be forwarded as soon as the case is referred to the arbitrator. The Legislature intended that tenure charges be decided expeditiously.

Also noted in Respondent's argument for dismissal was a reference to IMO Ebert and State Operated School District of New Jersey, Agency DKT. No. 49 – 3/15. The citation emphasized the necessity of full disclosure of witnesses and a summary of their testimony. Respondent's attorney considered this not only a requirement of the Statute but also an entitlement given that the "teacher is in a reactive posture."

The list was described by Respondent's counsel as "wholly deficient." The list identified more than twenty-five (25) names with vague summaries of their testimony. Respondent also argued the list had been delayed and not produced until requested by counsel. Ms. O'Driscoll contended that this delay alone warranted dismissal of the charges.

An additional matter contested by the Respondent concerned Petitioner's issuance of subpoenas. In preparation of the charges, the Petitioner sought to obtain, through subpoenas, the personnel records of two other school districts. The districts, West Morris Regional School

District and Marlboro Regional Township, were considered pertinent by the Petitioner for purposes of credibility and ethics. West Morris Regional School District was identified as Dr. Holeman's previous employer. The Marlboro Township School District Administration had been contacted by the Petitioner in regard to a recent application for employment submitted by Dr. Holeman after the tenure charge process commenced. The Petitioner speculated that the Marlboro application might contain false information.

Respondent's attorney argued the issuance of subpoenas was improper. Ms. O'Driscoll contended the subpoenas were untimely since they were not issued until October 28, 2016, two days after the parties' conference call on October 26, 2016. Ms. O'Driscoll also argued that the issuance of subpoenas rests solely with the arbitrator. Neither N.J.S.A. 18A: 16-17 and AAA rules allude to the issuance of subpoenas by an attorney. Omission of subpoena authority, Respondent's attorney argued, reflects her position regarding the issuance of subpoenas.

In my opinion, an attorney of record in New Jersey can issue a subpoena. This view is based on interpretation of the following:

> A subpoena may be issued by either: „ The clerk of the court. „ An attorney. „ A party in the name of the clerk. (N.J. Ct. R. 1:9-1). Practitioners most commonly issue subpoenas by signing the subpoena in the name of the clerk. In certain specialized proceedings, the following may also issue subpoenas: „ Judicial officers and sometimes law enforcement officers in municipal proceedings (N.J. Ct. R. 7:7-8). „ Judges and non-lawyer representatives in administrative proceedings (N.J. Admin. Code ξ 1:1-11.1). „ Arbitrators in arbitration proceedings (N.J. Stat. Ann. ξ 2A: 23B-17).

Under its Labor Arbitration Rules of the American Arbitration Association:

> 27. Evidence and Filing of Documents
>
> The parties may offer such evidence as is relevant and material to the dispute, and shall produce such evidence as he arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator or other person authorized by law to subpoena witnesses and documents may do so independently or upon request of any party....

Discussion of Motion to Dismiss

As indicated, it is my opinion that the State of New Jersey allows an attorney to issue subpoenas. However, the weight to be given to the information sought by the Petitioner is questionable. The Marlboro Regional School District subpoena is not relevant to the tenure charges since it represents a post termination document. Furthermore, the Petitioner does not know with certainty that its suspicions are valid.

The West Morris Regional School District subpoena has limited weight given that the Respondent has been in the employ of the Freehold District for approximately thirteen (13) years. During the years of Dr. Holeman's employment, the Freehold Regional District did not investigate or question his previous experience.

The release of personnel records is resisted by employers. Thus, the Petitioner's efforts to obtain personnel records have limited chance of success without a directive from the Court.

The witness list was acknowledged by Petitioner to be longer than the actual number of individuals who would likely be called to testify. The summary of witness statements is vague. While the relationship of possible witnesses can be culled from the tenure charge filed with the Commissioner of Education, I have instructed Petitioner to forward a more accurate list of witnesses and a more precise synopsis of their anticipated testimony.

The Respondent had taken issue with the failure on the part of Petitioner to adhere to the timelines prescribed under N.J.S.A. 18A: 6-17.1. As described below:

> (3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide

all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

I have taken into consideration the above and other issues raised by Respondent's attorney and do not believe they warrant dismissal of the Tenure Charges.

The Bureau of Controversies and Disputes forwarded the applicable file to me on or about October 11, 2016. The parties were informed of my selection a few days later and preferred to delay selection of hearing dates until they were officially notified of my appointment. This has resulted in delay of the process. The first hearing date was convened with the attorneys and arbitrator via a conference call on October 26, 2016. A second conference call was initiated on November 22, 2016. Hearing dates have been selected and various issues and concerns were expressed by both attorneys on November 22, 2016. A meeting to discuss a possible settlement is scheduled for December 12, 2016.

Selection of hearing dates has been complicated by the prior commitments of both representatives. Strict adherence to N.J.S.A. 18A: 6-17.1 timelines has been unavoidable. Neither party has deliberately delayed selection of hearing dates.

Given the above conclusions, I have determined that Dismissal of the Tenure Charge should not be granted.

12/3/16
Date

Stephen J. Rosen
Stephen J. Rosen, Ed.D.
Arbitrator

138-17

KATHLEEN DONOHUE,	:	
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
KATHLEEN DONOHUE,	:	
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a former Paterson school teacher who retired on September 1, 2015, after teaching for approximately 28 years – filed multiple petitions with the New Jersey Department of Education, Bureau of Controversies and Disputes, beginning in April of 2016. The allegations in all of the petitions relate to events that occurred during Ms. Donahue's prior service as a teacher in the Paterson school district, and involve charges of nepotism and favoritism by district administrators, as well as various wrongs she claims to have been subjected to – including being denied use of sick days. The respondent school district filed a motion to dismiss, contending that the petitions were late filed pursuant to *N.J.A.C.* 6A:3-1.3(i).

The ALJ found, *inter alia*, that: many of the allegations – which petitioner stated were motivated by her belief that Paterson school children have not received the thorough and efficient education they deserve because resources have been squandered by the administration, and because of inadequate supervision of the performance of teaching staff – assert the rights of third parties rather than those of petitioner herself; petitioner does not have standing to bring allegations that only assert the rights of others and not wrongs allegedly visited upon her; further, those allegations that do relate directly to wrongs against petitioner occurred during her employment in the school district, which ended September 1, 2015; the earliest petition of the several filed by Ms. Donahue was not filed until April 29, 2016. The ALJ concluded that all of the petitions were untimely and must be dismissed for failure to comply with *N.J.A.C.* 6A:3-1.3(i).

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

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

Issued 5/18/17

OAL DKT. NOS. EDU 08806-16 and EDU 09476-16 (consolidated)
AGENCY DKT. NOS. 123-4/16 and 150-5/16

KATHLEEN DONOHUE,	:	
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
KATHLEEN DONOHUE,	:	
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, along with petitioners' exceptions – filed pursuant to *N.J.A.C.* 1:1-18.4 – and the District's reply thereto.

In her exceptions, petitioner expresses dissatisfaction with the Administrative Law Judge's (ALJ) Initial Decision. Petitioner argues that this matter is not out of time because many of her allegations continued after her employment with the District and are still ongoing. Petitioner also argues that she has standing because she was a teacher in the District, but could not bring her claims while working out of fear of retaliation.

In reply, the District argues that petitioner's exceptions simply air her grievances, rather than taking exception to specific findings of fact or conclusions of law. The District argues that the ALJ's decision is well reasoned and urges the Commissioner to affirm the Initial Decision.

Upon review, the Commissioner does not find petitioner's exceptions to be persuasive. The Commissioner concurs with the ALJ that petitioner does not have standing to bring allegations that only assert the rights of others. The Commissioner further agrees with the ALJ that any allegations of wrongdoing by the District aimed at the petitioner are out of time – as petitioner retired on September 1, 2015, and the first petition was not filed until April 2016. As such, the matter is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i).

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons thoroughly expressed therein – and the petition is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/18/17

Date of Mailing: 5/18/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
(CONSOLIDATED)
OAL DKT. NO. EDU 08806-16
AGENCY REF. NO. 123-4/16
AND
OAL DKT. NO. EDU 09476-16
AGENCY REF. NO. 150-5/16

KATHLEEN DONOHUE,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,
Respondent.

Kathleen Donohue, petitioner, pro se

Robert Murray, Esq., for respondent

Record Closed: March 3, 2017 Decided: April 6, 2017

BEFORE **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Kathleen Donohue (Donohue or Petitioner), is a former Paterson school teacher who retired on September 1, 2015. Donohue filed four Petitions in the

form of letters with the Department of Education, Bureau of Controversies and Disputes. The first Petition, containing ten allegations, is dated April 21, 2016, and was filed on April 29, 2016. The second Petition, containing two allegations, is dated April 26, 2016, and was filed on April 29, 2016. The third Petition, containing twenty-four allegations, is dated May 16, 2016, (with a notarized signature dated May 13, 2016) and was filed on May 23, 2016. The fourth Petition, containing two allegations, is dated May 16, 2016, and was filed on May 23, 2016. Many of the allegations are repetitive.

Subsequently, on August 27, 2016, Donohue filed an Amended Complaint (i.e., Amended Petition) with the Office of Administrative Law alleging various forms of mismanagement at Paterson Public School Number 25 and seeking relief on behalf of students and the general public, and alleging wrongs perpetrated against her.

The Amended Petition of August 27, 2016, follows the format of the four previously filed Petitions and even reiterates the allegations according to the dates of her previously filed Petitions, as set forth above. The first Petition's ten allegations pertain only to wrongs allegedly visited upon third parties. The second Petition's two allegations pertain only to wrongs allegedly visited upon Donohue. In the third Petition, twenty-four allegations, numbers 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, and 23, all pertain to wrongs allegedly visited upon third parties; three allegations, numbers 8, 15, and 24, pertain to wrongs allegedly visited upon Donohue. The fourth Petition's two allegations pertain only to wrongs allegedly visited upon Donohue.

In short, Donohue makes the following seven allegations on her own behalf: the two allegations from her second Petition; allegation numbers 8, 15, and 24 from her third Petition; and the two allegations from her fourth Petition. She seeks relief for these wrongs.

The Amended Petition reiterates all of the allegations contained in the four previously filed Petitions. Donohue sets forth allegations of wrongs visited upon her by the District and she sets forth requests for relief as follows: (1) an explanation for the

denial of her request for non-accumulated sick days in December 2014, an apology for alleged untruthful statements made about her in connection with said request, and the purging from her personnel file of any statements that might malign her character; (2) cash compensation for time spent defending herself from false statements in connection with the denial of her request for non-accumulated sick days and for attending "Back To School Nights" and "Report Card Distribution Nights," and for time spent on "all of the work I had to complete on a daily, weekly basis, after hours, on weekends, and early in the morning"; (3) an explanation for why her name appears on assessment data, evaluation-type documents, Infinite Campus, and other documents for a time period while she was on medical leave; (4) an explanation for why she was not granted an interview when she applied for an ELA on-site supervisor position; (5) an explanation for why her e-mail to Carole Smelter went unanswered; (6) cash compensation for her personal instructional materials in her classroom which were allegedly destroyed or thrown out over the course of the summer of 2013, and to be informed of the results of an investigation into this incident by Luis Rojos, the director of the Labor Relations Office of the Paterson public schools; and (7) an explanation for why she was denied the use of a microphone at a "You Are Special To Me Tea" event in the 2013–2014 school year, as well as an apology.

The matter (Agency Reference Number 123-4/16) was transmitted to the Office of Administrative Law on June 13, 2016, and filed on June 14, 2016, as a contested case. Another matter (Agency Reference Number 150-5/16) was transmitted to the Office of Administrative Law on June 27, 2016, and filed on June 27, 2016, as a contested case. On June 13, 2016, Robert E. Murray, Esq., filed the respondent's Answer to the first, third and fourth Petitions, and on July 22, 2016, he filed the respondent's Answer to the second Petition. The tribunal held an initial conference by telephone on July 13, 2016. The tribunal issued its Pre-Hearing Order on July 15, 2016, and an Amended Pre-Hearing Order on July 27, 2016. The cases were consolidated by the Order of Consolidation dated July 18, 2016.

At present, this case is before the tribunal for the disposition of three motions:

The first motion is a "Motion to Request Additional Documents" was filed by the petitioner on October 20, 2016.

The second motion is a "Motion to Dismiss" was filed by the respondent on October 20, 2016; and

The third motion is a "Discovery Motion" was filed by the petitioner on November 3, 2016.

While the tribunal was reviewing the motions, it came to its attention that, in regard to the service of the petitioner's August 27, 2016, Amended Complaint (i.e., the Amended Petition) petitioner apparently did not receive the green return receipt card back from the U.S. Postal Service, which would indicate whether or not the respondent has actually received a copy of the Amended Petition. After checking its file and finding no filed Answer to the Amended Petition, the tribunal sent an e-mail to both the petitioner and the respondent on February 27, 2017. In this e-mailed letter the tribunal brought the issue of the service of the Amended Petition to their attention, seeking to find out—one way or the other—if respondent received the Amended Petition. On March 3, 2017, the tribunal received respondent's faxed correspondence and its Answer to the Amended Petition. The tribunal has accepted the Answer to Amended Petition *nunc pro tunc*, since there are no substantive differences between the allegations contained in the original four petitions and the Amended Petition.

FINDINGS OF FACT

The following facts are not in dispute:

1. Donohue served as a teacher in the Paterson School District for approximately twenty-eight years until she retired on September 1, 2015.

2. The events described by Donohue in her Petitions occurred during the period of time encompassed by her dates of her employment.

3. Donohue's Petitions were filed with the Bureau of Controversies and Disputes on April 19, 2016 (ten allegations); April 29, 2016 (one allegation); May 23, 2016 (twenty-four allegations); and May 23, 2016 (two allegations).

4. Donohue's Amended Complaint (i.e., Amended Petition) was filed on August 27, 2016.

5. Donohue's Motion to Request Additional Documents, filed on October 20, 2016, asks the Tribunal "to issue an Order requiring Respondent to submit any and all additional documents that the Petitioner requests that are necessary to support the validity of the accusations/violations of regulations."

6. Respondent's (the District's) Motion to Dismiss, filed on November 3, 2016, argues that Donohue lacks standing to bring the Petitions she has filed and also argues that she filed all of same out-of-time.

7. Donohue's "Discovery Motion", filed November 3, 2016, complains that the Respondent did not make "a good faith effort to provide ethical, truthful, complete and certified answers" and impliedly asks the Tribunal to compel same.

8. Although Donohue provided this Tribunal with copies of the Interrogatory Questions that she served on the Respondent, Donohue did not provide this Tribunal with copies of the respondent's answers to the Interrogatories.

9. Various opposition papers and correspondences from the parties were received and reviewed by the Tribunal, including a letter from the Petitioner received December 8, 2016. In this letter, Petitioner enclosed a newspaper article from the (Bergen) Record dated December 3, 2016, entitled "Paterson Schools Fill Lucrative Staff Positions," which petitioner cited in support of her position in the controversy at bar.

ISSUES TO BE DECIDED

The first issue to be decided is whether petitioner Donohue has the requisite standing to bring an action against the District.

The second issue to be decided is whether Donohue filed her petitions in accordance with the time limitations set forth in the regulations.

APPLICABLE LAW

Standing

In New Jersey, the Appellate Division, in the case of LDM v. Princeton Regional Health Commission, 336 N.J. Super. 277 (App. Div. 2000), stated:

> Standing is a threshold determination which governs the ability of a party to initiate and maintain a suit before the court. In re Adoption of Baby T., 160 N.J. 332 (1999). Generally, in New Jersey, "[e]ntitlement to sue requires a sufficient stake and real adverseness with respect to the subject matter of the litigation." New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Commission, 82 N.J. 57, 67 (1980) (quoting Crescent Park Tenants Association v. Realty Equities Corp. of N.Y., 58 N.J. 98, 107 (1971)). Additionally, [a] substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision is needed for purposes of standing. Ibid. (quoting Home Builders League of S. Jersey v. Berlin Twp., 81 N.J. 127, 134-35 (1979))."
>
> [See also New Jersey Citizen Action v. Riviera Motel Corp., 152 N.J. 361 (1998).]

The Chancery Division ruled that litigants, generally, have no standing to assert the rights of third parties. Bank of New York v. Raftogianis, 418 N.J. Super. 323, 451-52 (Ch. Div. 2010).

Time Limits for Filing

N.J.A.C. 6A:3-1.1(a) states:

> This chapter sets forth the rules of procedure established by the Department of Education for the filing of petitions with the Commissioner of Education to hear and decide controversies and disputes arising under school laws in accordance with N.J.S.A. 18A:6-9.

N.J.A.C. 6A:3-1.3(a) states:

> To initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, a petitioner shall prepare a petition of appeal conforming to the requirements of N.J.A.C. 6A:3-1.4 [including a statement of the specific allegations and essential facts as well as the section or sections of the school laws under which the controversy has arisen] and serve such petition upon each respondent, together with any supporting papers the petitioner may include with the petition. The petitioner then shall file proof of service on each respondent . . . and the original petition and supporting materials, if any, with the Commissioner . . . .

N.J.A.C. 6A:3-1.3(i) sets forth a ninety-day time limit for the filing of petitions, as follows:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

Case law in New Jersey supports a strict adherence to the ninety-day time limit. In Riley v. Hunterdon Central High Board of Education, 173 N.J. Super. 109 (App. Div. 1980), the petitioner was notified by letter of the nonrenewal of her contract on April 13, 1976. Rather than filing a petition with the Commissioner of Education, she opted to pursue her grievance through an arbitration process. After receiving an unsatisfactory result from arbitration, she decided to pursue an appeal to the Commissioner by filing a

petition on June 20, 1977. Her filing was more than a year after she received the notice of nonrenewal. The Commissioner dismissed the petition as untimely. The Appellate Division upheld the Commissioner's dismissal of the petition as untimely.

In Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572 (1993), the Supreme Court affirmed the Appellate Division holding that the Commissioner of Education had authority from the Legislature to adopt regulations establishing a ninety-day limitation for school personnel to file disputes under school laws; that administrative regulations were presumptively valid; that a ninety-day limitation afforded an aggrieved school employee a meaningful opportunity to file his/her petition; that ninety days was a reasonable procedural requirement; and, that anyone challenging such a regulation bears the burden of proving its invalidity. Kaprow, supra, 131 N.J. at 580-83. The Supreme Court also stated that the reason for a limitation period is twofold: "to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend," and "to penalize dilatoriness and serve as a measure of repose." Id. at 587.

It is therefore settled that when an employee has a grievance with his or her employer arising out of the school laws of New Jersey, his/her petition must be filed within ninety days from the date of the employer's allegedly wrongful act or from the date of the notice of the employer's adverse action.

LEGAL ANALYSIS AND CONCLUSIONS

The threshold question is whether Donohue has standing to bring the allegations contained in her petitions.

In all of her petitions, Donohue alleges that there is ongoing nepotism and favoritism whereby certain employees are not required by their superiors to perform the duties associated with their positions, particularly the instruction of schoolchildren.

Moreover, Donohue alleges that the school's administrative staff fails to perform its duties in regard to properly supervising and evaluating the performance of teachers and other school personnel. Donohue alleges that the school district's financial resources have been wasted because unqualified people have been hired, and that undeserving people have been given promotions. Throughout her petitions Donohue has stated that her complaints are primarily motivated by her belief that the schoolchildren have not received the thorough and efficient education they deserve because of the school administration's squandering of resources and failure to adequately supervise the performance of those responsible to instruct the children.

All of the aforementioned allegations, however sincerely motivated, assert the rights of third parties rather than Donohue herself. However appalled Donohue may feel because of her belief that the children are being shortchanged, it is the children who are the aggrieved parties rather than Donohue. Donohue's allegations of the District's failure to properly teach the children do not demonstrate that she has suffered or is in imminent danger of suffering some harm in the event of an adverse outcome in court. As noted above, in order to have standing Donohue would have to demonstrate that she has a sufficient stake in the subject matter. She has failed to do so. Moreover, as noted above, Donohue cannot gain standing in this case by asserting the rights of third parties. I **CONCLUDE** that Donohue has no standing to bring any allegations that only assert the rights of others and that do not address allegations of wrongs visited upon her by the District.

We now turn to Donohue's allegations of wrongs visited upon her by the District. Donohue has asserted that she was unfairly denied use of unaccumulated sick days in December 2014 and that the executive director of labor relations, Louis Rojas, made incorrect and maligning statements about her. These are the types of allegations that Donohue would have standing to bring. Furthermore, Donohue alleged that classroom materials and decorations that she purchased and placed in her classroom were destroyed or disposed of in 2013 and/or 2014. Again, without commenting on the veracity of these allegations, these are things that Donohue would have standing to allege in a petition. Donohue alleges that an administrator wrongfully denied her the

use of a microphone at a "You Are Special To Me Tea" event. This too is an allegation that Donohue would have standing to allege in a petition. Donohue alleges that her name appears on assessments, evaluations, and other types of documents composed during a period when she was out on medical leave. This is an allegation that Donohue would have standing to allege in a petition. Donohue alleges that she was unfairly denied cash compensation for her attendance at Back-To-School Nights and various other after-school activities and/or events. This is an allegation that Donohue would have standing to allege in a petition. Donohue alleges that she was unfairly denied an interview for the position of ELA on-site supervisor. This is an allegation that Donohue would have standing to allege in a petition. I **CONCLUDE** that all of the above-mentioned wrongs that Donohue alleges were visited upon her by the District are things for which she would have standing to petition the Commissioner and/or the tribunal for relief.

Regarding the timeliness of Donohue's petitions, as noted above, N.J.A.C. 6A:3-1.3(i) states that a petitioner has ninety days from the date of a notice of a final order, the date of a ruling, or the date of some other action by the district to file her petition. A review of all of the facts contained in Donohue's allegations in all of her petitions shows that all of the wrongs allegedly visited upon her by the District occurred at times during her employment. She retired on September 1, 2015. Therefore, all of the wrongs allegedly visited upon Donohue by the District were more than ninety days before the filing of any of her petitions. That is to say, Donohue failed to file a petition alleging a wrong visited upon her by the District—a final order, a ruling, or an action—within ninety days of its occurrence. For this reason, I **CONCLUDE** that all of Donohue's petitions have been filed in an untimely manner. I further **CONCLUDE** that all of Donohue's petitions must be and hereby are dismissed for failing to comply with N.J.A.C. 6A:3-1.3(i).

ORDER

Based upon the foregoing, I hereby **ORDER** that the motion to dismiss filed by the respondent is hereby **GRANTED**, and all petitions of the petitioner are hereby **DISMISSED**.

The petitions of the petitioner, having been dismissed as untimely filed, I hereby **ORDER** that petitioner's motion to request additional documents is **DENIED**; and I hereby **ORDER** that petitioner's discovery motion is **DENIED**.

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

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

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

April 6, 2017

DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: April 6, 2017

Date Mailed to Parties: April 10, 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

139-17

OAL DKT. NO. EDU 06155-16
AGENCY DKT. NO. 75-3/16

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
K.J., ON BEHALF OF MINOR CHILDREN, N.L.M. AND C.M.,	:	
RESPONDENT.	:	

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

Upon review, it is noted that the settlement makes reference to a payment to be made on January 31, 2017. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

Subject to the foregoing, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed – subject to compliance with the terms of the settlement – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/18/17

Date of Mailing: 5/18/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6155-16
AGENCY DKT. NO. 75-3/16

TOWNSHIP OF HAMILTON BOARD OF EDUCATION, MERCER COUNTY,
Petitioner,
v.
K.J. ON BEHALF OF MINOR CHILDREN, N.L.M. AND C.M.,
Respondent.

Christopher B. Parton, Esq., for petitioner (Kenney, Gross, Kovats & Parton, attorneys)

Seth N. Broder, Esq., for respondent (Broder Law Group, P.C., attorneys)

Record Closed: March 9, 2017 Decided: April 6, 2017

BEFORE **SUSAN M. SCAROLA,** ALJ:

This matter was transmitted to the Office of Administrative Law on April 21, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

April 6, 2017
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: 4/7/17

Date Mailed to Parties: 4/7/17

/cb

SETTLEMENT AGREEMENT AND RELEASE

THIS AGREEMENT is entered on this ____ of December, 2016, by and between the Hamilton Township Board of Education ("Board") and Kenette Johnson on behalf of minor children C.M. and N.L.M. in full and final settlement of a student residency matter. The undersigned representatives of the parties enter this Agreement knowingly and with the authority to do so, in consideration of the promises made herein.

NOW THEREFORE, the parties agree as follows:

1. This matter arises out of a claim by the Board that minor children C.M. and N.L.M. attended school in the Hamilton Township School District without legal eligibility to do so during certain parts of the 2014-2015 and 2015-2016 school years.

2. In compliance with the provisions of N.J.S.A. 18A:38 and N.J.A.C. 6A:22, the Board issued Initial and Final Notices of Ineligibility, which Ms. Johnson has disputed, and the parties have both filed Petitions of Appeal which are pending hearing before the Office of Administrative law under the jurisdiction of the Commissioner of Education (the "Litigation").

3. Subsequent to the legal procedures set forth above, the parties, through their authorized representatives, entered into negotiations for the resolution and closure of this matter, resulting in this Agreement.

4. The parties acknowledge the existence of their respective claims and positions, and mutually acknowledge that they could pursue said claims pursuant to the regulations of the New Jersey Department of Education and the Office of Administrative Law, and agree that there is a value in resolving this matter instead of pursuing further litigation, expense, time and uncertainty.

5. Therefore, Ms. Johnson shall pay to the Board, in full and final settlement of all claims related to this matter, the sum of two thousand dollars ($2,000.00), which amount shall be paid as follows via valid and negotiable check or money order, made payable to the

Hamilton Board of Education, and received at 90 Park Avenue, Hamilton, NJ 08690 as follows:

a. $1,500 received by January 31, 2017.
b. $500 received by June 30, 2017, in lump sum or in payments at Ms. Johnson's discretion, but to be fully paid no later than June 30, 2017.

6. The Board accepts this payment in lieu of pursuing further litigation, and in consideration of full and faithful performance by Ms. Johnson of the obligations set forth in herein, for monies claimed due and owing for the 2014-2015 school year. For purposes of settlement, the Board waives its claims for tuition monies owed for the 2015-2016 and 2016-2017 school years.

7. The parties expressly acknowledge and mutually consent that in the event that valid payment is not made and received as set forth above, and upon ten (10) days notice to Ms. Johnson, the Board has the legal authority and intention to resume litigation of this matter, and Ms. Johnson has the right to resume litigation of her defenses and affirmative claims via proceedings in the OAL and before the Commissioner of Education.

8. In consideration of the terms of this Agreement, the parties waive all claims related to this matter, provided that C.M. and N.L.M. remain eligible for continued enrollment in the Hamilton School District. Moreover, Ms. Johnson and the Board, in entering this agreement and subject to full performance of all obligations set forth herein, forever waive any and all claims against each other, absolutely and without exception, whether at law, in equity, under the applicable administrative regulations or otherwise, arising out of the Litigation.

9. This Agreement is legally enforceable under New Jersey law, and is binding upon both parties, their heirs, successors and privies.

10. All terms of this Agreement shall be kept strictly confidential except to the degree that disclosure is required by applicable law.

11. Legal counsel enters and executes this Agreement on behalf of the parties with the authority to do so as conferred by their respective clients. The Board's entry of this agreement is subject to approval by the Board in lawful executive session at its December 19, 2016 meeting.

12. This Agreement constitutes the parties' entire understanding and resolution. There are no other promises or obligations established by this Agreement, and none shall be added

unless the parties mutually agree to do so via a written and executed document modifying this Agreement.

KENETTE JOHNSON o/b/o MINOR CHILDREN C.M. and N.L.M.

By: Kenette L Johnson
Kenette Johnson

Date: 12/27/16

HAMILTON TOWNSHIP BOARD OF EDUCATION

By: _____
Christopher B. Parton, Esq.

Date: 12/29/16

WITNESS:

_____
Seth N. Broder, Esq.

RATIFIED BY ACTION OF THE HAMILTON TOWNSHIP BOARD OF EDUCATION:

Pamela A Kelly
~~**Anthony Celentano,**~~ **President**
Pamela Kelly

Katherine Attwood
Katherine Attwood, School Business Administrator / Board Secretary

Date: 11/31/17

I. Opening of the Meeting

A. Call to Order

The Hamilton Township Board of Education met in Regular Session on Wednesday January 25, 2017 at 6:32 P.M. in the board room of the Administration Building located at 90 Park Avenue Hamilton, NJ 08690. In accordance with board policy #0168, only the Presentations and Awards portions of the meeting will be video recorded.

B. Meeting Notice

Notice of this meeting dated January 17, 2017 was read by Katherine Attwood, Board Secretary. Furthermore, on that date, a copy of such notice was sent to The Times, The Trentonian and the Clerk of the Township of Hamilton. It was also posted on the bulletin board at the entrance to the Board Room in the Hamilton Square Administration Building.

C. Flag Salute

D. Roll Call

Present: Richard Kanka, Dr. Susan Ferrara, Susan Lombardo, Christopher Scales, Jessica Young and Pamela Kelly presiding.

Ms. Episcopo, Ms. Kraemer and Mr. Celentano were absent.

Also present were: Dr. Thomas Ficarra, Interim Superintendent; Katherine Attwood, Business Administrator/Board Secretary; Nate Webber, Director of Secondary Education; Jay Morris, Director of Elementary Education; Sylvia Zircher, Director of Curriculum and Instruction; Michael Giambelluca, Director of Human Resources; Marta Audino, Director of Student Services; Keith Bonds, Technology Manager; Patrick Carrigg, Board Attorney; Merna Abdel-Gleil, William James and Alex Robb, Student Representatives and interested members of the community.

Kelly Scales

Whereas Board Member Kraemer is unable to attend the Board Meeting in person as a result of her recovery from surgery and has notified the Board President sufficiently in advance to allow for a good quality electronic connection to be set up, I move that Ms. Kraemer be permitted to participate in the public portion of this meeting through electronic means. Due to security concerns, Ms. Kraemer shall not participate in executive sessions of the Board at this meeting.

Motion pulled - Ms. Kraemer not available to participate by phone for this meeting.

II. Award(s) and Presentation(s)

1. Recognition – Hamilton Township Board of Education Appreciation Month.
2. Recognition – School Resource Officers – In honor of National Law Enforcement Day (January 9, 2017)

III. Announcements

A. Superintendent

1. None

B. Board Members

1. Dr. Ferrara attended "Real Men Read" at Klockner elementary school. Everyone came in their pajamas. The fathers read stories and parents were given a presentation on cyber bullying from the Mercer County Prosecutor's office.
2. Dr. Ferrara stated the HTEA received grant funding for FAST (Family and Students Together). The grant allows for 24 events, of which 8 have been held already. Last night's event was attended by 150 people where dinner was provided and then parents attended workshops.

C. Student Representatives

1. Mr. Robb gave an update on Nottingham's activities which include:
    - On January 20th a junior basketball player was honored after scoring 1,000 points.
    - Outreach for the Stars collected $450 for a student at Klockner.
    - Collections by the Key Club are ongoing.
    - 8th grade orientation was a success.

Mr. Robb welcomed the new board member, Ms. Young and wished her good luck.

2. Mr. James provided an update on Steinert's activities which include:
    - Musical "Anything Goes" will be held February 23rd – 25th.
    - January 10th was 8th grade orientation.
    - GALRE competed in a mock trial competition against Hamilton West in preparation for their competition today.
    - The district orchestra performed their winter concert last week.
    - Annual talent show will be hosted by SGA.
3. Ms. Abdel-Gleil gave an update on West's activities which include:
    - The recent annual job fair was a good opportunity for students to find a job.
    - Hornet Buzz is now on Facebook and Twitter.
    - 8th grade orientation was one of our best.
    - West is bringing back the semi-formal dance for all grades on February 10th.
    - The Junior class is holding a fashion show to fundraise for the prom.
    - Practices are starting for the school musical "Cinderella", which will be held in the Spring.

IV. Committee Reports

A. Ms. Lombardo – Residency

1. Central Administration implemented a new online registration process using Gateway software.

2. Would like feedback from staff and the community regarding the new process so that the district can make any necessary improvements to the system.

B. Mr. Scales – Policy
1. The committee met on January 12th. The agenda for the meeting focused on three policies, all of which are on tonight's agenda. The policies discussed include: Student Activity Fund, Drones and Opioid Antidote.

Dr. Ferrara and Mr. Scales discussed the drone policy and the changes in wording for that policy.

C. Mr. Kanka – Negotiations
1. Met with the HTSSA on January 11th. During this meeting the ground rules for upcoming negotiations were set. The next meeting is scheduled February 8th at 5:00 P.M.
2. The committee met with the administrators on January 17th and had a first exchange of proposals. The next scheduled meeting is January 31st.

D. Suspension Report
1. Board members discussed the Suspension report.

E. Monthly HIB Report
1. None

F. Monthly Health Report
1. None

Ms. Kelly read board policy 0167 "Public Participation in Board Meetings."

V. Hearing of the Public

Dr. Dave Perry
- Thanked teachers who showed up tonight. The HTEA asked that every school attend a board meeting to stay involved. Tonight's schools that were represented were Alexander, Sunnybrae and Grice.
- Thanked Ms. Zircher, supervisors and Dr. Ficarra for attending FAST events. It has been a very successful first year.
- He feels Aramark menus are not what they are supposed to be. Some schools are encountering shortages of meals during the last lunch of the day.
- Thanked Dr. Ficarra, Mr. Webber and Mr. Giambelluca for fast response on the mold issues.
- The HTEA Pride committee is hosting a "Frozen" dinner dance for senior citizens on February 18th.

George Fisher
- Asked why the agenda does not include the referendum?
- Commented on the withdrawal from Capital Reserve.
- Asked how it was determined what projects are or aren't included.

- Voiced his disapproval on the cost for the new bleachers at Hamilton West.

VI. Business of the Board
Curriculum and Instruction Motions

Scales Ferrara
(C & I 2 - 5)
Upon the recommendation of the Interim Superintendent that the Board of Education approves the revisions to Board Policy #2468, Independent Educational Evaluations, (R/C), as per C & I Enclosure 2.

Upon the recommendation of the Interim Superintendent that the Board of Education approves the revisions to Board Policy # 6660 Student Activity Fund, (R/C), as per C & I Enclosure 3.

Upon the recommendation of the Interim Superintendent that the Board of Education approves the revisions to Board Policy # 7481, Unmanned Aircraft Systems (UAS Also Known as Drones), (R/C), as per C & I Enclosure 4.

Upon the recommendation of the Interim Superintendent that the Board of Education approves the revisions to Board Policy #5330.04, Administering An Opioid Antidote, 1st Reading, (R/C), as per C & I Enclosure 5.

Roll Call
Motions Carried: 6 in favor 0 opposed

Scales Ferrera
(C & I 1, 6 – 12 & 15 - 18)
Upon the recommendation of the Interim Superintendent that the Board of Education approves the payment for pupils sent to out-of-district schools as per C & I Enclosure 1.

Upon the recommendation of the Interim Superintendent that the Board of Education approves the disposal of textbooks, as per C & I Enclosure 6, as per our Policy #7300 – Disposition of Property. This shall include selling used textbooks to textbook companies, offering the books on the NJDOE textbook sharing website, and distributing text books to students as an at home resource.

Upon the recommendation of the Interim Superintendent that the Board of Education approves the additional potential student field trip destination(s), as per C & I Enclosure 7.

Upon the recommendation of Interim Superintendent that the Board of Education approves the ESEA Accountability Action Plan - Participation Rate and Assurances for submission to the Mercer County BOE on January 27, 2017, as per C & I Enclosure 8.

Upon the recommendation of the Interim Superintendent that the Board of Education authorizes the District to approve the Fiscal Year 2017 Amendment 1-Basic and Preschool, for Individuals with Disabilities Education Improvement Act (IDEIA) to include FY2016 Basic carryover of $338,892 for a total FY17 Basic Grant of $3,794,147 and FY16 Preschool carryover of $59,673 for a total FY17 Preschool Grant of $180,289. The Basic carryover amount will be used to supplement tuition. The Preschool carryover amount will be used to supplement the preschool curriculum. Further, that Dr. Thomas Ficarra, Interim Superintendent, be designated authorized representative for the district.

Upon the recommendation of the Interim Superintendent that the Board of Education approves the additional Winter 2017 Workshop Series - Instructional Technology, as per C & I Enclosure 10. Furthermore, that the Board of Education authorizes teachers to be paid for attendance/facilitation throughout the 2016-2017 school year for these workshops, at the cost not to exceed $13,200 from Title II account #20-271-100-101-00-00-60.

Upon the recommendation of the Interim Superintendent that the Board of Education accepts the following donation, as per C & I Enclosure 11.

Upon the recommendation of the Interim Superintendent that the Board of Education approves the Professional Travel Events, as per C & I Enclosure 12.

Upon the recommendation of the Interim Superintendent that the Board of Education accepts the Amended Overnight Student Field Trips, as per C & I Enclosure 15.

Upon the recommendation of the Interim Superintendent that the Board of Education approves the purchase of Teaching Strategies Creative Curriculum for preschool as per C&I Enclosure 16.

Upon the recommendation of the Interim Superintendent that the Board of Education authorizes the District to submit the FY16 NCLB Amendment Application to the NJDOE for changes to the scope of the Title III program as per C & I Enclosure 17.

Upon the recommendation of the Interim Superintendent that the Board of Education approves Educational Testing Service (ETS) to pilot the program "The Language Muse Activity Palette" in the Hamilton Township School District middle schools at no cost to the district, as per C & I Enclosure 18.

Motions Carried: 6 in favor 0 opposed

Finance and Operations Motions

Kanka Scales
(F & O 14)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the Resolution Authorizing the Submission of other Capital Project documents to the Department of Education and the withdrawal from Capital Reserve Account for the following summer capital projects:

1.) Sayen - ADA Accessible Bathroom - $28,000
2.) Kuser - Repair Sink Hole in Parking Lot - $35,000
3.) Klockner - Roof Replacement - $545,000
4.) Administration Building - ADA Accessible Ramp and bathroom - $248,000
5.) Hamilton West - Stadium Bleachers - $900,000
6.) Steinert - Walk-in Freezer Replacement - $68,000
7.) Lalor - Roof Replacement - $285,000
8.) Robinson - Roof Replacement - $650,000
9.) Yardville - Roof Replacement - $540,000
10.) Yardville Heights - Roof Replacement - $150,000
11.) Langtree - Windows - $500,000

Board members discussed the cost and other issues regarding the stadium bleachers at Hamilton West.

Roll Call
Motion Carried: 6 in favor 0 opposed

Kanka Ferrara
(F & O 1 - 13)

Upon the recommendation of the Interim Superintendent that the Minutes of the meetings of the Hamilton Township Board of Education be approved and released (as appropriate) at this time. (F & O 1)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the Secretary's report as of November 30, 2016, as per the attached. (F & O 2)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the Financial Certification, as per the attached. (F & O 3)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the November 30, 2016 Treasurer's Report, as per the attached. (F & O 4)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the line item transfers, as per the attached. (F & O 5)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the Food Services Financial Report, as per the attached. (F & O 6)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the Transportation Items and Bus Evacuation Drills, as per the attached. (F & O 7)

Upon the recommendation of the Interim Superintendent that the Board of Education approves Building Use Applications, as per the attached. (F & O 8)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the bills list in the amount of $$5,292,577.64 and ratifies the payrolls, in the amount of $10,875,133.90 and checks issued between meetings, in the amount of $2,097,630.84 for a grand total of $18,265,342.38 as per the attached reports. (F & O 9)

Upon the recommendation of the Interim Superintendent that the Board of Education approves payment to Tozour Energy Systems in the amount of $472,941.04 for work associated with the district's ESIP, as per the attached. Payment to Tozour will be released at the discretion of the Interim Superintendent upon satisfaction of any outstanding issues. (F & O 10)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the bid awards and/or bid rejections for supplies, equipment and contracted services for the 2016-2017 school year in the amount of $382,000.00 as per the attached. (F & O 11)

Upon the recommendation of the Interim Superintendent that the Board of Education approves the Individual School Agreements with Faith Christian Academy, Our Lady of Sorrows School, St. Gregory the Great Academy, St. Raphael School, Little Friends Day School and Trenton Catholic Academy for non-public security aid, as required by the NJ Department of Education. (F & O 12)

Upon the recommendation of the Interim Superintendent that the Board of Education approves an agreement with Spiezle Architectural Group, the district's Architect of Record, for architectural, design and construction administration services associated with Hamilton High West Bleacher Replacement, as per the attached. (F & O 13)

Mr. Kanka asked a question regarding a payment and Ms. Attwood responded.

Motions Carried: 6 in favor 0 opposed

<u>Personnel Motions</u>

Lombardo Scales
(P 1 – 15)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Appointment(s) as per the attached. (P 1)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Promotion(s) as per the attached. (P 2)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Transfer(s) as per the attached. (P 3)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Extension of Contract(s) as per the attached. (P 4)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Fulfillment of Contract(s) as per the attached. (P 5)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Rescind Appointment(s) as per the attached. (P 6)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Resignation(s) as per the attached. (P 7)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Retirement(s) as per the attached. (P 8)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Leaves of Absences and Extensions/Returns as per the attached. (P 9)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Salary Adjustment(s) as per the attached. (P 10)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Reimbursement for Unused Day(s) as per the attached. (P 11)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Stipend Adjustments for EDP/Coaching for the 2016 - 2017 School Year, due to the New HTEA Contract as per the attached. (P 12)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Salary Adjustments for the 2016 - 2017 School Year, due to the New HTEA Contract as per the attached. (P 13)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Job Description for the Night Custodial Supervisor as per the attached. (P 14)

Upon recommendation of the Interim Superintendent that the Board of Education approves the Agreement as per the attached. (P 15)

Roll Call
Motions Carried: 6 in favor 0 opposed
(Mr. Scales abstained on P motion #1 part F. Dr. Ferrara voted no on P motion #3 Item #1)

VII. Additional Reorganization Business

Scales Ferrara

RESOLVED, that the Board of Education appoints Christopher Scales as the Delegate to the New Jersey School Boards Association effective January 25, 2017, until the next Reorganization Meeting of the Board.

RESOLVED, that the Board of Education appoints Pamela Kelly as the Alternate Delegate to the New Jersey School Boards Association effective January 25, 2017, until the next Reorganization Meeting of the Board.

RESOLVED, that the Board of Education appoints Jennifer Kraemer as the Board Delegate to the Mercer County School Boards Association effective January 25, 2017, until the next Reorganization Meeting of the Board.

Roll Call
Motions Carried: 6 in favor 0 opposed

Lombardo Ferrara

RESOLVED, that the Board of Education establishes the following standing committees in accordance with the Board of Education Bylaw.

Board of Education Standing Committees (including Subcommittees)
Curriculum Committee
Curriculum Subcommittee
Policy Subcommittee
Special Services Subcommittee
Finance and Operations Committee
Facilities Subcommittee
Budget Subcommittee
Audit Subcommittee
Personnel Committee
Human Relations Subcommittee
Residency Subcommittee

RESOLVED, that the Board of Education establishes ad hoc committee(s) as listed below and additional committees as deemed necessary.

Ad-Hoc Committees
Negotiations Committee
Space and Enrollment Committee
Technology Committee

RESOLVED, that the Board of Education establishes liaison assignments to schools and other organizations.

Alexander School	Yardville Heights School
Greenwood School	Crockett Middle School
Kisthardt School	Grice Middle School
Klockner School	Reynolds Middle School
Kuser School	Hamilton High School East
Lalor School	Hamilton High School North
Langtree School	Hamilton High School West
McGalliard School	
Mercerville School	Alternative High School
Morgan School	Hamilton Education Program (HEP)
Robinson School	
Sayen School	Hamilton Educational Foundation (HEF)
Sunnybrae School	Mercer County Vo-Tech
University Heights School	Municipal Government
Wilson School	Parent/Teacher Association
Yardville School	

Motions Carried: 6 In favor 0 opposed

VIII. Other Business

Lombardo Scales
To approve Interim Superintendent contract extension to February 28, 2017.

Roll Call
Motion Carried: 6 in favor 0 opposed

1. Dr. Ferrara conveyed her feelings about a sitting board member being a founding member of a proposed charter school in the district. She understands no laws were broken by not divulging this information but feels there should be a policy in place and that this information needs to be disclosed to the board in the future.

Ferrara Kelly
Motion to instruct policy committee to bring forth a Charter School policy no later than March 20, 2017, since proposed charter school phase one applications must be submitted by March 31, 2017.

Board members and Dr. Ficarra discussed several issues regarding charter schools, including the need for a board policy due to the potential conflict of interest of board members being involved with Charter Schools.

Motion Carried: 6 In favor 0 opposed

2. Ms. Lombardo stated she would like to discuss two topics at the next board meeting:
   a.) The overcrowding at Nottingham and
   b.) The Demographic Study. She feels this needs immediate attention.

IX. Hearing of the Public

Dr. Dave Perry
- Stated he feels if you aren't looking out for the district's best interest then you should not run for a position on the board.
- He feels the price for the bleachers at West is too high. He doesn't think we should spend that kind of money on bleachers when special education programs are struggling.

George Fisher
- Stated that charter schools are to be competitive with districts and show public schools a way to improve.
- He feels it is ridiculous to spend $900,000 on bleachers for West. He feels the money should be used for educational needs.
- He stated his concerns that some of the issues the district is having with repairs could have been avoided if the district had a Strategic Plan in place.

Kate Hamm
- Asked if the sign-up sheet for public comment could be kept outside the boardroom because some people might not feel comfortable walking up to the front of the room to sign in.
- She stated she is very disappointed that $900,000 for the West bleacher project was approved. ADA accessibility should be considered before athletics. Athletics are not a legal obligation but ADA accessibility is.

Christine Reuter
- Very upset over the approval of $900,000 for bleachers at West.
- Asked if the sign-in sheet for Public Comment be moved because she often comes late to meetings and doesn't want to walk to the front of the room disrupt the meeting.

Dr. Ficarra stated that Capital Reserve money can only be used for certain things. The money cannot be used for books, paper, classroom supplies, etc.

X. Executive Session

Kelly

WHEREAS, N.J.S.A. 10:4-13 requires adoption of a resolution of the Board to go into Executive Session; BE IT RESOLVED, that the Board, pursuant to the Open Public Meetings Act, New Jersey Title 18A and the Hamilton Township Board of Education Bylaw No. 0166 hereby enters Executive Session to discuss a matter involving:

A. Human resources Matters
   1. Interim Superintendent
B. Negotiations(s)
   1. HTSSA status update
   2. HTASA status update
C. Student Matters
   1. Administrative Hearing
   2. Settlement Agreement

BE IT FURTHER RESOLVED, that the minutes of this Executive Session shall be made public following formal action by the Board and/or at the conclusion of any investigation(s), due process proceeding, or litigation, so long as not prohibited by law and so long as the need for maintaining confidentiality no longer exists.

Kanka Ferrara
To recess to Executive Session.
Motion Carried: 6 in favor 0 opposed

The Board recessed to Executive Session at 8:08 P.M.
The Board resumed in Regular Session at 9:12 P.M.

XI. Curriculum & Instruction Motion

Scales Ferrara
(C & I 13 & 14)
Upon the recommendation of the Interim Superintendent that the Board of Education accepts the findings of the Administrative Hearing Committee for H.N. effective January 25, 2017, as per Confidential C & I Enclosure 13.

Upon the recommendation of the Interim Superintendent that the Board of Education accept the settlement agreement, as per Confidential C & I Enclosure 14.

Roll Call
Motions Carried: 6 in favor 0 opposed

XII. Adjournment
Kelly Scales
To adjourn the meeting.
Motion Carried: 6 in favor 0 opposed

The meeting adjourned at 9:16 P.M.

Respectfully submitted,

DRAFT
Katherine Attwood
Board Secretary

140-17

S.W.,	:	
	:	
PETITIONER,		
	:	
V.		COMMISSIONER OF EDUCATION
	:	
BLACK HORSE PIKE BOARD OF EDUCATION, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on his own behalf, seeking a determination that he is entitled to a free public education in the Black Horse Pike Regional School District. The respondent Board contended that a residency investigation had determined that petitioner resides at an address in Winslow Township, outside of the Black Horse Pike Regional School District.

The matter was transmitted to the Office of Administrative Law (OAL) and a hearing was scheduled for March 21, 2017. Petitioner failed to appear at the scheduled hearing. The OAL sent a notice of petitioner's failure to appear to the Commissioner on April 4, 2017, and subsequently returned the file to this agency. Petitioner has provided no explanation for his failure to appear, despite having had the opportunity to do so.

Upon review of the record, it was determined that this matter is no longer a contested case before the Commissioner. Accordingly, the Commissioner dismissed the petition with prejudice.

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

May 18, 2017

OAL DKT. NO. EDU 545-17
AGENCY DKT. NO. 295-11/16

S.W.,	:	
	:	
PETITIONER,		
	:	
V.		COMMISSIONER OF EDUCATION
	:	
BLACK HORSE PIKE BOARD OF EDUCATION, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter – transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, and including an advisement of petitioner's failure to appear at the scheduled March 21, 2017 OAL hearing – has been reviewed. Petitioner filed no explanation for his failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/18/17
Date of Mailing: 5/18/17

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

THOMAS STRASSLE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured teacher, challenged the actions of the respondent Board in failing to pay his salary after he was suspended without pay for 120 calendar days after the certification of tenure charges. Petitioner contended that the Board's action to withhold his pay subsequent to reinstatement to his tenured position, by way of an October 5, 2016 arbitration decision under the TEACH NJ Act, is unlawful pursuant to *N.J.S.A.* 18A:6-8.3. The arbitrator's decision found that petitioner had engaged in unbecoming conduct, and determined that the appropriate penalty for his actions would be the forfeiture of the 120 days of pay already withheld following the certification of tenure charges. The respondent Board asserted that its actions are a proper exercise of its authority under *N.J.S.A.* 18A:6-14, as petitioner collected unemployment compensation during his 120-day suspension without pay, and that his actions in applying for and receiving such compensation are in contravention of the arbitrator's decision that petitioner forfeit 120 days of pay already withheld following the certification of tenure charges. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; pursuant to *N.J.S.A.* 18A:6-8.3, petitioner was suspended from his teaching position with pay, pending the Board's investigation of petitioner's alleged unbecoming conduct; on April 28, 2016, the Board certified tenure charges against petitioner, and his suspension converted to a suspension without pay under *N.J.S.A.* 18A:6-14; petitioner's suspension converted back to a paid suspension on September 1, 2016, as more than 120 days had elapsed since the certification of tenure charges; an arbitration award was rendered on October 5, 2016, setting forth petitioner's penalty as the forfeiture of the 120 days of pay already withheld following the certification of tenure charges; at the time of the arbitration decision, petitioner was on paid suspension since September 1, 2016; the Board ceased paying petitioner on November 30, 2016, having determined that petitioner was not entitled to his salary because he had collected unemployment benefits during the months of July and August 2016, and was not so entitled as a ten-month employee; however, *N.J.S.A.* 18A:6-14 specifically legislates the time period when the Board may exclude payments to a tenured employee and does not regulate the compensation that the employee may receive while he or she is not being paid; and the Board's assertion that there is an exception to the requirements of *N.J.S.A.* 18A:6-14 when an employee receives unemployment benefits is without merit. Accordingly, the ALJ granted the petitioner's motion for summary decision, and ordered that the Board restore petitioner's salary commencing with the pay period ending November 30, 2016.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

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

Issued 5/18/17

OAL DKT. NO. EDU 00311-17
AGENCY DKT. NO. 312-12/16

THOMAS STRASSLE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Administrative Law Judge's recommended decision for the reasons expressed therein. Accordingly, petitioner's motion for summary decision is granted. Respondent is directed to restore petitioner's salary effective November 30, 2016. A copy of this decision will be forwarded to the Department of Labor and Workforce Development, Unemployment and Disability Insurance Services.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/18/17
Date of Mailing: 5/18/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 00311-17
AGENCY DKT. NO. 312-12/16

THOMAS STRASSLE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,
Respondent.

Edward A. Cridge, Esq., for petitioner (Mellk O'Neill, attorneys)

Christopher B. Parton, Esq., for respondent (Kenny, Gross, Kovats & Parton, attorneys)

Record Closed: March 3, 2017 Decided: April 13, 2017

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, a tenured teacher challenges the actions of the Old Bridge Board of Education ("the Board") in failing to pay petitioner his salary after he was suspended without pay for one-hundred twenty calendar days (120-day) after the certification of

tenure charges. Petitioner contends that the Board's decision to withhold his pay after an arbitrator's decision under TEACH NJ Act and the Tenure Employees Hearing Law, N.J.S.A. 18A:6-1, to reinstate petitioner in his tenure positon and without back pay, violates the provisions of N.J.S.A. 18A:6-8.3 and 18A:6-14.

The Board contends that its actions are a legally proper exercise of its authority under N.J.S.A. 18A:16-14, as petitioner collected unemployment compensation during his 120-day suspension without pay. The Board further contends that it is not obligated to pay petitioner his salary, which they have withheld since November 30, 2016, as petitioner's actions are in contravention of the arbitrator's decision that petitioner forfeit 120 days of pay already withheld following the certification of tenure charges.

Petitioner filed a Verified Petition of Appeal with the Commissioner of Education on December 8, 2016, challenging the actions of the Board and seeking immediate restoration of his salary. Thereafter, on December 29, 2016, petitioner filed a Notice of Motion for Summary Decision with the Commissioner of Education under N.J.A.C. 6A:3-1.12. On January 3, 2017, the Board filed an Answer to Verified Petition of Appeal with the Commissioner of Education.

On January 5, 2017, the Commissioner of Education transmitted this matter to the Office of Administrative Law for a hearing on the merits of the underlying claims raised in the petition. The same was filed with the OAL Clerk's Office on January 9, 2017.

On January 20, 2017, the Board filed with the OAL Clerk's a certification in opposition to petitioner's Motion for Summary Decision, a response to statement of material facts and a brief in opposition to the petitioner's motion for summary decision. [1]

[1] Petitioner had initially filed a Motion for Summary Decision with the Commissioner of Education under N.J.A.C. 6A:3-1.12. However, once the matter is transferred to the OAL, applications for summary decision shall be filed with the ALJ in accordance with applicable rules of the OAL. Summary decision motions in the OAL are governed by N.J.A.C. 1:1-12.5.

Petitioner wrote to the undersigned on January 25, 2017, requesting oral argument in connection with the motion for summary decision. The Board initially opposed petitioner's Motion for Summary Decision, urging that material issues of fact necessitated a plenary hearing. However, after a telephonic prehearing conference on February 24, 2017, the parties agreed that this matter would proceed without the need of a plenary hearing and instead, each party would submit supplemental pleadings in connection with the motion for summary decision and a ruling would be made thereafter. On March 3, 2017, petitioner and the board filed their respective pleadings requesting a ruling by summary decision as to the legal issues raised in the petition and answer.

DISCUSSION

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

A determination whether a genuine issue of material fact exists that precludes summary judgment requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Our courts have held that the "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Anderson, supra, 477 U.S. at 252.

Conversely, it is critical that a favorable ruling on a summary judgment motion not "shut a deserving litigant from his [or her] trial." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 77 (1954).

Both parties concede that the factual background which led to the filing of the petition is not in dispute. Petitioner is a tenured teacher employed by the Board as a ten-month employee, receiving twenty bi-weekly paychecks. On or about September 29, 2015, petitioner was suspended from his teaching positon, with pay pursuant to N.J.S.A. 18A:6-8.3, pending the Board's investigation of petitioner's conduct. On April 28, 2016, the Board certified tenure charges against petitioner to the Commissioner of Education and petitioner's suspension converted to a suspension without pay under N.J.S.A. 18A:6-14. Petitioner's unpaid suspension took effect on May 1, 2016 and continued through June 2016 and the summer months that followed. On September 1, 2016, petitioner's suspension converted to a paid suspension, as more than one-hundred twenty days had passed since the tenure charges were certified on April 28, 2016 (N.J.S.A. 18A:6A-14).

On October 5, 2016, pursuant to the TEACH NJ Act and the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et. seq., an Arbitration award was rendered adjudicating the tenure charges filed against petitioner by the Board. In a written opinion, the arbitrator ruled that petitioner "shall be reinstated to his positon as tenured teacher in the District. The penalty for the proven allegations as set forth ...above shall be reduced from termination to a forfeiture of the 120 days of pay already withheld following the certification of the tenure charges. Therefore, there shall be no back pay awarded in connection with this 120 days loss of pay."

This is where the parties' understanding of "suspension without pay" differs and why this matter is in dispute. At the time the Arbitration award was entered on October 5, 2016, petitioner was on paid suspension since September 1, 2016. The Board ceased paying petitioner on November 30, 2016, as it determined that petitioner was not entitled to his salary because he had collected unemployment benefits during the summer months

of July and August 2016.[2] The Board opined that petitioner was not entitled to unemployment benefits as he is a ten-month employee and is not paid for the summer months, and in addition, he was on suspended pay for 120 days, for the months of May through August 2016. The Board determined further, that petitioner was not entitled to his salary on November 30, 2016, as it interpreted the Arbitration award as ruling that a "forfeiture of pay" against petitioner included all compensation received by petitioner during his 120 suspension-including the unemployment compensation.

The Board has decided to withhold petitioner's pay effective November 30, 2016, pending a determination by the OAL and the Commissioner of Education, as to the correct amount to release to petitioner, net petitioner's salary that the Board is holding in escrow. The Board acknowledges that under N.J.S.A. 18A:6-14, the 120-day suspension period "generally" includes, summer months "even" for 10-month employees like petitioner. The Board is of the opinion, however, that petitioner did not comply with the 120-day suspension period by applying for and receiving unemployment compensation during the said period. The Board does not present any exception to the 120-suspenson rule in N.J.S.A. 18A;6-14 as proof, but does cite several cases for the proposition that any delay that negatively impact the 120-day suspension is counted against the employee, and not counted towards the 120-day period. The same are not dispositive of the issue before the OAL as the petitioner did not cause any delay in the accumulation of the 120-day suspension.

The Board also relies upon the Arbitration Award for authority to withhold petitioner's salary. A review of the Award indicates that the arbitrator's ruling was consistent with N.J.S.A. 18A:6-14; a "forfeiture of the 120 days of pay already withheld following certification of the tenure charges. Therefore, there shall no back pay awarded in connection with this 120 day loss of pay." The Arbitration proceeding is governed by

[2] Petitioner had applied for unemployment compensation on July 10, 2016, and received unemployment benefits through the end of August 2016. Thereafter, petitioner refiled for unemployment benefits in December 2016 (after the Board withheld his November 30 paycheck), and was granted the same. It appears from the pleadings submitted that the Board did not contest the July 10 unemployment filing and did contest the December filing, which initially denied petitioner unemployment benefits. This decision was reversed by the Appeal Tribunal on February 7, 2017, and petitioner was granted unemployment benefits from November 27, 2016 through April 2017. The Appeal Tribunal informed the Board that they can notify the Department of Labor as to any back pay that petitioner received after November 15, 2016.

N.J.S.A. 18A:6-16, and the arbitrator has ruled consistent with the applicable law for said proceedings as allowed under N.J.S.A. 18A:6-14. There is no exception to the 120-day suspension as the Board has carved out for petitioner. The Board argues that the arbitrator had some greater power than allowed by N.J.S.A. 18A:6-14, as the award was not the typical "suspend and restore" decision but an actual "penalty" imposed by the arbitrator. The Board fails, however, to present regulatory proof or cite a case that substantiates this argument.

N.J.S.A. 18A:6-14, provides specifically that the Board is to pay the employee commencing on "the one hundred twenty-first day [following the 120 calendar days of suspension] until such determination is made [excluding the 120 days]." This statutory language explicitly legislates the time period when the Board may exclude payments to a tenured employee and does not regulate the compensation that the employee may receive while he or she is not being paid. For the Board to now imbue an exception to N.J.S.A. 18A:6-14 when an employee receives unemployment benefits, or any compensation, is contrary to the statutory language.

The Board also makes an argument that petitioner should not be allowed to collect unemployment as he has abused the system regulating unemployment benefits. The petitioner cites N.J.S.A. 43:21-5(b), regarding the return of unemployment benefits collected when an individual receives back pay during the unemployment period. Moreover, the Appeal Tribunal ruled that the Board was not prevented from notifying the Department of Labor of any back pay issued to petitioner while he received unemployment compensation after November 15, 2016, which is the date of petitioner's last paycheck.

Accordingly, the Board's motion for summary decision is **DENIED**. Petitioner's motion for summary decision seeking relief in the form of an order directing his restoration to full paid status to November 30, 2016 is **GRANTED**.

ORDER

It is hereby **ORDERED** that the Board's motion for summary decision be **DENIED**. It is hereby **ORDERED** that petitioner's motion for summary decision is **GRANTED**. It is hereby **ORDERED** that the Board is to restore petitioner's salary commencing with the pay period ending on November 30, 2016 through the date of this decision.

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

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

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

April 13, 2017
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: April 13, 2017

Date Mailed to Parties: APR 17 2017

lr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

144-17

ROBERT REILLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the decision of the respondent Board to terminate his employment as Athletic Trainer when the position was abolished due to a reduction in force (RIF) and the responsibilities of his former position were transferred to an outside vendor. Petitioner alleged that his tenure rights were violated, asserting that the Athletic Trainer position was not abolished and that the vendor was given the position without acknowledgment of the petitioner's recall rights. The RIF occurred following a period when petitioner had been suspended with pay pending the outcome of an IAIU investigation concerning allegations of child abuse, which ultimately determined that the allegations against petitioner were unfounded. Petitioner subsequently filed the within petition, and the parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: petitioner's motion for summary decision stated that there were no material facts in dispute; however, petitioner contradicted this in his opposition to the Board's motion for summary decision, where he stated that the Board's motives for outsourcing the position of Athletic Trainer were not based solely on reasons of efficiency and economy; further, petitioner alleged that his position was eliminated due to retaliation based on his filing a notice of claim and providing information that another employee had a criminal history; despite this allegation, petitioner failed to provide documents, statements of potential witnesses or anything else to support this position; respondent, on the other hand, has demonstrated that there was a clear economic reason for the Board to abolish the position of Athletic Trainer and to contract the services to an outside vendor, as petitioner's last salary was $100,363, or $40,000 more than the cost of contracting with the outside vendor to provide Athletic Trainer services. The ALJ concluded that petitioner failed to provide any evidence that the Board's abolition of the Athletic Trainer position was arbitrary, capricious or done in bad faith, and that the Board's contract with the outside vendor was undertaken for reasons of economy, resulting in a savings of $40,000 for the school district. Accordingly, the ALJ denied petitioner's motion for summary decision and granted the Board's motion for summary decision, thereby dismissing the appeal.

Upon comprehensive review, the Commissioner concurred with the ALJ that the Board's decision to abolish the Athletic Trainer position was not arbitrary, capricious or unreasonable. Further, the Commissioner found that the Board's decision to contract with an outside vendor for economic reasons did not violate petitioner's seniority rights. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter and the petition was dismissed.

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

Issued 5/22/17

OAL DKT. NO. EDU 13301-16
AGENCY DKT. NO. 208-7/16

ROBERT REILLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Robert Reilly, and the East Orange Board of Education's (Board) reply thereto.[1]

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons set forth in the Initial Decision – that the Board's decision to abolish the petitioner's athletic trainer position as a result of a reduction in force was not arbitrary, capricious or unreasonable. The Commissioner also finds that the Board's decision to contract the athletic trainer services to an outside vendor for economic reasons did not violate the petitioner's seniority rights. See, *Gillian Impey v. Board of Educ. of the Borough of Shrewsbury*, 273 *N.J. Super* 429, 435 (May 24, 1994) (Unlike a scenario involving "the re-titling of the position ... in order to remove a tenured incumbent, this case involves a statutorily authorized administrative change in the method of providing an educational service for the sole purpose of

[1] The petitioner submitted a response to the Board's reply exceptions that was not considered because there is no provision that authorizes a reply to reply exceptions.

saving money.") Finally, the Commissioner is not persuaded that the exceptions submitted by the petitioner dictate a different result.[2]

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/22/17
Date of Mailing: 5/22/17

[2] Despite the fact that the petitioner filed a motion for summary decision at the OAL stating that there are no material facts in dispute, his exceptions suggest that this matter should not have been decided on summary decision and instead there should have been a hearing with witness testimony regarding the Board's intent behind the elimination of his position. The petitioner also attempts to argue in his exceptions that his motion for summary decision only concerned his recall rights and what occurred after his position was abolished, not the Board's conduct before his position was abolished.

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 13301-16
AGENCY DKT. NO. 208-7/16

ROBERT REILLY,

Petitioner,

v.

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

Respondent.

Paul W. Tyshchenko, Esq., for petitioner (Caruso Smith Picini, attorney)

Avis Bishop-Thompson, Esq., for respondent, (DeCotiis, Fitzpatrick, Cole & Giblin, attorney)

BEFORE: **KIMBERLY A. MOSS**, ALJ

Record Closed: March 27, 2017 Decided: April 11, 2017

STATEMENT OF THE CASE

Richard Reilly, (Reilly or Petitioner) contests his termination by East Orange Board of Education (Board or respondent) due to a reduction in force. On April 28, 2016, Reilly was informed by the Board that his position as Athletic Trainer was going to be abolished effective June 30, 2016 for reasons of economy. On May 10, 2016, the

Board passed a resolution abolishing the position of Athletic Trainer. Petitioner appealed the Board's decision. The appeal was filed with the Office of Administrative Law on September 1, 2016.

PROCEDURAL HISTORY

Petitioner filed a motion for summary decision on March 7, 2017. Respondent filed a reply to that motion on March 31, 2017. Respondent filed a motion for summary decision on March 10, 2017. Petitioner filed opposition to respondent's motion on March 22, 2017. Respondent replied to the opposition on March 27, 2017.

FACTUAL DISCUSSION

Having reviewed the petitioner and respondent's briefs in support of and opposition to motion for summary disposition, I **FIND** the following **FACTS**:

Reilly was a certified, tenured Athletic Trainer at East Orange Campus High School (Campus). He began working for the Board in 2001. Reilly's annual salary for the 2015-2016 school year was $100,363. Reilly was suspended with pay pending an allegation of child abuse and neglect on September 9, 2015. On September 11, 2015, the Board entered a contract with outside vendor SD Gameday to provide a licensed certified Athletic Trainer for Campus due to the suspension of Reilly. On November 3, 2015, petitioner was informed that the investigation was unfounded. He was directed to report to campus on November 9, 2015. Petitioner filed a Notice of Claim against the Board for among other things civil rights violation, retaliation and harassment on December 9, 2015. The Board approved family leave absences for petitioner from November 16, 2015 to November 23, 2015 and January 13, 2016 to June 30, 2016. SD Gameday continued to provide the services of Athletic Trainer at Campus through the end of the 2015-2016 school year.

In March 2016, Dr. Gloria P. Watson, the Acting Superintendent of East Orange School District from March 15, 2015 to June 30, 2016, and the Senior Cabinet began the process to implement a reduction in force due to declining aid from the State,

increase in charter schools and the rising cost of goods and services. During this time Dr. Watson, became aware that the contract with SD Gameday was a significant savings in comparison to petitioner's salary.

On April 28, 2016, petitioner was informed that it was recommended that his position among other positions was to be abolished. On May 3, 2016 petitioner was informed that his position as Athletic Trainer was to be abolished due to budgetary restraints and that he would be non-renewed for the 2016-2017 school year. On May 10, 2016, the Board approved a resolution which included non-renewal of Reilly and abolishing the position of Athletic Trainer. On June 28, 2016, the Board passed a resolution to contract with SD Gameday to hire an Athletic Trainer from July 15, 2016 to June 21, 2017, in an amount not to exceed $60,000.

Reilly alleges that the position of Athletic Trainer was not abolished and that S.D. Gameday was given the position, without given him his recall rights. Petitioner also contends that the Board's motives for outsourcing the Athletic Trainer position were not solely based on efficiency and economy in his opposition to respondent's motion. Petitioner did not address motives of the Board in his motion for summary decision. Petitioner did not include any evidence of any type that the position of Athletic Trainer was abolished in retaliation for his filing of a notice of claim or in bad faith.

LEGAL ANALYSIS AND DISCUSSION

Both parties are requesting summary decision. The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of Rule 4:46-2 and the New Jersey Supreme Court's decision in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523

(1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

In Martin v. Rutgers Cas. Ins Co 346 N.J. Super 320, 323 (App. Div. 202) The Court stated "The record is barren of any evidence that plaintiff had such a license other than her own self-serving assertion to that effect. That is clearly insufficient to create a question of material fact for purposes of a summary judgment motion."

In this matter petitioner's motion for summary decision states that there are no material issues of fact in dispute. Petitioner contradicts this in his opposition to respondent's motion for summary decision states that respondent's motives for outsourcing the position of Athletic Trainer were not based solely on reasons of efficiency and economy and therefore questions of motive or intent are not appropriate for summary decision. Petitioner alleges that his position was eliminated due to retaliation based on filing a notice of claim and providing information that another employee had a criminal history. Other than the allegation of petitioner in the petition there is no evidence of this. Petitioner has not provided any documents, statements potential witness or anything to support this position.

I **CONCLUDE** that Reilly has not presented any evidence to show that the abolition of the position of Athletic Trainer was arbitrary, capricious or done in bad faith.

In his motion for summary decision petitioner's contention is that by outsourcing the position of athletic trainer to SD Gameday instead of re-employing him in the position that the Board violated N.J.S.A. 18A 28-12. In Impey v. Shrewsbury Bd of Education 273 N.J. Super. 429 (App. Div 1994) Impey was a tenured speech correctionest. Shrewsbury abolished her position and contracted with Educational Services Commission of Monmouth County for speech correction services at a savings

of $12,000. Impey alleged that this violated her tenure rights and sought reinstatement. Id. at 431. In Impey the Court stated:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.
>
> The Board's decision to contract with an ESC to provide the speech correction services previously performed by appellant eliminated the need for the position of speech correctionist within the district. Moreover appellant stipulated that the Board would save more than $ 12,000 per year by contracting with an ESC to provide these services. Therefore, we are satisfied that the Board properly abolished appellant's position of speech correctionist "for reasons of economy" and thus did not violate her tenure rights. Klinger v. Board of Educ. of Cranbury, 190 N.J.Super. 354, 357, 463 A.2d 948 (App.Div.1982) ("[R]eduction in force is entirely within the authority of the board if done for reasons of economy."), certif. denied, 93 N.J. 277, 460 A.2d 678 (1983). Id at 434

In this matter like Impey there is a clear economic reason for position of Athletic Trainer to be abolished and the services to be contracted to an outside vendor. Reilly's salary of $100,363 is $40,000 more than the Board will pay SD Gameday for the Athletic Trainer services.

I **CONCLUDE** that the Board abolished the position of Athletic Trainer on May 16, 2016 and contracting those services to an outside vendor, SD Gameday, with a savings of $40,000.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Reilly's motion for summary Decision is **DENIED**.

It is **FURTHER ORDERED** that East Orange Board of Education's motion for Summary Decision is **GRANTED**.

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

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

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

4-11-17

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

Date Mailed to Parties: APR 11 2017

ljb

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

- Petitioner and Respondent's, motions, briefs and exhibits.

148-17

PURSUANT TO THE REFERRAL BY THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY

IN THE MATTER OF THE TENURE HEARING OF BELINDA MENDEZ-AZZOLLINI	:	**BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY**
BY THE SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY	:	**AGENCY DOCKET NO. 219-8/16**

BEFORE: CAROL F. LASKIN, ESQUIRE, ARBITRATOR

APPEARANCES:

On behalf of Belinda Mendez-Azzollini
Caruso Smith Picini, P.C.
Nick Poberezhsky, Esquire
Paul W. Tyshchenko, Esquire
W.P. Tyshchenko, Esquire

On behalf of Irvington Board of Education
The Law Firm of Hunt, Hamlin & Ridley
Ronald Hunt, Esquire

PROCEDURAL BACKGROUND

Pursuant to *N.J.S.A.* 18A:6-16, as amended by *P.L. 2012, c. 26* ("TEACHNJ"), tenure charges were brought by the Board of Education, Irvington Public School, Essex County ("Petitioner", "District" or "Irvington") against Belinda Mendez-Azzollini ("Respondent" or "Mendez-Azzollini" or "Azzollini") on August 19, 2016. Respondent filed an Answer of Evidence/Position in Opposition to the Tenure Charges on September 21, 2016. This matter was referred to me by the Bureau of Controversies and

Disputes on October 3, 2016, for hearing and decision. The hearings in this matter were conducted on November 15, 2016, December 16, 2016, February 15, 2017, and March 2, 2017. Final submissions were received by April 11, 2017, whereupon the record was closed.

THE CHARGES

The Sworn Tenure Charges brought against Belinda Mendez-Azzolini in pertinent part state:[1]

"A. Just Cause Termination
The Respondent had been charged with the following conduct and/or other good cause necessitating the need to terminate her employment with the Irvington School District (hereafter 'Petitioner') for Conduct Unbecoming a Public School Guidance Counselor:

7. During this same time frame, June 16, 2016, it was discovered by the Supervisor of Guidance, Claire Hamm, during an audit of senior transcripts that J.D. had not obtained a passing grade in Geometry, a requirement for graduation.

8. J.D. had obtained a failing grade in Geometry during the 2013-2014, school year and had never made up the grade. Ms. Hamm informed the Respondent of this at the time of the initial senior transcript review in the beginning of the 2015-2016, school year.

9. On June 17, 2016, Ms. Hamm again reminded the Respondent that J.D had not passed Geometry to which Respondent suggested that she check the Historical Grades screen in Power School

[1]With regard to the original charges 1 through 6, the parties stipulated,: "The historical record should reflect that prior to the alleged events giving rise to the instant tenure charges, the district alleges that another incident involving respondent occurred earlier in the same school year for which the district had already taken disciplinary action against respondent. Respondent is challenging the discipline imposed in connection with the earlier incident in a separate grievance procedure, and as such the counts of the district tenure charges against respondent pertaining to that earlier incident are not part of the instant tenure proceedings."
IT 6/6 to 18

and not rely on the student's transcript.

10. Thereafter, Ms. Hamm checked the Historical Grades screen for J.D. and observed a grade of "D" for the 2013-2014 school year. Ms. Hamm was somewhat puzzled by the discovery and questioned how the "D" grade suddenly appeared when the grade on his printed transcript reflected an "F" just two weeks earlier.

11. When questioned, the Respondent could not explain the change, but only mentioned that they should rely on the Historical Grades screen and not the transcript.

12. Thereafter, while reviewing the Historical grades screen, Ms. Hamm discovered that J.D.'s Geometry grade had been changed from an "F" to a "D" on June 15, 2016 at 11:02 am by Belinda Mendez-Azzollini.

13. On June 20, 2016, during the Senior Transcript meeting with the Superintendent, High School Principal, Ms. Hamm and the Respondent, the Respondent was asked directly if she changed J.D.'s. grade, to which she replied "no." Thereafter in a later meeting with her Union President present, the Respondent was again asked whether she changed the grade and again replied "no."

14. At that point, the Respondent was shown a copy of the Historical Grades screen showing that her user code was used to modify the student's grade. She then admitted that she had changed the grade and claimed for the first time that the student had informed her in September 2015, that he had passed Geometry in summer school.

15. Subsequent review of the summer school rosters for 2014 and 2015, did not demonstrate evidence that J.D. ever attended summer school. Additionally, J.D. was questioned on the subject and wrote a statement confirming that he *never* attended summer school or had a conversation with the Respondent about summer school.

16. The Respondent was unable to produce any documentation to support her action of modifying the student's grade. Her conduct constitutes unbecoming conduct for a public school employee." (R-1, P-2)[2]

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[2]Exhibits shall be referenced as J-Joint, P-Petitioner, and R-Respondent. The transcript of the hearing conducted on December 15, 2016 shall be referenced as 1T followed by page/line. The transcript of the hearing conducted on February 15, 2017 shall be referenced as 2T followed by

ISSUE PRESENTED

Has the School District of the Township of Irvington, Essex County, met its burden of establishing by a preponderance of the credible evidence the tenure charges against Respondent, Belinda Mendez-Azzollini?

If so, do the tenure charges warrant dismissal or a lesser discipline?

EVIDENTIARY FINDINGS

At hearing, the parties were zealously represented. Each was given a full opportunity to present testimony, written evidence, cross-examine witnesses and submit post hearing briefs.

Petitioner Irvington proffered:

Claire Hamm - Supervisor of Guidance
Sandra Y. Boone-Gibbs - High School Principal
Bevin Subocz - Director of Technology and Media Services
Dr. Neely Hackett - Superintendent of Schools

Petitioner Belinda Mendez-Azzollini testified on her own behalf in addition to:

Eleanor Gatling - School Counselor - Transcript Coordinator Blue Knights Academy
Eileen Wesley - Irvington High School Social Studies Teacher, President-Irvington Education Association

Based upon a through review of the record, including all relevant exhibits, arguments and observations of the demeanor of each witness, I ***find*** the following as fact:[3]

Irvington Public Schools is a kindergarten through twelfth

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page/line. The transcript of the hearing conducted on March 2, 2017 shall be referenced as 3T followed by page/line.

[3]Controverted evidence will be identified and discussed in *Position of the Parties* below.

grade district, classified as special needs, referred to as an "SDA District." The Superintendent of Schools, Dr. Neely Hackett attended Irvington Public Schools as a child. With the exception of a short tenure as High School Principal at Franklin High School in Somerset County, Dr. Hackett has been employed by the District as a teacher and in a series of progressive administrative positions. (2T236/21-237/11)

Upon her appointment as Superintendent five (5) years ago, Irvington High School's graduation rate was fifty percent (50%). The District is being monitored; the State is seeking a graduation rate of eighty-five percent (85%). The last school year - 2015/2016, Irvington High School's graduation rate was seventy percent (70%). (2T 242/5-22)

Respondent, Belinda Mendez-Azzollini, was hired in 2004 as a Guidance Counselor at the Union Avenue School by its then Building Principal, Dr. Hackett (then known as Nettie Settle). Dr. Hackett was replaced at the middle school by Mr. Joy and ultimately Ronald Bligh. In 2010, Ms. Mendez-Azzollini's contract for employment was non renewed based upon the District's mistaken belief the Petitioner had not worked long enough to obtain tenure. In addition to seeking tenure before the Commissioner of Education, in 2010, Ms. Mendez-Azzollini filed a civil action in Superior Court against Ronald Bligh, then Superintendent Ethel Davion and the Board of Education. On November 7, 2013, Ms. Mendez-Azzollini executed a Settlement Agreement and Release after receiving Eighty

Thousand Dollars ($80,000.00). Neither the District nor the named Defendants made any admission of liability. (J-1)

When Respondent returned to the District, she was assigned to the Blue Knights Academy, a night school program within Irvington Public Schools. When a position opened for a guidance counselor in the high school, Ms. Mendez-Azzollini applied for the transfer which was granted by Dr. Hackett. Thus, Respondent transferred from the night school to Irvington Public High School in or around April 2014. Prior to June 2016, Ms. Mendez-Azzollini was not issued discipline; she earned consistent positive evaluations. (R-10)

GUIDANCE DEPARTMENT

Claire Hamm was appointed Supervisor of Guidance prior to the 2015/2016 school year. Approximately twenty-two (22) guidance counselors service all schools within the District. As to the duties of a high school guidance counselor in Irvington, Ms. Hamm revealed,

> "Q. What does a guidance counselor do?
>
> A. A guidance counselor's role is to support their students in a caseload academically, social development and behavioral development. At the high school level, that means ensuring that your student and your caseload have all the required courses to graduate to make sure that they are progressing academically, make sure their attendance is not becoming an issue, make sure there's no behavior issues to prepare them for colleges and applications and careers, so they really have the full circle of responsibilities for high school students." (1T 13/5-17) (See also R-9 - *Guidance Counselor* Position Description)

At Irvington High School, it is the duty/responsibility of each guidance counselor to ensure students are assigned to courses which fulfill the New Jersey State requirements for graduation. Ms. Hamm disclosed courses required to complete:

> English Language Arts, four years or 20 credits
> Mathematics, three years or 15 credits
> Social Studies, three years
> Science, three years including a lab science - one must be biology
> Physical Education - every year enrolled
> One year of a World Language
> One year of Art
> One year of a career or practical Art
> One half year of financial literacy
> (IT 15/16 to 16/6)

The Guidance Supervisor is responsible for assigning duties to each guidance counselor in the high school. Dr. Hackett informed that within the last three (3) years these assignments have been tweaked. One counselor may be assigned all English learning language students, one counselor may be assigned only Freshman students, one counselor may be assigned special education students.

Since her reassignment to the high school in 2014, Respondent was "responsible for between 250-275" students every school year. (3T429/17) Counselors are also assigned additional duties. These include, *inter alia*, HIB specialist, college and career fairs, college visits, senior awards ceremony, translating transcripts from students of a foreign country. There is an attempt to equalize these roles between the Counselors. (2T319/14 to 321/8) In the school year 2015/2016, Ms. Mendez-Azzollini's

additional duties included assignment as the high school HIB specialist (Harassment Intimidation and Bullying).

SEPTEMBER 2015

Counselors meet their students throughout the year and schedule courses for the next school year. In order to ensure seniors have scheduled all required courses to graduate in June, Principal Boone-Gibbs meets in September separately with the Supervisor of Guidance and each Guidance Counselor. Consistent with this process, in September 2015, Principal Boone-Gibbs and Ms. Hamm requested each Guidance Counselor to provide, for their 2016 graduating students, transcripts and schedules. (1T 126/3-13)

Upon receipt, Ms. Hamm reviewed the approximately three hundred (300) graduating student transcripts before the meetings. In the event a student's transcript evidences he or she will have problems with graduation, students can be assigned a credit recovery course embedded during the school day, after school on the premises, and at the Blue Knights Academy. (1T 126/14 to 127/11) This process was designed to ensure graduating seniors are on track to graduate; given an opportunity to take all required courses.

In preparation for the September meeting, Guidance Supervisor Hamm created a form identifying all graduation requirements with a check list for completion to graduate in June 2016. During this process, she discovered that student J.D. had failed "geometry." (P-4)

The meeting on September 29, 2015, was conducted by Principal Boone-Gibbs and Guidance Supervisor Hamm. When Respondent met with them to review her senior case load, she was informed student J.D. had failed geometry and needed to pass this mathematics course in order to graduate in June 2016. (1T 21/2 to 22/18; 3T 452/19 to 453/21)

NOVEMBER 2015

Upon her transfer to the high school in April 2014, Respondent was assigned Sophomore student J.D. She remained his counselor throughout J.D.'s Junior and Senior years of high school. After J.D. failed geometry during the 2013-2014 school year, Ms. Mendez-Azzollini never addressed this deficiency by scheduling J.D. to another geometry class, credit recovery, or Blue Knights Academy.

Prior to the September 29, 2015, meeting with the Principal and Guidance Supervisor, J.D.'s official transcript evidenced grade F and zero credit for geometry in his Sophomore year. On November 10, 2015, Ms. Mendez-Azzollini changed J.D.'s geometry credit from zero credit to five credits.[4]

Acknowledging she made this change, on cross, Respondent testified,

"Q Now I think I heard your testimony today, it was a

[4]This change was not discovered by the District until the Fall of 2016, after Respondent's suspension. Director of Technology Bevin Subocz, upon request of Dr. Hackett, conducted an in depth review of all grade changes made by Respondent in Power School during the 2015-2016 school year.

little confusing to me but I want to be clear about what you said, I think you said you changed his credits on November 10th, to five credits; is that accurate?
A Yes.
Q On what authority did you do that?
A Because guidance counselors are able to update information.
Q Okay, and what updated information did you get that he had five credits?
A Well, like I said, like I testified before that I don't actually recall it, recall it but if that was the cause and in November we were getting information in to update the audit sheet or their transcripts I may have mistakenly changed it thinking it was summer school grade.
Q Let's stop there, let's stop this.

You know at this point in time in 2014/15, how long have you been a guidance counselor?

ARBITRATOR LASKIN: You mean 15/16?

Q 15/16, how long had you been a guidance counselor?
A Twelve years.
Q You would be considered like a veteran at that point, right, yes, more or less?
A Yeah.
Q It is a very serious thing to change a grade or to give anyone credits that he hasn't earned, you would agree with that statement, wouldn't you?
A Yes. I would never intentionally do that.
Q Let's forget intentionally.
A I would never intentionally fabricate or change any grade.

(3T 453/22 to 455/4)

...
Q Okay, I think the testimony was in November you changed the credit; is that accurate?
A Yes.
Q Did you change the credit and the grade or just the credit?
A Just the credit.
Q What was the grade that you left, was it an F?
A I don't know." (3T 457/3 to 10)

JUNE 2016

The final graduating senior review, under the direction of Dr. Hackett, is conducted every June with each guidance counselor, together with the Supervisor of Guidance and the High School Principal. Each Guidance Counselor's case load of graduating seniors is reviewed to confirm all requirements were met; the student(s) had earned their Irvington High School diploma.

In preparation for this meeting, on June 9, 2016, Guidance Supervisor Hamm directed her secretary to print out all senior transcripts and historical grade screens. (1T 65/25 - 66/7) Ms. Hamm reviewed these records for each the approximately three hundred (300) graduating students. On Friday, June 17, 2016, in preparation for the review meeting scheduled on Monday, June 20, 2016, Claire Hamm sent questions to counselors requesting updated information.

At 8:21 a.m., Supervisor Hamm emailed Ms. Mendez-Azzollini as follows,

> On Fri, June 17, 2016 at 8:21 AM, Claire Hamm <chamm@irvington.k12.nj.us> wrote:
>
> Just a couple of questions that I have after reviewing your senior transcripts...
>
> 1) For J. D., I don't see a Geometry course listed on his transcript. Please advise.
>
> 2) For L. J., I am seeing five years of studies, but only four PE classes. Please advise.
>
> 3) For T. L., if he fails Spanish II and African American History, he will not have enough credits to graduate. Do we have an update from both teachers regarding his status in

both classes at this time?

4) For S. L., I don't see Financial Literacy (or an equivalent) on his transcript. Please advise.

5) For A. M., I don't see an visual/performing art elective. Please advise.

I will need your updates on these five students before you leave for the day today because, as you know, I am meeting with Dr. Hackett tomorrow to review all transcripts.

Thanks so much,
Claire"

Respondent replied, by email:

"From: Belinda Mendez-Azzollini
Date: Fri, Jun 17, 2016 at 1:18 PM
Subject: Re: URGENT: QUESTIONS RE SENIOR TRANSCRIPTS - RESPONSES DUE TODAY FRI JUNE 17, 2016
To: Claire Hamm

can you please call me" (P-11)

Prior to receipt of the Friday email, on Wednesday, June 15, 2016, at 11:02 a.m., utilizing Power School, Respondent modified J.D.'s geometry class grade and credit. To accomplish this task, Ms. Mendez-Azzollini made multiple changes in various quarters of his tenth grade geometry class resulting in the change of the final grade from F to D and credit from zero to five. (P-8)

Complying with Respondent's request, Guidance Supervisor Hamm called asking if J.D. earned a passing grade for Geometry. Ms. Mendez-Azzollini insisted he did. Guidance Supervisor Hamm advised Respondent that J.D. had an F in geometry. Respondent insisted her Supervisor was looking at the wrong computer screen. At hearing, Guidance Counselor Hamm reiterated this conversation

as follows:

> "I am very worried. Does this student have a passing grade for geometry?
>
> And she said to me: Yes, yes, he is fine. Everything is fine. He has a passing grade.
>
> And I said: Well, how can that be? Because I have a transcript that has an F and zero credits.
>
> And she said: No, no, he is fine. You must be looking at the wrong screens.
>
> And I said: Well, I am looking at Historical. Is that not what I am supposed to be looking at?
>
> And she said: Well, yeah, but you must be looking at the wrong thing, because look at it now.
>
> And so while I was on the phone with Ms. Azzollini I did go into the Power School, I did go into the historical grade screen, and sure enough, I saw something different. I saw a D with five credits. So I was very puzzled at that moment and I kept saying to Ms. Azzollini, I don't understand this. How could I have a transcript that says F with zero credits that was printed out a couple of weeks ago and now I am looking at a screen that says a D with five credits? I am really confused.
>
> And she just kept saying: No, its right, it's right. You were probably looking at the wrong screen."
> (1T 28/20 to 29/23)

During this conversation, Ms. Mendez-Azzollini failed to advise her Supervisor that J.D.'s Sophomore Geometry record was changed by her two (2) days previous, on June 15, 2015.

After speaking to Ms. Mendez-Azzollini, Ms. Hamm immediately contacted Director of Technology Bevan Subocz, communicating her concern of "Big Problems with Power School" believing it was a "computer glitch" which caused the grade change. Ms. Hamm added," I wouldn't have in my wildest dreams thought anybody would have gone in and changed a grade." (1T 34/2 to 35/2)

Director Subocz immediately investigated. Her testimony disclosed, upon clicking the final grade in the Power School data

base, an edit stored grade page is opened. Any change in a grade is saved and recorded with the notation of the user. (2T 203/5 to 204/1) Subocz's investigation revealed J.D.'s credit and grade was changed on June 15, 2016. Ms. Subocz relayed her findings; user 3309 made multiple manipulations on J.D.'s transcript. Ms. Hamm requested the identity of user 3309. Upon further investigation, Director Subocz identified 3309 as Respondent, Belinda Mendez-Azzollini. (P-8)

JUNE 20, 2016

Prior to the commencement of the senior transcript meeting, Ms. Hamm informed Dr. Hackett and Principal Boone-Gibbs about the Director of Technology's finding regarding J.D.'s geometry grade. When Ms. Mendez-Azzollini came before the committee, her senior transcripts were reviewed. The final student was J.D. Dr. Hackett's testimony, corroborated by Ms. Hamm, Principal Boone-Gibbs and Respondent exclaimed,

> "We get to J.D. and then she says fine. And Ms. Hamm says are you sure, she says yes, he is fine. So Ms. Hamm says we have an issue because I had a D - there was an F, I am sorry, and now the passing - Ms. Hamm said what did he get in geometry and Ms. Azzollini said a D. And Ms. Hamm said there's a problem because I saw an F when I did my review and now it is a D. So Ms. Mendez-Azzollini said, no, no, he is fine, he is fine. So I believe at that point I said, Ms. Mendez-Azzollini, did you change the grade, she said no.
>
> Q. Who was there when you said that, when you asked the question?
>
> A. Ms. Boone-Gibbs and Ms. Hamm. So I said again because now I am getting a little nervous, I said Ms. Mendez-Azzollini, did you change the grade. She said, no. I think I might have asked her two or three times.

Q. And her answer was the same?

A. Her answer was the same. At that point I knew something was wrong. I didn't quite know what it was. I knew something was wrong." (2T 247/5 to 24)

After the denials, Dr. Hackett interrupted the meeting directing Respondent to return with a Union representative. President of the Irvington Education Association, Eileen Wesley, a high school social studies teacher, returned to the meeting with Respondent. In the presence of her representative, Dr. Hackett again asked Respondent if she had changed any grades. Ms. Mendez-Azzollini expressed, she "had not." (3T 378/20 to 25) Thereupon, Dr. Hackett showed Respondent and Ms. Wesley a copy of the historical grade screen, researched by Technology Director Subocz evidencing that J.D.'s grade was modified by an individual using Respondent's user code. (P-6, P-8)

Soon thereafter, Ms. Mendez-Azzollini acknowledged she changed J.D.'s grade from F to D. Dr. Hackett asked why the grade change was from an F to a D instead of an A, B or C. The Superintendent sought documentation as to why Respondent changed the grade and why that grade was a D. Ms. Mendez-Azzollini informed she believed J.D. had taken Summer school. Thereupon, Director Hackett requested Ms. Wesley accompany Respondent to her office to find the Summer school documentation.

When they left the room, Dr. Hackett directed the Principal to meet privately the student. J.D. informed the Principal he

neither spoke of nor attended Summer school to rectify his geometry failure.

In addition to Ms. Wesley, another counselor and Guidance Secretary assisted to find Summer school lists. Approximately 15 to 20 minutes later, finding no documentation to support her claim, Respondent along with Ms. Wesley returned to the meeting informing the participants of the lack of documentation. Thereupon, Dr. Hackett instructed Ms. Mendez-Azzollini to leave the school grounds, notifying "she would be officially suspended pending further investigation." (2T 225/9 to 10; 3T 467/9 to 469/21)

POSITION OF THE PARTIES

The parties presented argument at hearing and through post hearing submissions; the essence of each is as follows:

School District of the Township of Irvington

The District maintains Respondent's conduct was deliberate and calculated, warranting dismissal from her guidance counselor position at the Irvington Board of Education. She engaged in a series of unethical acts. She had numerous opportunities to cure her failure to provide J.D. a geometry course and/or admit her changes in the Power School data base. Her conduct, the District avers, cannot be rehabilitated by interventions available to a school district.

Irvington views Respondent's defense as lacking genuine

candor as she blamed others and feigned confusion.

Arguing her behavior throughout the 2015-16 school year presents a series of deliberate actions, "unbecoming conduct," Counsel reflected upon her deportment during the senior transcript meeting,

> "The meeting of June 20, 2016, was the culmination of all deception demonstrated by the Respondent, but also another failed opportunity to admit her error and accept the consequences. On this occasion, when confronted with what appeared to be an unauthorized grade and credit change, the Respondent chose to lie to her Supervisor, Building Principal and Superintendent of Schools, when asked repeatedly and simply, did you change the grade? The transgression was further enhanced when the Respondent suggested that the Student himself had told her he had taken summer school and passed the class. This myth was quickly dispelled when the student was called and denied her version. The Respondent finally relented and suggested that she changed the grade in June because she was confused when she audited the student's transcript and noticed that he had an F and 5 credits. What she conveniently failed to disclose to the committee was that there was no confusion to her, since it was she who had changed JD's credits to 5 earlier that year on November 10, 2015. At no point in this process did the Respondent simply take a principled stance and admit her fault.
>
> Here, the Respondent's conduct did not only not meet the high standards expected of public employees, it demonstrated a lack of fundamental honesty and integrity in a position in which guidance is sought by our students. **In re Fulcomer**, 93 N.J. Super. 404 (App. Div. 1967)." (Brief pps 14-15)

Moreover, neither Respondent's years of service, positive evaluations, award recognition, or personal story nullify her conduct, avers the district. Trust is lost between the District and Guidance Counselor Belinda Mendez-Azzollini.

Accordingly, Irvington requests this arbitrator sustain the Tenure Charges and determine dismissal is the appropriate

discipline.

Belinda Mendez-Azzollini

Respondent maintains the fact pattern in this matter is "not illustrative of the type of nefarious, intentional, misconduct that would warrant loss of tenure." Ms. Mendez-Azzollini argues she held a good faith basis "at least in her mind" to change J.D.'s credit based upon her mistaken belief J.D. passed geometry when she made the credit change in November 2015. (Brief at 2, 3)

Acknowledging she is not free from blame, Respondent contends her "serious error" was unintentional. Counsel cites recent tenure cases arguing the loss of tenure in TEACHNJ decisions are predicated on more egregious conduct than Respondents. (See In re Gilda Nicole Harris, Agency Dkt. Nos. 342-11/14 & 379-12/14, final decision, (October 2, 2015); In re Carol Zepralka, Agency Dkt. No. 162-7/15, final decision, (September 4, 2015))

Comparing her actions to those in the cases cited by counsel, Respondent asserts her missteps do not warrant the forfeiture of tenure. (Brief at page 5) Particularly, Ms. Mendez-Azzollini is aggrieved to face punishment for an act that did not violate any District policy - reasoning the failure of the District to have a written policy for processing grade changes is a "severe, even fatal deficiency in the tenure charge."

In addition, Ms. Mendez-Azzollini claims her $80,000 settlement from the District in 2013, J-1, and Dr. Hackett's lack of knowledge of the settlement raises the inference of a potential

inappropriate factor in the District's decision to file tenure charges. Moreover, Dr. Hackett's failure to initially confront Ms. Mendez-Azzollini about J.D.'s grades without any effort to have her union representative present, violated her *Weingarten* rights to union representation.

Listing other mitigating factors, Respondent notes she was burdened with a work load disproportionate to that of other guidance counselors. And, reassignment to an elementary school would obviate the District's concern about any future grade changes. Finally, Respondent views the tremendous impact her loss of position on her family as a mitigating factor. Counsel concludes,

> "As a result, were Ms. Mendez-Azzollini to be terminated, her entire family would lose most of its income, its health insurance coverage, and its retirement income and associated benefits. Such a devastating impact is unwarranted given the foregoing fact pattern. Accordingly, Respondent urges the Arbitrator to exercise her discretion to refrain from penalizing Ms. Mendez-Azzollini beyond what would be appropriate for a first-time offender under the circumstances." (Brief at 12)

ANALYSIS OF EVIDENTIARY FINDINGS

Has the School District of the Township of Irvington, Essex County, met its burden of establishing by a preponderance of the credible evidence the tenure charges against Respondent, Belinda Mendez-Azzollini?

If so, do the tenure charges warrant dismissal or a lesser discipline?

New Jersey provides protection to tenured guidance counselors such as Belinda Mendez-Azzollini from dismissal for "unfounded,

flimsy or political reasons." Spiewak v. Rutherford Board of Education, 90 N.J. 63, 73 (1982) The Statute expresses, *inter alia*, tenured staff "shall not be dismissed or reduced in compensation except for inefficiency, incapacity or conduct unbecoming such a teaching staff member or other just cause...." *N.J.S.A. 18A:28-5.* While "conduct unbecoming" is not defined by statute, it is an "elastic standard" determined on a case by case basis, embracing a wide range of conduct. (In The Matter of Tenure Hearing of Thomas Strassle and the School District of the Township of Ulbridge, Middlesex County, Agency Dk. No. Number 131-5/16 (Biren, October 5, 2016).

At all times, the District maintains the burden of establishing by a preponderance of the credible evidence Brenda Mendez-Azzollini engaged in conduct unbecoming a public school guidance counselor. Upon consideration of this record, with emphasis upon resolution of the credibility of the witnesses, I ***find*** the District has met its burden.

The evidentiary findings above reveal the District has established Belinda Mendez-Azzollini engaged in the conduct outlined in *Charges 7 through 16, infra* at pages 2-3. Her behavior resulted in the inability of J.D. to graduate with his class in June 2016. J.D. had no knowledge of this possibility until the day the students practiced their graduation ceremony. From June 2014 through June 2016, Respondent failed to provide him

opportunity to obtain a passing grade in geometry, a requirement for graduation. While Respondent's conduct affected only one student, J.D., her actions from November 2015 through June 20, 2016 present a series of an intentional deliberate acts establishing conduct unbecoming.

During her testimony, and in argument, Ms. Mendez-Azzollini repeatedly claimed she did not "intentionally fabricate or change any grade"; that she "mistakenly changed" the credits and grade. Reviewing the record and Respondent's demeanor during hearing, I ***find*** her position unworthy of belief. Respondent's testimony was not credible.

Even after finally admitting she was "untruthful" to Dr. Hackett, Principal Boone-Gibbs and Guidance Supervisor Hamm at the senior transcript meeting, Respondent attempted to limit her culpability. On direct,

> "Q. Now you heard obviously the testimony from a number of people indicating that you were untruthful during the meeting, did you deny changing J.D.'s grade at all?
>
> A. At first, yes, I did. My mind wasn't clear in that meeting, I actually was coming back from suspension I was in the rubber room five days prior to that and I panicked, I was scared and I definitely wasn't thinking clearly." (3T 423/18 to 424/1)

Ms. Mendez-Azzollini intentionally, on November 10, 2015, changed J.D.'s geometry credit from zero (0) credits to five (5) credits. Ms. Mendez-Azzollini purposefully made numerous manipulations in Power School on June 15, 2016 resulting in J.D.'s final "D" geometry grade with five (5) credits. Ms. Mendez-

Azzollini deliberately, pre-meditatively, and wantonly lied to Guidance Supervisor Hamm on June 17, 2016 that J.D. had a passing grade, claiming "everything is fine" and the "wrong screen" was being viewed. Ms. Mendez-Azzollini, on at least three (3) occasions on June 20, 2016 at the senior transcript meeting, consciously lied to Superintendent Hackett, Principal Bone-Gibbs and Guidance Supervisor Hamm asserting she did not change J.D.'s geometry grade. And, when she finally acknowledged she made the changes, Ms Mendez- Azzollini "lied" on J.D- the student she was charged to protect.[5]

Accordingly, this record is patently clear. Irvington School District has established by a preponderance of the credible evidence Ms. Mendez-Azzollini engaged in the actions expressed in paragraphs 7 through 16 of the Tenure Charges, *Conduct Unbecoming a Public School Guidance Counselor.*

Does the finding of Conduct Unbecoming a Public School Guidance Counselor warrant dismissal or a lessor discipline?

Brenda Mendez-Azzollini, prior to the 2015-2016 school year, served both the District and her students in performing the duties of a guidance counselor (R-9). These duties included, *inter alia*,

> "(GUIDANCE COUNSELOR
>
> DUTIES
> The Guidance Counselor is responsible for, but not limited to the following duties:
>
> 1. Assemble, maintain and interpret information regarding

[5] See Dr. Hackett's rationale for seeking dismissal.(3T 264/12 to 267/5)

pupils

2. Plan and supervise advance scheduling and orientations as required

3. Counsel pupils individually and in groups

4. Consult with teachers and other school staff members regarding the adjustment of individual pupils

5. Conduct conferences with parents in order to help them better understand and assist in the educational, vocational, personal and social adjustment needs of their children

6. If necessary, adjust the programs of pupils having difficulty in school

7. Identify pupils who require evaluation by the Child Study Team, collate the data necessary for the referral and refer these pupils to the Team after notification to the child's parents

8. Schedule case conferences between the Team and the faculty

9. Coordinate the implementation of the Child Study Team recommendations in the school

10. Participate in the school testing program and assist in interpreting the test results to parents, pupils and teachers" (R-9)

The District views these duties as requiring ethics and the ability to be trusted, reviewing confidential documents and engaging with children, colleagues, supervision, and parents. If she had not changed J.D.'s grade, or had admitted her mistake, the District would not have sought her dismissal. Dr. Hackett, explained,

> "But she changed the grade so she wouldn't get in trouble. In my world and how I believe you take whatever consequence comes your way when you make a mistake but you do not change a grade and possibly allow a child to get a diploma who has

not earned it. You do not do that, you say Dr. Hackett, Ms. Hamm, Ms. Boone-Gibbs, I made a mistake, I never made sure this kid was re-enrolled in geometry. And then I would have to scramble and make it happen. I am not saying it wouldn't have been a consequence for her but it wouldn't have been tenure charges. It wouldn't have been my belief that tenure charges. Tenure charges came from the fact I cannot trust her again." 2T 265/16 to 266/3)

Seeking a lesser discipline than dismissal, Respondent raised defenses and requests for this arbitrator to consider mitigating factors as follow:

1. *Failure of the Board to have a written policy on grade changes*. This failure, Respondent argues, is a fatal flaw to the tenure charges. The record, however, does not support this position. Rather, testimony revealed all employees recognize documentation is necessary to change grades, and prior approval is required.

2. *Weingarten Rights*. Ms. Mendez-Azzollini claim her statutory rights were violated is not consistent with this record. Dr. Hackett appropriately stopped the senior transcript meeting, directing Respondent to return with Union representation, after Respondent lied about changing J.D.'s grade. She was not obligated to do so at the commencement of the meeting wherein the transcripts of all the seniors' Respondent counseled were reviewed.

3. *Bias and Burdens*. Respondent did not proffer any corroborative evidence supporting her inference Dr. Hackett held an inappropriate bias toward her due to the 2013 Settlement of her

2010 Civil Action, J-1. Dr. Hackett hired Ms. Mendez-Azzollini as a guidance counselor in 2004 and approved her request for transfer to the high school in 2014, after Respondent received eighty thousand dollars ($80,000) in settlement. Likewise, Respondent failed to present documentary or testamentary evidence in support of the assertion her duties and work burdens were greater than any other guidance counselor and/or affected her behavior.

Finally, Respondent's suggestion that placement in an elementary school could obviate District concern as these students do not receive grades, is not an appropriate request for mitigation. The district cannot be required to limit its ability to assign Guidance Counselors where needed.

Brenda Mendez-Azzollini's conduct in the school year 2015/2016 cannot be rehabilitated by workshops, professional development courses, or any interventions available to Irvington. Her conduct has broken the level of trust the District expects to rely upon for a guidance counselor to perform requisite duties, R-9.

AWARD

The School District of the Township of Irvington, Essex County has established Belinda Mendez-Azzollini engaged in the actions expressed in paragraphs 7 through 16 of the Tenure Charges, *Conduct Unbecoming a Public School Guidance Counselor.*

There is insufficient evidence in this record to support a

discipline less than dismissal. Accordingly, Belinda Mendez-Azzollini engaged in unbecoming conduct constituting just cause for dismissal.

DATED: 5/25/17

Carol F Laskin
CAROL F. LASKIN, ESQUIRE

STATE OF NEW JERSEY :

COUNTY OF CAMDEN :

I CERTIFY that on May 25, 2017

I, CAROL F. LASKIN, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Decision and Award.

DATED: May 25, 2017

Lynda A Green
NOTARY PUBLIC OF THE
STATE OF NEW JERSEY

LYNDA A GREEN
ID # 2316329
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires June 28, 2019

149-17

IN THE MATTER OF THE TENURE HEARING OF IVONNE SAAVEDRA, SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,

AND

IN THE MATTER OF THE TENURE HEARING OF IVONNE SAAVEDRA, SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In these consolidated cases, the petitioning Board alleged that respondent, a tenured clerical employee, illegally obtained and disclosed student records, improperly obtained free and reduced lunch benefits for her son, and abused sick leave. Tenure charges were filed with the Office of Administrative Law on November 15, 2011 and January 18, 2012; a criminal complaint alleging, *inter alia*, official misconduct in violation of *N.J.S.A.* 2C:30-2 was filed by the Hudson County Prosecutor on August 30, 2011. The matter was subsequently held in abeyance and placed on the inactive list. A lengthy procedural course culminated in a Superior Court order in May 2016, resulting in respondent's admission into a pre-trial intervention program (PTI) – a condition of which was that Ms. Saavedra forfeit her public employment with the school district, as well as any future right to public employment. Respondent successfully completed PTI, and the criminal complaint against her was dismissed in January 2017.

The ALJ found that the tenure charges against respondent have been rendered moot by the forfeiture of her position via order of the Superior Court. Accordingly, the ALJ ordered the charges against respondent dismissed as moot.

The Commissioner concurred with the ALJ's conclusion that the tenure charges against respondent are moot; as such, there is no justiciable controversy before the Commissioner. Accordingly, the Initial Decision was adopted as the final decision in this matter, and the tenure charges were dismissed as moot.

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

Issued 6/02/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 13732-11
AGENCY DKT. NO. 301-10/11

IN THE MATTER OF THE TENURE HEARING OF IVONNE SAAVEDRA, SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY.

OAL DKT. NO. EDU 00782-12
AGENCY DKT. NO. 370-12/11

IN THE MATTER OF THE TENURE HEARING OF IVONNE SAAVEDRA, SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY.

Kevin Hanly, Esq., for petitioner, North Bergen School District

Jamison M. Mark, Esq., for respondent, Ivonne Saavedra, (Mark Law Firm, attorneys)

Record Closed: April 17, 2017 Decided: April 18, 2017

BEFORE **ELLEN S. BASS**, ALJ:

PROCEDURAL HISTORY FINDINGS OF FACT

In these consolidated cases, the North Bergen School District, (the District) alleged that Ivonne Saavedra, (Saavedra), a tenured clerical employee, illegally obtained and

adversity of interest. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff'd, Comm'r (May 3, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>; S.J. v. Bd. of Educ. of Mountain Lakes, EDU 07081-03, Initial Decision (October 7, 2003), aff'd, Comm'r (Nov. 17, 2003), aff'd, St. Bd. (Feb. 3, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>. Saavedra has forfeited her public employment, rendering the issues raised by the pleadings academic.[1]

ORDER

Based on the foregoing, the tenure charges against Saavedra are **DISMISSED**.

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

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

[1] The order of the Superior Court was consistent with the spirit and intent of N.J.S.A. 2C:51-2, which provides for forfeiture of public employment upon conviction of a crime of the third degree or higher. Public misconduct is a crime of the second degree. N.J.S.A. 2C:30-2. While PTI is a diversionary program that allowed Saavedra to avoid conviction, clearly forfeiture of her employment with the District was the *quid pro quo* for admission into PTI. See e.g.: State v. Bender, 80 N.J. 84 (1979).

APPENDIX

Exhibits

For petitioner:

P-1 Order admitting defendant into PTI

P-2 PTI Order of Dismissal

For Respondent:

None

150-17

STEVEN BALDWIN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – who had been employed as Head Custodian in the respondent Board's school district since May 2004 – contended that his tenure rights were violated when he was reassigned to the position of Second Shift Custodian in January 2016, and his salary was reduced by the elimination of the additional salary/stipend he had previously received as Head Custodian. The Board denied that its action violated petitioner's tenure rights. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue, and the matter is ripe for summary decision; the Board's contention that petitioner is barred from seeking relief from the Commissioner because he failed to file a grievance regarding his reduction in salary is without merit, as is the Board's argument that the petition is time-barred; petitioner in this matter has tenure and the rights associated with that status, which include a right not to suffer a reduction in compensation unless guilty of the offenses statutorily defined in *N.J.S.A.* 18A:17-3; the "stipend" at issue here was not provided for services that were "extra-curricular" or "extra duty", but rather were part and parcel of petitioner's primary custodial duties; the "stipend" here was not distinguished from his base pay in the annual notices provided to petitioner of his salary for the next school year, and pension contributions were deducted based on his total compensation. The ALJ concluded that the contractual designation of a "stipend" does not override the actual treatment by the Board of the amount of money so designated in the contract. Accordingly, the petitioner's motion for summary decision was granted and the Board's cross-motion was denied. The ALJ ordered the Board to restore petitioner's salary to what he was receiving before his reassignment, with the stipulation that he shall receive that difference only until such time as the salary designated for custodians surpasses the current level designated for Head Custodians, including the so-called "stipend".

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

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

June 5, 2017

150-17

OAL DKT. NO. EDU 8132-16
AGENCY DKT. NO. 109-4/16

STEVEN BALDWIN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Administrative Law Judge's recommended decision for the reasons expressed therein. Accordingly, petitioner's motion for summary decision is granted and respondent's cross-motion for summary decision is denied, consistent with the terms set forth in the Initial Decision.[1]

IT IS SO ORDERED.[2]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/05/17
Date of Mailing: 6/06/17

[1] The Board shall restore to petitioner the salary he has not received since his reassignment from Head Custodian to Second Shift Custodian, *i.e.*, the difference between the Head Custodian salary – including the "stipend" – and the custodian salary. Furthermore, petitioner shall only receive the difference in salary until such time as the salary designated for custodian surpasses the current salary for Head Custodian (inclusive of the "stipend").

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8132-16
AGENCY DKT. NO. 109-4/16

STEVEN BALDWIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,
Respondent.

George T. Syrek, Esq., for petitioner (Bucceri & Pincus, attorneys)

Michael I. Goldman, Esq., for respondent (Florio, Perrucci, Steinhardt & Fader, attorneys)

Record Closed: February 23, 2017 Decided: April 19, 2017

BEFORE **JEFF S. MASIN,** ALJ t/a:

Steven Baldwin filed a Verified Petition on April 11, 2016, with the Commissioner of Education in which he complained that the Board of Education of West New York reduced his salary, in violation of his tenure rights, as guaranteed by N.J.S.A. 18A:17-3. According to the Petition, Baldwin was employed by the Board of Education as a Head Custodian, commencing on May 1, 2004. On January 14, 2016, he was notified that he would be reassigned to the position of Second Shift Custodian, a position he began working on January 15, 2016. According to his Petition, as a Head Custodian Mr. Baldwin received additional salary/stipend above that he would receive as a custodian. When he was reassigned to the position of Second Shift Custodian his salary was

reduced by the elimination of the additional salary/stipend. It is this reduction from which he seeks relief.

The Board of Education denied that its action violated Mr. Baldwin's tenure rights. The Commissioner transferred the contested case to the Office of Administrative Law on June 2, 2016. On December 5, 2016, petitioner Baldwin filed a motion for summary decision. The Board filed its own motion for summary decision on that date as well. The case was assigned to an administrative law judge, however, due to the judge's extensive calendar the matter was reassigned to this judge, sitting on recall, on March 15, 2017, for the purpose of resolving the cross-motions for summary decision. The parties each responded to the cross-motions and then filed replies. In addition, the parties filed a Stipulation of Facts and a Supplemental Stipulation of Facts. This Supplemental Stipulation was received on February 23, 2017, at which time the record closed for the purposes of determination of the motion.

The lengthy Stipulation of Facts, consisting of twenty-one numbered items with attached exhibits, and the Supplemental Stipulation of Facts, consisting of four additional numbered items and exhibits, are incorporated in this decision as exhibits. Additionally, **each of the numbered stipulations is adopted herein as FINDINGS OF FACT** as if recited in full.

According to the stipulated facts, Mr. Baldwin was employed by the Board beginning May 1, 2004 through June 30, 2004, as a Head Custodian. Thereafter, he was employed by the Board in each of the school years from 2004-2005 through 2015-2016. In each of the years he was again employed as a Head Custodian. The parties agree that Mr. Baldwin held tenure with the Board. Additionally, they agree that according to the contractual agreement between the Board and the West New York Education Association, "Individuals assigned to the position of Head Custodian received a stipend in addition to their annual salary." Exhibit J-20, which is a copy of the Agreement for the period July 1, 2012 through June 30, 2015, contains a provision that provides for a "Head Custodian stipend," which is designated at different levels for "High School" and "Elementary." The Stipulation also identifies a series of letters sent by the Board to Mr. Baldwin during various years which simply advise him that his salary for

the year identified in the letter is a specific dollar figure. As an example, the letter sent to Baldwin on April 30, 2014, reads as follows: "Dear Stephen Baldwin: This is to inform you that your salary for the 2014-2015 school year is $41,132."

The parties agree that for the 2015-16 school year Baldwin's base salary was $35,042, plus $1,350, an additional amount designated in the Agreement as a "Black Seal" "stipend" because he has a boiler license. In addition, the Head Custodian "stipend" applicable for him was $4,740.

On January 14, 2016, Baldwin was advised of his reassignment from Head Custodian to Second Shift Custodian at PS#4. His salary was then reduced by the "Head Custodian stipend" in the amount of $4,740 (pro rata). Mr. Baldwin continues to be employed as a custodian by the Board for the 2016-2017 school year, with a base salary of $35,042, plus the boiler license "stipend." The applicable head custodian "stipend" for 2016-2017 is $4,740.[1] The Supplemental Stipulation of Facts provides that

1. The contractual stipend paid to Head Custodians employed by the respondent is included and paid as part of their regular salary check. There is no separate check for the Head Custodian contractual stipend.

2. Standard deductions and withholdings such as taxes and pension contributions, are based on the full amount of the salary checks paid to Head Custodians. The full amount includes base salary plus Head Custodian contractual stipend.

It is also noted that the petitioner did not receive a salary notice for the 2015-2016 school year.

In response to the petitioner's motion for summary decision, the Board initially argues that Mr. Baldwin failed to utilize the administrative remedies provided under the collective bargaining agreement between the Board and the Education Association. Specifically, the Board points to Article IV, subsection C, which reads as follows

[1]The Board's notice to Baldwin of January 11, 2017, states that his salary "effective June 1, 2016 to March 30, 2017 will be "Step 16—$38,863.00." This amount does not reflect a salary that includes the "so-called "Head Custodian stipend."

> No employee shall be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional opportunity without just cause. Any such action asserted by the board, or agent or representative thereof, shall be subject to the grievance procedure set forth in Article 3.

As Mr. Baldwin never filed any grievance concerning the reduction in salary, he is barred from seeking relief from the Commissioner. In addition, the Board contends that the claimant is time-barred, because Article 3 of the Agreement provides that such a grievance must be filed within thirty school days from the event or condition, or from the time that the person knew or should have known about same. As no petition has ever been filed, Mr. Baldwin has waived his right to seek relief relating to the alleged claim.

In addition to these grounds, the Board contends that if the Commissioner asserts jurisdiction to decide this matter despite the failure of the petitioner to utilize the grievance procedure, the matter must be dismissed and the Board granted summary decision. This result is dictated because the Head Custodian stipend is not salary and therefore is not subject to the restriction on the reduction of salary contained in N.J.S.A. 18A:17-3.

In responding to the Board's motion, Mr. Baldwin contends that, since tenure rights are statutory, an allegation of a violation of tenure rights falls within the statutory jurisdiction of the Commissioner of Education. The grievance procedure contained in the collective bargaining agreement is inapplicable to the dispute. As the Verified Petition was filed with Commissioner within the required ninety days following the Board's action, it was timely filed. Finally, Baldwin asserts that the Board paid him a single salary, one which contained the Head Custodian "stipend" and from which deductions, including pension deductions, were made. Under applicable case law, the petitioner's right to receive that full salary without reduction unless such be based upon statutorily defined grounds is protected by the tenure statute.

N.J.S.A. 18A:6-9 provides that the Commissioner has jurisdiction over disputes regarding "Controversies and disputes arising under the school laws." It has been held in a number of cases that the Commissioner does not have jurisdiction over contractual

disputes. Board of Education, East Brunswick Township v. Township Council in East Brunswick, 48 N.J. 94, 102 (1966). Decisions involving disputes concerning non-tenured employees which arise under provisions of contracts and which do not involve "statutory educational entitlement" have been held to be outside the Commissioner's jurisdiction. However in the present matter, while the contractual provision cited by the Board states that an employee asserting that he has been reduced in compensation shall present a grievance, the employee here has tenure and the rights associated with that status are protected by a statute which clearly involves an "educational entitlement." Indeed, N.J.S.A. 18A:17-3 provides that "every public school janitor . . . hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended reduce compensation . . . or except for neglect, misbehavior or other offense. . . ." Mr. Baldwin's position with the Board, whether characterized as "Head Custodian" or merely as "custodian," most assuredly falls within the definition of "janitor." Thus, his right not to suffer a reduction in compensation unless guilty of the statutorily described offenses is protected by statute. The Commissioner most assuredly has jurisdiction over matters arising under the Tenure Act. While the Legislature has determined to provide for arbitration as the means for resolving at least one aspect of the protections accorded by the tenure, that is, the removal of tenure, at present, matters involving the protections associated with the holding of tenure, such as the right to certain positions or the right to be protected against the reduction of salary, have not been the subject of legislative action reassigning the jurisdiction to resolve such disputes. No authority has been cited by the Board suggesting the ability of parties to a negotiated contract between the Board of Education and an Education Association to oust the Commissioner from jurisdiction over a "dispute arising under the school laws." The rights accorded by the Tenure Act, and the protections thereunder, involve matters of educational expertise which absent some other legislative directions, are within the special expertise of the Commissioner. The Tenure Act defines the specific grounds which allow for reduction of compensation for a tenured employee such as a janitor. The collective bargaining agreement uses different language to describe the grounds upon which such action may be taken. While the contractual "just cause" may well encompass the statutory terminology of "during good behavior . . . neglect, misbehavior or other offense," it is entirely conceivable that the contractual term could incorporate conduct and actions falling outside the

appropriate definition of the statutory terms. Therefore, it appears that it is for the Commissioner and not an arbitrator to determine whether a tenured janitor may suffer a reduction in compensation that is otherwise protected by tenure rights. Therefore, the Board's application to dismiss the matter for failure to utilize the grievance procedure is **DENIED**.[2] Further, I **FIND** that the Petition was filed with the Commissioner in a timely manner.

Petitioner moves for summary decision based upon his tenured status as a custodian and his contention that the elimination of the money he was paid while serving as a Head Custodian is money protected from reduction due to that tenured status. All those holding the position of "janitor," regardless of how the position is styled, come within the statutory protection. In Barnes, et al. v. Bd. of Ed., City of Jersey City, 85 N.J. Super. 42, 45-46 (App. Div. 1964), certif. den. 43 N.J. 450 (1964), the court noted

> It is appellant's contention that the statutory coverage does not extend to the entire janitorial and custodial staff but is limited to the positions specified. Thus, appellant argues that an assistant janitorial supervisor is not covered, nor utility men, nor a groundskeeper.

The court rejected this approach

> Our consideration of the statutes in the light of the principle of liberal construction satisfies us that the Legislature used the terms janitor, custodian, etc., in a generic sense with the intent to include all janitorial and custodial employees.

Thus, petitioner does not argue that he had tenure in a position of Head Custodian, but that as a custodian his tenure right protected him from having his compensation reduced without cause as defined by the statute. The Board's contention, however, is that the additional money petitioner earned while acting as a Head Custodian is not part of that compensation protected by the petitioner's tenured status as a janitor.

[2] Of course, no arbitration of this dispute has occurred, so there is no concern that resort to the Commissioner is providing the petitioner with a second chance to avoid the reduction. No issue of collateral estoppel, or any concern about conflicting decisions, affects this case.

In Reinertsen v. Bd. of Ed., Tp. of East Brunswick, www/libweb/collections/oal/final/edu06574-07.pdf, the administrative law judge discussed a similar contention that money paid to Reinertsen as a head custodian was a stipend, and not protected by his tenured status.

> the petitioner has stated that this stipend was actually part of his base salary and was subject to pension payments. (Petitioner's letter brief in opposition to Respondent's Motion, Feb. 12, 1998). If this is shown to be correct, then the additional money is properly included as part of petitioner's compensation, and in order to be reduced the Board of Education must comply with the requirements of N.J.S.A. 18A:17-3 (reduction in compensation allowed only as the result of a reduction in force, or for misbehavior, neglect or other offense) and N.J.S.A. 18A:6-9 et seq. (hearing with the appropriate due process). The Board did not so comply.
>
> The Board of Education's argument that the additional money was merely a stipend must fail. A stipend is more closely associated with compensation to employees providing additional services than those normally included within their regular employment duties. For example, a teacher who doubles as a coach of a school's sports team or as a yearbook editor/supervisor is often paid by way of stipend. In these circumstances, the money is not considered part of the teacher's salary and is not subject to pension payments. . . . the petitioner in the present case was provided additional compensation for services directly related to his primary employment as a custodian. . . . the petitioner claims that the extra compensation was subject to pension payments. Pursuant to the Teachers' Pension and Annuity Fund Law, N.J.S.A. 18A:66-1 et seq., pension payments are deducted from only "salary" of all employees who are members of the fund. See N.J.S.A. 18A:66-107(a). Since it is found that the "stipend" was subject to pension payments, the money should be properly regarded as salary. Any reduction of this salary cannot be imposed by the Board of Education upon the petitioner except for neglect, misbehavior or other offense, or reduction in force, and only then after a hearing. N.J.S.A. 18A:17-3.

The Commissioner affirmed the judge's decision. Here too, according to the stipulated facts, standard deductions, including pension contributions, were made based upon the "full amount of the salary check paid to Head Custodians. The full amount includes base salary plus Head Custodian contractual stipend." And the Board made no distinction in its annual letters to Baldwin announcing his compensation for the coming year between the base salary and the stipend.

The Board attempts to distinguish Reinertsen because there is no mention in that decision of any collective bargaining agreement which, as here, sets out a stipend for the Head Custodian position.[3] However, as Judge Reback noted in Reinertsen, and as here, this "stipend" is not paid for activities that are unrelated to or outside of Baldwin's "primary employment as a custodian" and pension deductions were taken from the entire compensation, not only from the "base salary." The letters noticing Baldwin as to the compensation refer only to "salary" and do not separate out from that term, the so-called "stipend." While it is unclear whether there was actually a contract in Reinertsen that established the "stipend," the existence of the agreement here does not support a different outcome from that in Reinertsen.

The Board relies on two cases. Schipman and Zeitz v. Piscataway Twp. Bd. of Ed., 1989 S.L.D. 2010 (May 25, 1989) is not helpful, for the claim there was of tenure in a janitorial supervisor position, but here petitioner does not assert that he has tenure as a "Head Custodian," but only as a custodian. He claims that the salary he received is protected from reduction without resort to the provisions of the statute due to his "custodian" tenure, not through some claim based upon his being able to maintain himself through tenure as a Head Custodian. Dignan v. Bd. of Ed., Rumson-Fair Haven Regional School Dist., 1971 S.L.D. 336, aff'd. 1974 S.L.D. 1376 (State Board of Education); aff'd. 1975 S.L.D. 1083 (App. Div.) involved a claim regarding an extra-curricular assignment as a faculty advisor. The decision determined that there was no tenure protection for such extra duty assignments. Again, here, Baldwin's work as a Head Custodian was not "extra-curricular," was not "extra duty," but was a part of his "primary employment as a custodian." Neither of these cases affects the weight to be given here to the Reinertsen decision.

Based upon the stipulated facts, I **FIND** that Mr. Baldwin was for many years assigned as a Head Custodian and was paid a salary that included as a part thereof, what the agreement between the Board and the Education Association referred to as a stipend for the Head Custodian position. The Board provided notice yearly to Baldwin

[3]The initial decision refers to a "pay schedule."

of the "salary" to be paid to him for the next school year, without distinguishing between portions of that "salary" such as "base pay" and "stipend." The Board deducted pension contributions from this "salary," again without carving out from that from which said contributions were taken any amount designated as "stipend" or otherwise. The Board determined in January 2016, that Baldwin would be reassigned to a position as Second Shift Custodian PS#4. When he was reassigned, his "salary" was reduced by an amount equal to the "Head Custodian Stipend," pro-rated from $4,740. The Board did so without resorting to the grounds or the process provided in N.J.S.A. 18A:17-3 for reduction in compensation of a tenured "janitor." ("neglect, misbehavior or other offense").

I **CONCLUDE** that the Board's action cannot stand. The contractual designation of a "stipend" does not override the actual treatment by the Board of the amount of money so designated in the contract. Clearly, the case law, Reinertsen, supra, existing at the time that Baldwin was employed by the Board as a Head Custodian, May 1, 2004, and thereafter, taught that a stipend was something other than what Baldwin was given and was intended for services unlike those he provided, services that were neither "extra-curricular" nor "extra duty," but were instead part and parcel of his "primary" custodial duties.

Conclusion and Order

I **CONCLUDE** that the petitioner's motion for summary decision is **GRANTED** and the respondent's cross-motion for summary decision is **DENIED**. **IT IS HEREBY ORDERED** that the Board shall restore to Mr. Baldwin such salary as he has not received since his reassignment, the difference between the custodian salary and the Head Custodian salary, including the so-called "stipend." However, I agree with the Board that Baldwin is not entitled to receive the difference between the salary designated for a custodian and that for a Head Custodian indefinitely. He shall receive that difference until such time as the salary designated for custodians surpasses the current level designated for Head Custodians, including the so-called "stipend." See Potocki v. Bd. of Ed. of the Princeton Reg' Sch. Dist., http//www/libweb/collections/oal/final/edu06574-07.pdf.

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

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

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

April 19, 2017
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency: 4/19/17

Date Mailed to Parties: 4/19/17

mph

EXHIBITS

Joint Exhibits

J-A Stipulation of Facts, with attached J-1 through J-22

J-B Supplemental Stipulation of Facts, with attached J-23

J-C Agreement between West New York Board of Education and West New York Education Association, July 1, 2012 through June 30, 2015

For petitioner

None

For Respondent

R-1 Certification of Allan C. Roth, Esq.

R-2 Certification of Michael I. Goldman, Esq.

151-17

A.P., ON BEHALF OF MINOR CHILD, M.S., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In October 2016, *pro se* petitioner appealed the determination of the respondent Board that her daughter, M.S., is not entitled to a free public education in Neptune schools for the 2016-2017 school year. Petitioner contended that she resides in Neptune, but was staying temporarily at one of her rental properties in Asbury Park when the school district conducted a residency investigation. The Board argued that A.P. does not meet the residency requirements to be considered legally domiciled in Neptune Township, and that M.S. should be enrolled in Asbury Park schools. The Board filed a motion to dismiss in lieu of an answer to the petition.

The ALJ found that: petitioner failed to appear for a scheduled pre-hearing telephone conference on February 21, 2017, despite receiving appropriate notice of same; the matter subsequently proceeded, *ex-parte,* on the merits through certifications; petitioner failed to demonstrate that she is a resident of Neptune; M.S. still attends Neptune schools; petitioner has not requested a hearing before the Board; as of April 11, 2017, petitioner had attended school for 119 days during the current academic year; and the Board's certification indicates that the reimbursable tuition rate is $70 per day. The ALJ concluded that petitioner is not legally domiciled in Neptune, and M.S. is ineligible to receive a free public education in Neptune schools. Accordingly, the ALJ granted the respondent's motion to dismiss and ordered the petitioner to reimburse the Board in the total amount of $8,330 for tuition owed through April 11, 2017, and $70 per school day attended thereafter.

Upon review, the Commissioner rejected the Initial Decision, and directed the Board to provide petitioner with a board hearing. In so deciding, the Commissioner found that the Board failed to comply with *N.J.A.C.* 6A:22-4.3 when it issued a final notice of ineligibility, removing M.S. from the District without a hearing, rather than the required preliminary notice of ineligibility that must "provide for a hearing before the district board of education prior to a final decision on removal." The Commissioner accordingly dismissed the petition as premature.

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

June 5, 2017

OAL DKT. NO. EDU 00544-17
AGENCY DKT. NO. 279-10/16

A.P., ON BEHALF OF MINOR CHILD, M.S., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

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

Petitioner is challenging the Board's determination that she is not a resident of Neptune, and therefore her daughter is ineligible to attend Neptune Township schools. Petitioner received a final notice of ineligibility from the Board on October 7, 2016, disenrolling M.S. from the District and advising petitioner that she had 21 days to appeal the determination with the Commissioner in order for her daughter to remain enrolled during the pendency of the appeal. Petitioner timely filed the instant residency petition.[2]

N.J.A.C. 6A:22-4.3 explains the procedure for removing a currently enrolled student from a district. Specifically, *N.J.A.C.* 6A:22-4.3(b)(1) requires the chief school administrator to issue a preliminary notice of ineligibility that must "provide for a hearing before the district board of education prior to a final decision on removal."

[1] Petitioner's exceptions were filed out of time, and there is no indication that petitioner served the Board or copied the Administrative Law Judge (ALJ), as required by *N.J.A.C.* 1:1-18. Accordingly, petitioner's exceptions were not considered by the Commissioner.

[2] The Commissioner notes that although the ALJ made a determination of tuition owed by the petitioner – which was based on a supplemental certification submitted by the respondent Board during ex-parte proceedings – the Board has never filed a counterclaim for tuition.

In this matter, the Board did not send a preliminary notice of ineligibility providing petitioner with the right to a board hearing. Instead, the Board provided only a final notice of ineligibility, removing M.S. from the District without a hearing.[3] As the Board failed to provide petitioner with the right to a board hearing, petitioner is still entitled to an opportunity to present evidence to the Board regarding her domicile and her daughter's eligibility to attend school in the District.[4]

Accordingly, the Initial Decision of the ALJ is rejected. The Board is directed to provide petitioner with a board hearing, and the petition is hereby dismissed as premature.

IT IS SO ORDERED.[5]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/05/17

Date of Mailing: 6/06/17

[3] The final notice of ineligibility is dated October 7, 2017, the same date that the Superintendent certified that the Board first became aware that petitioner and M.S. were not residing within the District. As such, it is apparent that the final notice of ineligibility is the first communication that the Board sent to petitioner regarding this matter.

[4] The Commissioner reminds petitioner that at the board hearing, it is her burden to prove that she is a domiciliary of Neptune.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
FAILURE TO APPEAR
AND ON THE MERITS
OAL DKT. NO. EDU 00544-17
AGENCY DKT. NO. 279-10/16

A.P. ON BEHALF OF M.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE,
Respondent.

No appearance by or behalf of **A.P.,** petitioner

Joseph D. Castellucci, Jr., Esq. for respondent (Florio Perrucci Steinhardt & Fader, LLC, attorneys)

Record Closed: April 18, 2017 Decided: April 19, 2017

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

On January 13, 2017, this matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On January 31, 2017, the OAL mailed notice of the pre-hearing telephone conference in this matter for February 21, 2017. The OAL dispatched the notice to petitioner's address in Neptune, the address petitioner maintains is her residence for

purposes of this residency appeal. The petitioner failed to contact the OAL to provide a telephone number to contact her on the day of the prehearing telephone conference, and did not call or appear on said date. The Administrative Law Judge (ALJ) noted the failure to appear on February 21, 2017. The petitioner did not request any adjournment. The OAL obtained petitioner's telephone number from the respondent and contacted her on February 21, 2017, leaving a voice mail to contact this office. Petitioner made no contact as of February 23, 2017. On February 23, 2017, the ALJ wrote to petitioner at the Neptune, as well as at an Asbury Park address, paperwork of the investigation revealed as a potential residence. The correspondence advised of the failure of petitioner to contact the OAL with a means to communicate with her; and the fact that petitioner filed no response to respondent's motion to dismiss in lieu of answer. The ALJ advised petitioner in the correspondence that if petitioner provided no response by March 3, 2017, respondent's motion would be granted. The ALJ also requested, despite the fact, that the motion called for dismissal on the failure to exhaust administrative remedies, for the respondent to provide a certification as to the amount the respondent sought in recoverable education costs. The petitioner did contact the OAL on March 10, 2017, advising she did not receive the February 23, 2017, letter at either address. Petitioner then advised she did not oppose the motion. The ALJ noted the failure to appear. Pursuant to N.J.A.C. 1.1-14.4(d), the matter proceed on the merits ex-parte. Additional certifications regarding the number of days and cost per day for student educational reimbursement. The hearing closed on April 18, 2017.

FACTUAL DISCUSSION AND FINDINGS

I have reviewed the April 11, 2017, certification of Dr. Tami Crader, Superintendent of Schools and I **FIND**:

1. Petitioner failed to appear for the telephone pre-hearing conference and has represented to the OAL that she does not oppose the position of the respondent. Petitioner has failed to demonstrate that she is a resident of Neptune.

2. Petitioner's child still attends Neptune Township School district as she has not requested a hearing before the board, and accordingly, the board has taken no action. As of April 11, 2017, petitioner has attended 119 days this school year.

3. Respondent's reimbursable tuition is $70 per day, as of April 11, 2017, the total reimbursable tuition is $8,330, accruing at the rate of $70 per school date thereafter.

CONCLUSION

Accordingly, it is on this 19th day of April 2017, **ORDERED** that the Motion to Dismiss the petition in lieu of answer is **GRANTED,** on default for failure to respond to the motion.

On April 18, 2017 respondent submitted a supplemental certification of the tuition reimbursement amount. It is on this 19th day of April 2017, **ORDERED** the respondent is entitled to be reimbursed from petitioner the amount of $8,330.00 for tuition at the rate of $ 70.00 per diem for a current total of 119 days as of April 11, 2017; and continuing at the rate of $70.00 per day until petitioner removes her child from the school. This Initial Decision resolves all issues in this matter.

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

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

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

April 19, 2017
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 4/19/17

Date Mailed to Parties: 4/20/17

/lam

APPENDIX

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

None

LIST OF EXHIBITS

For Respondent:

Motion to Dismiss and supporting papers

R-1 Supplemental tuition certification

152-17

M.K. and M.K., on behalf of minor child, M.K., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

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

RESPONDENT. :

SYNOPSIS

Petitioners appealed the determination of the respondent Board that their son, M.K., was ineligible for a free public education in respondent's school district. Petitioners contended that they reside at an address within the Bridgewater-Raritan Regional school district. However, petitioners also asserted that M.K. – the mother of the minor child – frequently stays overnight at the home of her mother, the grandmother of the minor child, in South Bound Brook because the grandmother has chronic health conditions and requires assistance. The Board contended that a residency investigation revealed that petitioner M.K. and her son actually reside in South Bound Brook, which is outside of the respondent's school district. The Board filed a counterclaim seeking tuition for the period of M.K.'s ineligible attendance in the district.

The ALJ found, *inter alia*, that: the testimony of the respondent Board's residency investigator was credible and persuasive, while the testimony of the petitioners and their witnesses was inconsistent and lacked credibility; the Board completed a residency investigation in this matter during the 2015-2016 school year, the results of which indicated that although the petitioners claim to reside in Bridgewater, M.K. – the mother of minor child, M.K. – resides in South Bound Brook in order to care for her ailing mother; M.K. – the father of minor child, M.K. – had substance abuse issues, and was not able to care for his child during the period in question; and the minor child therefore was domiciled in South Bound Brook, with his mother, during the 2015-2016 school year. Accordingly, the ALJ concluded that M.K. was not entitled to a free public education under *N.J.S.A.* 18A:38-1, and that the Board is therefore entitled to be reimbursed for tuition by the petitioner in the amount of $38,329.20 for the period of M.K.'s ineligible attendance.

The Commissioner adopted the Initial Decision as the final decision in this matter, for the reasons expressed therein. The petitioner was ordered to pay tuition in the amount of $38,329.20 for M.K.'s ineligible enrollment in the District for the 2015-2016 school year.

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

Issued 6/05/17

OAL DKT. NO. EDU 172-16
AGENCY DKT. NO. 363-12/15

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

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

Upon such review, the Commissioner adopts the Initial Decision as the final decision for the reasons set forth therein. Accordingly, the petitioner shall pay the Board $38,329.20 in tuition costs for M.K.'s ineligible enrollment in the District for the 2015-2016 school year.

IT IS SO ORDERED.*

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/05/17
Date of Mailing: 6/06/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00172-16
AGENCY DKT. NO. 363-12/15

M.K. AND M.K. ON BEHALF OF
MINOR CHILD, M.K.,
Petitioners,
v.
BOARD OF EDUCATION OF THE
BRIDGEWATER-RARITAN REGIONAL
SCHOOL DISTRICT, SOMERSET COUNTY,
Respondent.

Pasquale Marago, Esq., for petitioner (Law Offices of Pasquale Marago, attorneys)

Stephen M. Bacigalupo II, Esq., for respondent (Schwartz, Simon, Edelstein & Celso, L.L.C., attorneys)

Record Closed: March 8, 2017 Decided: April 20, 2017

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

Petitioners M.K. and M.K., are the mother and father of the minor child, M.K., who are challenging the determination made by the Board of Education (Board) of the Bridgewater-Raritan Regional School District (District) that he did not reside in the District. The District filed a counterclaim seeking payment of tuition for the number of days that the minor child, M.K., attended school in the District.

PROCEDURAL HISTORY

On October 16, 2015, the District notified the petitioners that their son, M.K., was ineligible to attend the schools of the District due to non-residency. A hearing was held on November 2, 2015, and the committee recommended that the minor child, M.K., be removed from enrollment in the District. Petitioners appealed the decision. On December 23, 2015, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Throughout 2016, the parties made several attempts to exchange discovery. The difficulties in exchanging discovery required multiple conference calls with the court in an effort to resolve the conflicts. A hearing was held on January 4, 2017, but the record remained open for the parties to submit written closing summations. The record closed on March 8, 2017.

FACTUAL DISCUSSION

M.K. and M.K. are the parents of minor child, M.K. M.K. and M.K. married in 2005 and resided in his parents' basement in Bridgewater, Somerset County. D.K. is the maternal grandmother of the minor child, M.K., and resides in South Bound Brook, which is outside the District. For the 2015-2016 school year, M.K. was enrolled in second grade in the District. The Board completed a residency investigation and conducted a residency hearing on November 2, 2015. Respondent filed its notice of final determination of ineligibility on November 16, 2015, determining that M.K. does not reside in the District. As a consequence, the parents of minor child ,M.K., appealed the determination. The tuition

rate of reimbursement as filed with the State for the 2015-2016 school year was $212.94 per day.

The preceding statements are not in dispute as they are from the records and testimony of the parties and are hereby **FOUND** as **FACT**.

TESTIMONY

For petitioner

M.K. is the mother of the minor child, M.K., who is an eight-year-old second grader at Milltown Primary School. She testified that she and her husband have lived on P. Street in Bridgewater, New Jersey since they started dating in 1995. The home is owned by her In-laws. In 2005, they were married and M.K. was born in 2008. They live in the basement which consists of one room, with a kitchen and bathroom. The basement was built and refinished in 2005.

The residence at South Bound Brook is owned by her mother. She testified that she stays at the South Bound Brook address to care for her mother because she has pulmonary edema. She alleges that in the middle of the night, at 3:00 a.m. or 4:00 a.m., the minor child, M.K., wakes up screaming, wanting his mother. She claims that it is a result of separation anxiety. As a result, M.K. is required to go to the Bridgewater address, pick him up and drive to the South Bound Brook address where they would leave to go to school. This happens four to five times a week. The child begins each night with dad and the in-laws in Bridgewater, and then after transport, spends only approximately two hours in South Bound Brook.

On cross-examination, she acknowledged that the answer to interrogatory number twenty-seven, indicates that the separation anxiety happens ten times in two months, not the four-five times per week as she testified. Also, a handwritten correspondence from her, dated October 5, 2015, never mentions the child being transported back-and-forth between residences. (R-5). Additionally, there is a storage

rental agreement, dated March 23, 2016, that has mother's address in South Bound Brook not Bridgewater. Finally, her Jeep SUV and a Black Mazda SUV are registered at the South Bound Brook address.

M.K. is the father of the minor child, M.K., and the husband of M.K. He testified that he has lived on P. Street in Bridgewater for forty-three years (his entire life.) He lives in the basement with his wife and child. His uncle finished the entire basement in 2005, so that the family would have a place to live.

He noted that he did not live in the house from June 17, 2015, through December 8, 2015, because of addiction and that he was involved in a court-ordered rehab. Before June 17, 2015, he had addiction "issues" and would not necessarily be home. However, he or his wife brought minor child, M.K., to school. On some occasions, his son would "freak out" at approximately 3:00 a.m. through 6:00 a.m. and his wife would be required to pick him up and transport him to the South Bound Brook address.

On cross-examination he was ordered by Drug Court to attend Integrity House, which is an aftercare drug treatment facility. He explained that he was not home before June 17, 2015, because of the drug addiction. He "was not there mentally or physically."

D.K. is the grandmother of the minor child, M.K. She has lived at the same address in Bridgewater for forty-five years with her husband. She explained that her son and daughter-in-law have lived in the basement since 1996. Sometimes the minor child, M.K., would leave to go to the South Bound Brook address in the middle of the night because he has anxiety for his mother. He would wake-up screaming "I need mommy."

On cross-examination, she testified that the minor child was never at the South Bound Brook residence and the anxiety incidents would occur fourteen to fifteen times a month.

J.K., Jr. is the grandfather of the minor child, M.K., and the husband of D.K. They reside in Bridgewater with their son, daughter-in-law and grandson. He explained that the minor child, M.K., is picked up from school in the afternoon by him, five days a week. Then he does homework and eats dinner and goes to bed in Bridgewater. "His mother would come to get him if there was a problem," but M.K. never goes to school from the South Bound Brook address.

For respondent

Walter Kalicki (Kalicki) has been with the District for eighteen years as the Attendance Officer. In September 2015, he received an anonymous email regarding the minor child, M.K., and his mother living in South Bound Brook. (R-1). As a result, he started a residency investigation on them for the South Bound Brook address. (R-2).

The investigation consisted of sixty occasions of surveillance. On thirty-five occasions, the mother and minor child were observed at the South Bound Brook address. On each of those occasions, the child was taken directly to the school in Bridgewater. Twelve occasions were during the summer (no school), seven occasions the child was absent from school and on three occasions he was late to school. On two occasions he was able to view a dismissal. On May 9, 2016 and May 10, 2016, the minor child, M.K., was picked-up by his mother and was observed being dropped off at South Bound Brook address. Two family vehicles, a Jeep SUV and a Black Mazda SUV are registered at the South Bound Brook address, not Bridgewater. It is his opinion that the student, M.K., was not domiciled in Bridgewater but at the residence in South Bound Brook.

He recalled an incident when he spoke to the mother of the minor child, M.K., on the phone and she said that she lived in Bridgewater with the family but then received the letter (R-5) which was contrary to her story. He also recalled another incident with the mother of the minor child, M.K., where he was seen during surveillance. He stated that the mother speedily changed lanes and got behind his vehicle and tailgated him for

a distance then honked and waved at him. She then proceeded to the Milltown School and dropped him off. It was obvious to him that she recognized him.

Finally, he indicated that the minor child, M.K., attended the entire school year (180 days) and the tuition rate for the 2015-2016 school year was $212.94 per day.

On cross-examination, he conceded that residency is the domicile where the child puts his head down at night. In this case, he does not know where the child puts his head down at night. It is possible that the child slept at Bridgewater because his surveillance started at 7:00 a.m., so he does not know what happened before 7:00 a.m. Also, it was explained that vehicles are registered to M.K.'s mother and leased, so insurance required that the vehicles be registered at the South Bound Brook address.

FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J.Super. 1 (App. Div.1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone

Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

After hearing the testimony and reviewing the evidence, I make the following findings of fact:

For the 2015-2016 school year, the minor child, M.K., was enrolled in second grade in the District. After receiving an anonymous complaint, the Board completed a residency investigation and conducted a residency hearing on November 2, 2015. The results of which were that the parents of the minor child, M.K., claimed to reside in Bridgewater, Somerset County. M.K., the mother of the minor child, M.K., resides in South Bound Brook which is outside the District. She resides at that location so that she may take care of her ailing mother. The father of the minor child had substance abuse issues and "was not there mentally or physically." As a result, the minor child, M.K., resided with his mother in the South Bound Brook residence because he had separation anxiety and the residence in South Bound Brook provided a more stable environment for the child. The tuition rate of reimbursement as filed with the State for the 2015-2016 school year was $212.94 per day.

The testimony of respondent's witness was especially credible and persuasive. He did not embellish his investigative findings and in fact, conceded the point that it was possible that the child slept at Bridgewater because his surveillance started at 7:00 a.m., so he does not know what happened before 7:00 a.m.

Conversely, the petitioners' witnesses' testimony was not credible in the manner in which it was given. Their own testimony assisted the respondent in proving the facts of the case by a preponderance of the evidence. The witnesses failed to give a concise number of days in which the minor child would experience episodes of "separation anxiety". In fact they all testified to a different frequency and the inconsistency made the testimony by each, suspect.

A logical assembly of piecemeal facts, as testified to by the petitioners,

was that due to the father, M.K.'s substance abuse, the mother would keep the minor child with her at the South Bound Brook residence. The undersigned believes that the petitioners brought together the respondent's case quite well in establishing the real facts.

It was obvious that the petitioners attempted to "sell" their version of the facts to the undersigned. On several occasions, the individuals that had already testified were cautioned by the court to not "coach" a witness that was testifying on the witness stand. This detracted from any modicum of credibility.

Therefore, I **FIND** that the minor child, M.K., was domiciled outside the District in South Bound Brook. Accordingly, I **FIND** that M.K. became ineligible to attend school in the District for the 2015-2016 school year. I **FURTHER FIND**, by a preponderance of the credible evidence, that respondent filed a counterclaim seeking tuition for the days M.K. attended the District ineligible for the 2015-2016 school year. As such, the District must establish the cost of tuition and the number of days M.K. attended the District's schools when he was ineligible to do so. Testimony was uncontroverted and therefore, I **FIND** that the per-pupil cost for a student to attend school in the district for the 2015-2016 school year was $212.94 per day equaling $38,329.20 per annum.

CONCLUSIONS OF LAW

At issue is whether minor child, M.K., was entitled to a free education under N.J.S.A. 18A:38-1, which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom. Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education).

A person who meets age requirements and is domiciled within a school district may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). A person may have

many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). A child's domicile is normally that of his or her parents. Ibid. The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999).

The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

The record reflects that the minor child, M.K., attended school within the district for the 2015-2016 school year while domiciled outside of the District. Accordingly, I **CONCLUDE** that the minor child, M.K., was not entitled to a free public education in the district. N.J.S.A. 18A:38-1(b)(1) provides that when the evidence does not support the claim of the resident, the resident shall be assessed tuition "for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per-pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced." The uncontested record reflects that the actual cost of M.K.'s attendance in-district was $212.94 per day equaling $38,329.20 per annum. Accordingly, I **CONCLUDE** that the District is entitled to be reimbursed for tuition by the petitioner in the amount of $38,329.20. I further **CONCLUDE** that petitioner's appeal should be dismissed.

ORDER

It is, therefore, **ORDERED** that petitioners, pay respondent, Board of Education of the Bridgewater-Raritan Regional School District, Somerset County, tuition in the total

amount of $38,329.20 for unauthorized attendance in the District schools for the periods stated above. It is further **ORDERED** that the District's determination that the minor child, M.K., was ineligible to attend school while domiciled outside the District is hereby **AFFIRMED**. Petitioner's appeal is **DISMISSED**.

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

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

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

April 20, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 4/20/17

Date Mailed to Parties: 4/20/17

/vj

APPENDIX

WITNESSES

For petitioner:

M.K.

M.K.

D.K.

J.K., Jr.

For respondent:

Walter Kalicki, Attendance Officer

EXHIBITS

For petitioner:

Exhibit X – Drivers License, Food Stamps and dogs rabies certificate

For respondent:

R-1 Email, dated September 16, 2015

R-2 Report of Walter Kalicki

R-3 Letter from Victor Hayek, dated September 25, 2015

R-4 Letter from Victor Hayek, dated September 25, 2015

R-5 Handwritten Statement of Petitioners

R-6 Letter from Victor Hayek, dated October 16, 2015

R-7 Letter from Victor Hayek, dated November 16, 2015

R-8 Notes of Committee recommended removal

R-9 Board of Education of the Bridgewater-Raritan Regional meeting minutes

R-10 IEP for M.K.

R-11 Correspondence to MVC from Walter Kalicki

R-12 Correspondence to MVC from Walter Kalicki

R-13 Correspondence from Concerned Taxpayer

153-17SEC

153-17

AGENCY DKT. NO. 86-5/17

IN THE MATTER OF PATRICIA FABRIZIO,	:	
UNION COUNTY EDUCATIONAL SERVICES,	:	COMMISSIONER OF EDUCATION
COMMISSION, UNION COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission), finding that respondent violated the School Ethics Act for failure to timely file her Personal/Relative and Financial Disclosure statements in accordance with *N.J.S.A.* 18A:12-25 and 26. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately filed disclosure statements after the issuance of its February 28, 2017 Order to Show Cause, but prior to the Commission's March 28, 2017 meeting, and it therefore recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal – pursuant to *N.J.A.C.* 6A:4 – of the Commission's underlying finding of violation.

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

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

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/05/17

Date of Mailing: 6/06/17

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

IN THE MATTER OF PATRICIA FABRIZIO	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***UNION COUNTY EDUCATIONAL SERVICES COMMISSION,* UNION COUNTY**	:	**DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS**
	:	**DOCKET NO.: D05-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on February 28, 2017, and mailed on March 1, 2017 through regular and certified mail, return receipt requested, directing Respondent, a "school official" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

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

ANALYSIS

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

Respondent is a school official who was elected or appointed after April 30, 2016 and, therefore, required to file Disclosure Statements within thirty (30) days of election or appointment. Respondent failed to file her Disclosure Statements within the statutorily required timeframe.

Consequently, by letter dated January 10, 2017, the Commission informed Respondent that failure to file her Disclosure Statements by January 25, 2017 would result in the

IN THE MATTER OF PATRICIA FABRIZIO	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS**
***UNION COUNTY EDUCATIONAL SERVICES COMMISSION*, UNION COUNTY**	:	
	:	**DOCKET NO.: D05-16**

WHEREAS, Respondent is a "school official," as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), at Union County Educational Services Commission; and

WHEREAS, as a school official who was elected or appointed after April 30, 2016, Respondent was required to file her Personal/Relative and Financial Disclosure Statements (Disclosure Statements) within thirty (30) days thereof;

WHEREAS, Respondent failed to file her Disclosure Statements within the statutorily required timeframe;

WHEREAS, at its meeting on February 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file her Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1; and

WHEREAS, Respondent filed her Disclosure Statements on March 7, 2017, which were required to be filed no later than thirty (30) days of election or appointment pursuant to N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1; and

WHEREAS, Respondent also filed a response to the OTSC, but did not dispute that her Disclosure Statements were not timely filed; and

WHEREAS, at its meeting on March 28, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by failing to timely file her Disclosure Statements; and

WHEREAS, at its meeting on March 28, 2017, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on April 25, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on April 25, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

154-17

AGENCY DKT. NO. 87-5/17

IN THE MATTER OF TINA REEVES,	:	
PAUL ROBESON CHARTER SCHOOL FOR	:	COMMISSIONER OF EDUCATION
THE HUMANITIES, MERCER COUNTY.	:	DECISION

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission) – finding that respondent violated the School Ethics Act for failure to timely file her Personal/Relative and Financial Disclosure Statements in accordance with *N.J.S.A.* 18A:12-25 and -26, and *N.J.A.C.* 6A:28-3.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that the respondent failed to file her disclosure statements despite the issuance of its February 28, 2017 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

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

Accordingly, respondent is hereby suspended for 30 days as a school official found to have violated the School Ethics Act, effective from the date of this decision. If respondent fails to file her disclosure statements during the 30-day suspension period, she will be removed from office on the 31st day.

IT IS SO ORDERED.[1]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/06/17
Date of Mailing: 6/06/17

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

IN THE MATTER OF TINA REEVES	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***PAUL ROBESON CHARTER SCHOOL FOR THE HUMANITIES*, MERCER COUNTY**	:	**DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS**
	:	**DOCKET NO.: D04-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on February 28, 2017, and mailed on March 1, 2017 through regular and certified mail, return receipt requested, directing Respondent, a "school official" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

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

ANALYSIS

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

Respondent is a school official who was elected or appointed after April 30, 2016 and, therefore, required to file Disclosure Statements within thirty (30) days of election or appointment. Respondent failed to file her Disclosure Statements within the statutorily required timeframe.

Consequently, by letter dated January 10, 2017, the Commission informed Respondent that failure to file her Disclosure Statements by January 25, 2017 would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file her Disclosure Statements required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by January 25, 2017, an OTSC was issued by the Commission at its meeting on February 28, 2017. After having been served with the OTSC, Respondent still failed to file her completed Disclosure Statements.

DECISION/PENALTY RECOMMENDATION

Based on the record as set forth above, at its meeting on March 28, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1. Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. The Commission recommends that the Commissioner of Education impose a penalty of **suspension for thirty (30) days**, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education. If Respondent fails to file her Disclosure Statements within the period of her thirty (30) day suspension, the Commission recommends that Respondent be **removed from office on the thirty-first (31st) day**.

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

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

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

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: April 26, 2017

IN THE MATTER OF TINA REEVES	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS**
***PAUL ROBESON CHARTER SCHOOL FOR THE HUMANITIES,* MERCER COUNTY**	:	
	:	**DOCKET NO.: D04-16**

WHEREAS, Respondent is a "school official," as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), at the Paul Robeson Charter School for the Humanities; and

WHEREAS, as a school official who was elected or appointed after April 30, 2016, Respondent was required to file her Personal/Relative and Financial Disclosure Statements (Disclosure Statements) within thirty (30) days thereof; and

WHEREAS, Respondent failed to file her Disclosure Statements within the statutorily required timeframe; and

WHEREAS, at its meeting on February 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file her Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1; and

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

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

WHEREAS, at its meeting on March 28, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by failing to file her Disclosure Statements; and

WHEREAS, at its meeting on March 28, 2017, the Commission recommended that the Commissioner of Education impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education; and

WHEREAS, if at the conclusion of the thirty (30) day suspension, Respondent still has not filed her Disclosure Statements, the Commission recommends that she be removed from office on the thirty-first (31st) day; and

WHEREAS, at its meeting on April 25, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on April 25, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

156-17

S.R., ON BEHALF OF MINOR CHILD, Z.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In December 2016, petitioner S.R. filed a *pro-se* residency appeal contesting the respondent Board's determination that Z.K. was not entitled to a free public education in South Orange-Maplewood Schools. A hearing date was scheduled for April 25, 2017.

The ALJ reported that prior to the hearing, respondent's attorney advised that Z. K. was withdrawn from the school district on April 6, 2017, and the Board was withdrawing its counterclaim for back tuition. After confirming with petitioner that Z.K. was no longer in the district, the ALJ concluded that this matter was no longer a contested case before the Office of Administrative Law. Accordingly, the ALJ ordered the petition dismissed.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter for the reasons stated therein. The petition was dismissed.

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

June 6, 2017

156-17

OAL DKT. NO. EDU 02179-17
AGENCY DKT. NO. 6-1/17

S.R., ON BEHALF OF MINOR CHILD, Z.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner is in accord with the ALJ's conclusion – for the reasons set forth in the Initial Decision – that this matter is no longer a contested case before the Commissioner. Petitioner has withdrawn Z.K. from the District and the Board has withdrawn its counterclaim for back tuition.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/06/17
Date of Mailing: 6/06/17

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 02179-17
AGENCY DKT. NO. 6-1/17

S.R. ON BEHALF OF MINOR CHILD Z.K.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,

Respondent.

S.R., pro se

Jospeh L. Roselle, Esq. on behalf of respondent (Schenck, Price, Smith & King, LLP)

Record Closed: April 14, 2017 Decided: April 24, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

On February 14, 2017 this matter was transmitted to the Office of Administrative Law (OAL) for a hearing. A hearing date was scheduled for April 25, 2017. Prior to the hearing respondent's attorney advised that on April 6, 2017 minor child Z.K. withdrew

from the District. Respondent's attorney also advised that the District will withdraw its concurrent counterclaim for any back tuition. Under my direction, my secretary reached out to petitioner who confirmed that her child is no longer in the district. Petitioner faxed over a letter advising same. Said letters are attached hereto for reference.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is therefore **ORDERED** that this matter be and is hereby **DISMISSED**.

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

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

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

April 27 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

4-24-2017

Date Mailed to Parties:

APR 24 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

DOCUMENTS RELIED ON

- Letter from S.R. regarding Z.K.'s withdrawal from District
- Letter from Joseph Roselle, Esq. re: counterclaim for back tuition

fax

To:
Judge Caneldo

Fax number:
973-648-2358

From:
Rankins, Shenise

Fax number:

Date:
4/14/2017

Regarding:
Zamir Knox/Docket #EDU02179-2017

Phone number for follow up:
9733366993

Comments:
Good Morning,

This letter is to inform you that my son Zamir Knox has decided to withdraw from Columbia High School. He felt the district wasn't providing the help he needed. Currently, he's enrolled in a new school, that's more equipped to handle his disability.

Thank you

Shenise Rankins

SCHENCK PRICE SMITH & KING, LLP
ATTORNEYS AT LAW
~ Founded 1912 ~

Serving Our Clients and Community For Over 100 Years

JOSEPH L. ROSELLE
Direct Line: 973-540-7349
Email: jlr@spsk.com

220 Park Avenue
PO Box 991
Florham Park, NJ 07932
Telephone: 973-539-1000
Fax: 973-540-7300

www.spsk.com

April 10, 2017

Via Fax and Regular Mail
Hon. Joann LaSala Candido, ALJ
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: S.R. o/b/o Z.K. v. South Orange – Maplewood Board of Education
OAL Dkt. No. EDU 2179-17N
Agency Ref. No. 6-1/17

Dear Judge Candido:

This firm represents the Board of Education of the School District of South Orange and Maplewood in the above-referenced matter. The case is currently scheduled for hearing before Your Honor on April 25, 2017. By way of brief background, S.R., the parent of adult student Z.K., attempted to enroll the student in the District as an affidavit pupil. The enrollment request was denied by the District due to the student's failure to meet the standard for enrollment as an affidavit pupil. This appeal followed.

On April 6, 2017, the student withdrew from the District. He is not currently enrolled in the District nor is he attending the District's schools during the pendency of this appeal. Therefore, it is respectfully requested that Petitioner officially withdraw her Petition of Appeal, and/or Your Honor mark this matter as "withdrawn" or "dismissed," as appropriate, since Petitioner's challenge to the Board's determination is now moot. There is also no need to hold a hearing in this case.

Additionally, in light of the student's withdrawal from the District and, provided that the matter is withdrawn or dismissed, the Board will withdraw its concurrent counterclaim for any back tuition. Note that should the student return to the District or reenroll using a District address, the District reserves its right to investigate Petitioner's residency status in the future, if necessary.

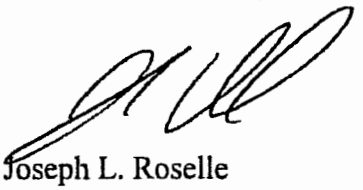
4/13 - M. Rankins was call
she confirmed that her son is
no longer in the District. I
asked that she send over a
ltr of W/D. She agreed to fax
to 973-648-2358.

SCHENCK PRICE SMITH & KING, LLP
ATTORNEYS AT LAW
- Founded 1912 -

Thank you for your courtesies. Should you have any questions or require additional information, or wish to schedule a conference call, please do not hesitate to contact me

Respectfully submitted,

SCHENCK, PRICE, SMITH & KING, LLP



Joseph L. Roselle

c: Shenise Rankins, *Pro Se* Petitioner (via mail)

fax

To:
Judge Caneldo

Fax number:
973-648-2358

From:
Rankins, Shenise

Fax number:

Date:
4/14/2017

Regarding:
Zamir Knox/Docket #EDU02179-2017

Phone number for follow up:
9733366993

Comments:
Good Morning,

This letter is to inform you that my son Zamir Knox has decided to withdraw from Columbia High School. He felt the district wasn't providing the help he needed. Currently, he's enrolled in a new school, that's more equipped to handle his disability.

Thank you,

Shenise Rankins

4/21/17

Good Morning —
I would also like to
cancel our court date as well.
Thank you
Stenpo

157-17

CORY PISKIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In May 2016, petitioner appealed the determination of the respondent – the State Board of Examiners (SBE) – that he had not met the requirements for issuance of a Teacher of Elementary School Certificate of Eligibility (CE). Specifically, petitioner did not achieve a cumulative grade point average of 2.75 in his baccalaureate program, which is required to receive the CE. The SBE filed a motion to dismiss with the Commissioner of Education, and the matter was transmitted to the Office of Administrative Law as a contested case in June 2016.

The ALJ reported that petitioner failed to respond to a previously scheduled telephone conference in this matter on March 16, 2017. Subsequently, notice was mailed to petitioner, advising that he had missed the telephone conference, and instructing that he had until April 7, 2017 to provide a written explanation of his failure to appear; otherwise, petitioner's appeal would be dismissed. As of the date of the ALJ's Initial Decision, no response had been received. Accordingly, the ALJ concluded that the petitioner no longer wishes to proceed and ordered the petition dismissed.

Upon review, the Commissioner concurred with the ALJ that this matter is appropriately dismissed for failure to attend the scheduled telephone conference without explanation. Accordingly, the Initial Decision was adopted as the final decision in this matter and the petition was dismissed.

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

Issued 6/06/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 9468-16
AGENCY DKT. NO. 140-5/16

CORY PISKIN,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS,
Respondent.

Cory Piskin, petitioner, pro se

Kathryn Duran, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: April 8, 2017 Decided: April 25, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter arises out of petitioner Cory Piskin's challenge to the decision by respondent New Jersey State Board of Examiners (Board) to deny his application for a Teacher of Elementary School Certificate of Eligibility (CE) due to his not meeting all of the certification requirements. On December 10, 2015, the Board considered petitioner's appeal. On January 21, 2016, the Board adopted a written decision

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

April 25, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: April 26, 2017

Date Mailed to Parties: April 26, 2017

cmo

159-1

159-17

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges Against Richard D. Allen:

HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

Petitioner,

- and -

RICHARD D. ALLEN

Respondent.

Agency Dkt No.
191-7/16

OPINION AND AWARD

Before
Joyce M. Klein
Arbitrator

Appearances:

For the Petitioner:
John B. Comegno, II, Esq.
Alicia D. Hoffmeyer, Esq.
Comegno Law Group, P.C.

For the Respondent:
Joseph R. Donahue, Esq.
Brickfield & Donahue, Esquires

Pursuant to *N.J.S.A.* 18A:6-16, as amended by *P.L. 2012*, c. 26 ("TEACHNJ"), the tenure charges brought by the Hunterdon Central Regional High School District Board of Education (the "Board" or "Petitioner") against Richard D. Allen ("Allen" or "Respondent") were referred to me by the Director of the Bureau of Controversies and Disputes, Department of Education, for a hearing and decision. I conducted hearings at the Board's offices in Flemington, New Jersey on September 26, November 7, November 21, December 1,

December 14, 2016, January 3, January 17, February 1, February 16, March 2, March 16, March 24 and March 30, 2017.

At the hearings, the parties argued orally, examined and cross-examined witnesses, and introduced documentary evidence into the record. Testimony was received from Christina Steffner, Superintendent of Livingston Board of Education, previously Superintendent of Hunterdon Central Regional High School District, John Fenimore, retired Director of Curriculum and Instruction, Michael Carr, Vice Principal, Karen Batista, retired Science Department Supervisor, Matthew Thompson, Vice Principal, C.L.,[1] Parent, Lori Blutfield, Member of the Board of Education, Sara Jane Mahan, Manager of Human Resources, Vincent Panico, a member of the Board of Education, Cynthia Fink, Chemistry Teacher, Sharon Cooper, Chemistry Teacher, Jay Kriesman, Chemistry Teacher, Leon Copeland, Chemistry Teacher, B.B., Parent, B.C., student, K.S., student, C.J., student, P.G., parent, Bonnie Berenger, Science Teacher, S.B., student, Eric Wasserman, Calculus Teacher, S.H., parent, Lars Wendt, Physics Teacher, Kenneth Macai, previously Science Supervisor, S.P., parent, Lisa Allen, Respondent's spouse, Sean Chappe, Physics Teacher and Association Representative and Dr. Richard (Dan) Allen.

Post-hearing briefs were received on May 15, 2017, whereupon the record was closed. An extension of time to issue an award until June 7, 2017 was granted by the Director of Controversies and Disputes, Department of Education.

RELEVANT REGULATIONS AND POLICIES

N.J.A.C. 6A:9-3.3: Professional Standards for Teachers

> Standard Eleven: Ethical Practice. The teacher acts in accordance with legal and ethical responsibilities and uses integrity and fairness to promote the success of all students.
>
> > i. Performances:
> >
> > ...
> >
> > (3) The teacher promotes aspects of students' well-being by exercising the highest level of professional judgment, and working cooperatively and productively with colleagues and parents to provide a safe, healthy, and emotionally protective learning environment;

[1] Parents and students are referenced by initials only to protect their privacy.

(4) The teacher maintains the confidentiality of information concerning students obtained in the proper course of the educational process and dispenses such information only when prescribed or directed by Federal and/or State statutes or accepted professional practice;

(5) The teacher maintains professional relationships with students and colleagues;

...

(7) The teacher fosters and maintains a school environment which protects students from sexually, physically, verbally, or emotionally harassing behavior by recognizing, understanding, and conducting themselves in a sound and professionally responsible manner.

ii. Essential Knowledge:

...

(2) The teacher understands laws related to learners' rights and teacher responsibilities (for example, for educational equity, appropriate education for learners with disabilities, confidentiality, privacy, appropriate treatment of learners, reporting in situations related to possible child abuse, and responding to harassment, intimidation, bullying, and suicide);

(3) The teacher understands his or her professional responsibilities as reflected in constitutional provisions, statutes, regulations, policies, and collective negotiations agreements;

Discipline Board / Policy 3150

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

National Education Association Code of Ethics / Board Policy 3211

The NEA Code of Ethics has been codified by the Board as Board Policy 3211-Code of Ethics. The policy provides:

Principle I -- Commitment to the Student

The educator strives to help each student realize his or her potential as a worthy and effective member of society. The educator therefore works to stimulate the spirit of inquiry, the acquisition of knowledge and understanding, and the thoughtful formulation of worthy goals.

In fulfillment of the obligation to the student, the educator—

...

4. Shall make reasonable effort to protect the student from conditions harmful to learning or to health and safety.

5. Shall not intentionally expose the student to embarrassment or disparagement.

...

8. Shall not disclose information about students obtained in the course of professional service, unless disclosure serves a compelling professional purpose or is required by law.

Professional Responsibilities/ Board Policy 3270

The Board of Education will establish and enforce rules for the assignment of specific duties to teaching staff members and for the conduct of teaching staff members during the work day.

The Board directs the Superintendent to require the preparation of lesson plans by each teacher that implement the goals and objectives of the educational program. Teachers shall also be responsible for providing adequate direction and guidance to substitutes. Lesson plans will be subject to periodic review by the principal or designee.

Inappropriate Staff Conduct / Board Policy 3281

...

- Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district

- School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils

Acceptable Use of District Technology / Board Policy 3360

V. Unacceptable Use

Unacceptable use shall include, but not be limited to, the following.

...

5. Use of the school district system to transmit, receive, access, review, upload, download, store, print, post, or distribute pornographic, prurient, obscene, abusive, profane, lewd, vulgar, rude, inflammatory, threatening, disrespectful, or sexually explicit language, images or other material that is lacking educational merit, socially redeeming value or that is disruptive to the educational process.

VI. State and Federal Compliance

State and federal laws may impact or limit the use of technologies. Users of those technologies must be aware of and comply with requirements of the Family Education Rights and Privacy Act (FERPA), Health Insurance Portability and Accountability Act (HIPAA) and the Children Internet Protection Act (CIPA). Except in instances as specifically provided by law, any student records which are made, maintained, or transmitted technologically must be kept confidential.

CHARGES

The tenure charges brought against Dr. Richard Allen on June 14, 2016 alleging that he engaged in conduct unbecoming a public employee are voluminous and include both factual allegations and argument. This statement of the charges includes the charges, but not the extensive supporting factual allegations and argument.

COUNT ONE-UNBECOMING CONDUCT
(Retaliation)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

Dr. Allen's retaliatory conduct, as demonstrated in his May 6, 2016, email, wherein he threatened to lower K.P.'s grade due to her mother questioning his lesson planning, violates Standard Eleven[2] by creating an emotionally harassing environment for K.P. Threatening retaliation against students is at odds with his professional obligation to foster a safe and healthy learning environment. As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position to protect the students at HCRHS, and ensure they are free from retaliation.

COUNT TWO-UNBECOMING CONDUCT
(Disrespect for Supervisor)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

When Dr. Allen told Ms. Batista, his direct supervisor, "F*** you" in his May 6, 2016, email, he violated Standard Eleven by displaying open hostility and disrespect for a supervisor, in the virtual presence of other colleagues, and a parent, D.P. In doing so, he evidenced his refusal to work cooperatively and productively with his colleagues, and conducted himself in a professionally irresponsible manner by copying D.P. on his email tirade.

As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position, so that the Board can maintain a community of respect and integrity amongst the students, parents and staff at HCRHS.

COUNT THREE-UNBECOMING CONDUCT
(Violation of Student Confidentiality)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

Dr. Allen's disclosure of confidential information regarding K.P. and C.N. to his wife, in his May 6, 2016, email violates Standard Eleven. Dr. Allen failed to maintain student confidentiality, ultimately exposing C.N. to harassment by her peers.

In fact, Dr. Allen purposely and knowingly shared confidential student information to his wife on multiple occasions, knowing full well that the law requires him to keep this information confidential. His behavior in this regard

[2] The New Jersey Administrative Code sets forth "Professional standards for teachers" at N.J.A.C. 6A:9-3.3, enumerating eleven (11) standards that govern teacher behavior and practice in New Jersey public schools.

served no purpose other than to spread gossip for his own gratification. Dr. Allen's behavior makes it unreasonable for the Board to continue trusting him with confidential student information.

As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position, so that the Board can ensure the confidentiality of student information at HCRHS.

COUNT FOUR-UNBECOMING CONDUCT
(Disrespect for Students)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

Dr. Allen not only disclosed student information in his multiple email communications to his wife, he often spoke in a derisive and pejorative manner about his students, in violation of Standard Eleven. Dr. Allen referred to a student as "annoying" and deserving of a bad grade. He questioned C.L.'s parenting ability and C.N.'s character merely because C.L. questioned her child's progress in his class. Even more troubling is his email to M.W., apparently expressing concern for her son, which he then forwarded to his wife saying "haha" and later seemed to laugh about that student's bad grade.

Dr. Allen's unprofessional behavior in this regard makes it impossible to ask parents to trust Dr. Allen's judgment, and leave their own children's educational well-being in his hands. His behavior deteriorates the safe, healthy, and emotionally protective learning environment that he is obligated to foster, and which HCRHS strives to maintain.

As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position, so that the Board can ensure the confidentiality of student information, and continue providing a healthy and safe learning environment for all students at HCRHS.

COUNT FIVE-UNBECOMING CONDUCT
(Failure to Teach)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

Dr. Allen's conduct, as demonstrated by his failure to complete lesson plans for AP Chemistry, subsequent to the AP exam, violates Standard Eleven, which tasks him with understanding his professional responsibilities "as reflected in constitutional provisions, statutes, regulations, policies, and collective negotiations agreements." Dr. Allen is the only AP teacher who is refusing to

teach after the AP exam, in violation of the terms of the collective bargaining agreement between that governs the terms of his employment.

As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position, so that the Board can ensure its students receive the full amount of instructional time to which they are entitled.

COUNT SIX-UNBECOMING CONDUCT
(Violation of Student Confidentiality)
(Violation of National Education Association Code of Ethics/Board Policy 3211)

Dr. Allen's conduct violates the National Education Association's ("NEA") Code of Ethics, which sets forth the high ethical standards to which teachers are held.

Dr. Allen's conduct in habitually disclosing student information to his wife via his HCRHS email account, for no compelling professional purpose, rather only in pursuit of his own gratification, violates the NEA's Code of Ethics, as set forth above.

As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position, so that the Board can ensure the confidentiality of student information at HCRHS.

COUNT SEVEN-UNBECOMING CONDUCT
(Disparaging Students)
(Violation of National Education Association Code of Ethics/Board Policy 3211)

Dr. Allen's conduct in mocking struggling students to his wife via his HCRHS email account, violates the NEA's Code of Ethics, as set forth above, in that he has intentionally exposed his own students to embarrassment and disparagement.

As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position, so that the Board can ensure the confidentiality of student information, and continue providing a healthy and safe learning environment for all students at HCRHS.

COUNT EIGHT-UNBECOMING CONDUCT
(Violating Student Confidentiality)
(Violation of National Education Association Code of Ethics/Board Policy 3211)

Dr. Allen's conduct, as demonstrated by his May 6, 2016, email, wherein he disclosed confidential student information regarding K.P. and C.N. to his wife, violates the NEA Code of Ethics. By failing to maintain C.N.'s confidentiality, Dr. Allen exposed C.N. to harassment by her peers, who came to believe that C.N. and C.L. were trying to get him fired. In doing so, Dr. Allen failed to protect C.N. from conditions that are harmful to learning, health and safety, and further exposed her to embarrassment and disparagement.

Dr. Allen's disclosure, or his failure to prevent additional disclosure, was done in a completely self-serving context, namely to garner support in opposition to disciplinary action against him. His actions make it unreasonable for the Board to return him to a position of trust with respect to confidential student information. By prioritizing his personal campaign over the rights of his students, Dr. Allen has made it impossible for the Board to expect parents to trust his judgment, and objectivity, and to leave their own children's educational well-being in his hands.

As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position, so that the Board can ensure the confidentiality of student information, and continue providing a healthy and safe learning environment for all students at HCRHS.

COUNT NINE-UNBECOMING CONDUCT
(Retaliation)
(Violation of National Education Association Code of Ethics/Board Policy 3211)

Dr. Allen's conduct, as demonstrated by his May 6, 2016, email, wherein he threatened to lower K.P.'s grade in retaliation for her mother questioning his lesson planning, violates the NEA Code of Ethics. Dr. Allen has exposed K.P. to conditions that are harmful to learning, health and safety, and has caused her mother to fear retaliation for simply inquiring about Dr. Allen's lesson plans after the AP exam, an inquiry which turned out to be well-justified.

Dr. Allen's behavior makes it untenable to expect prospective parents to trust Dr. Allen's judgment, and objectivity, and to leave their own children's educational well-being in his hands.

As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position, so that the Board can continue providing a healthy and safe learning environment for all students at HCRHS.

COUNT TEN-UNBECOMING CONDUCT
(Violation of Board Policy 3281 - Inappropriate Staff Conduct)

Dr. Allen's conduct, as demonstrated by his May 6, 2016, email, wherein he told Ms. Batista, his direct supervisor, "F*** you" violates Board Policy 3281-Inappropriate Staff Conduct, which provides "The Board strongly believes that school staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district" and further provides:

- Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district
- School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils

Dr. Allen's palpable disrespect for his supervisor, and his use of profanity multiple times, in the virtual presence of other colleagues, and a parent, D.P., and in response to a mundane parent inquiry demonstrate clearly inappropriate conduct, which should not be tolerated.

Dr. Allen's conduct was knowing and deliberate, as evidenced by his email to Sean Chappe, saying "See you in court" with a smile. Dr. Allen's email demonstrates that his tirade was not the result of a momentary loss of temper or professionalism, but rather a calculated and knowing exposure of his disdain for his colleagues. His behavior undermines the public's trust and confidence, and erodes the professional environment at HCRHS.

As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position, so that the Board can maintain a community of respect and integrity at HCRHS.

COUNT ELEVEN-UNBECOMING CONDUCT
(Violation of Board Policy 3150-Discipline)

Dr. Allen's conduct, as demonstrated in the foregoing paragraphs, violates Board Policy 3150- Discipline.

Dr. Allen's disclosure of confidential student information violates the Federal Educational Rights and Privacy Act ("FERPA"), New Jersey Statutes, New Jersey Administrative Code, as well as Board Policy. Dr. Allen's violation of the aforementioned laws has caused exposure and embarrassment to a student, and compromises the public's trust in the Board.

As such, Dr. Allen is guilty of unbecoming conduct, and should be removed from his tenured position.

COUNT TWELVE-UNBECOMING CONDUCT
(Violation of Board Policy 3360-Acceptable Use of District Technology)

Dr. Allen's disclosure of confidential student information via his HCRHS email, as well as his profane and disrespectful tirade toward his supervisor, violates Board Policy 3360- Acceptable Use of District Technology.

Dr. Allen's conduct violates both State and Federal confidentiality laws, as set forth herein. Further, Dr. Allen used his HCRHS email account to transmit vulgar, rude, inflammatory, threatening, and disrespectful content to Ms. Batista, and D.P., in his May 6th email tirade.

Dr. Allen's conduct in violating Board Policy 3360-Acceptable Use of Technology renders him guilty of unbecoming conduct, and requires his removal from his tenured position.

COUNT THIRTEEN-UNBECOMING CONDUCT
(Violation of Board Policy 3270-Professional Responsibilities)

Dr. Allen's refusal to teach AP chemistry after the AP exam, combined with his failure to have emergency lesson plans on file, failure to provide tests and lesson plans to his ICS teacher, and refusal to use common assessments violate Board Policy 3270-Professional Responsibilities.

Dr. Allen's conduct in failing to teach or have lesson plans subsequent to the AP Chemistry exam is an abdication of his professional responsibilities. Further, his emergency lesson plans were determined to be non-existent, and contained the name of his 2014-2015 students. Finally, by failing to provide lesson plans and tests to his ICS teacher, Dr. Allen has failed in his professional responsibility to 504 and IEP students, and compromised the Board's ability to fulfill its legal obligations to these students.

Accordingly, Dr. Allen's conduct in violation of Board Policy 3270 constitutes conduct unbecoming, requiring his removal from his tenured position.

BACKGROUND

Dr. Richard (Dan) Allen is a tenured member of the Science Department at Hunterdon Central Regional High School (HCRHS), teaching Advanced Placement Chemistry ("AP Chemistry") and CP (College Prep) Chemistry during the 2015-2016 school year. Dr. Allen began teaching for the school district at the beginning of the 2004-2005 school year. Dr. Allen gained tenure in his position as of October 5, 2007.

Dr. Allen has received a variety of training, including annual training via computer on the Federal Educational Rights and Privacy Act ("FERPA") for the past four (4) years. Dr. Allen has received satisfactory or better evaluations throughout his career at HCRHS. Dr. Allen received a written reprimand in 2012 after he suggested to parents at a Back to School Night that Superintendent Christina Steffner's motivation for increasing the number of students taking the AP exam was tied to her compensation.

During the 2014-2015 school year, HCRHS changed from a "semester block schedule" to an "A/B block schedule." This resulted in a significant change for AP teachers because they previously taught their courses over either a half year or three quarter year period. Before the 2014-2015 school year, the District's semester block schedule resulted in completion of the AP Chemistry class and curriculum a few weeks before the national AP exam that is given during the first week in May each year. Beginning in the 2014-2015 school year, the District adopted and implemented an A/B block scheduling model that resulted in students continuing in the same class through the entire school year. Under the new schedule, AP courses were taught over the course of the entire school year, including the portion of the school year after the national AP exam. As a result, teachers who taught AP classes were required to develop a curriculum for the classes after the AP exam in early May until the end of the school year. AP teachers were provided with support and training to prepare them for this change. Science Supervisor Karen Batista testified that in preparation for the schedule change, AP science teachers were given first priority at summer curriculum writing money, given access to a teacher forum through the College Board website, and offered the opportunity to observe AP teachers in other districts using the A/B block schedule. Preparing AP teachers for the schedule changes was discussed at faculty meetings in Professional Learning Communities ("PLCs"), as well as at department meetings.

For the 2014-2015 school year, Dr. Allen developed a series of research projects and associated assignments and presentations, but found that most students did not work up to their potential and did not produce good work. So, for the 2015-2016 school year, Dr. Allen planned to show a series of video

lectures on chemistry topics that related to those topics covered by the AP Chemistry curriculum. Initially, Dr. Allen had not planned to require graded assignments associated with the lectures, but after showing the first lecture had determined that he needed to do so in order to make sure the class paid attention. As of May 6, 2016, Dr. Allen had not advised the class that there would be graded assignments based upon the video lecture series.

The charges arise primarily out of the events that occurred on and around May 6, 2016 and shortly thereafter.

During the 2015-2016 school year, Students K.P. and C.N. were students in one of Dr. Allen's two AP Chemistry classes. Neither student excelled and both of their parents were in touch with Dr. Allen and Ms. Batista during the school year. C.L., a parent, met with Dr. Allen and her daughter, C.N. in January of 2016 to determine why C.N. did well on homework and labs, but not on tests. According to C.L., she did not find the results of the meeting to be satisfactory. In February, after C.N. continued to struggle in Dr. Allen's class, C.L. met with Ms. Batista and C.N.'s counselor, Casey Roupon.

Similarly, D.P. was in touch with Dr. Allen and Ms. Batista because her daughter, K.P., also struggled in Dr. Allen's AP Chemistry class. D.P. complained that Dr. Allen consistently told K.P. to do homework and attend tutorials but did not offer specific help. During the school year, K.P. consulted with counselors, but did not approach Dr. Allen. Dr. Allen speculated that K.P. went "behind [his] ... back" to counselors because she was looking to drop the course.

In 2016, the national AP Chemistry exam was given on Monday, May 2, 2016. Several students missed class during the remainder of the week as they sat for AP exams in other subjects. For the remainder of classes that week, Dr. Allen showed videos of chemistry lectures and did not give students an assignment regarding those lectures. According to Dr. Allen, K.P. and C.N. were not attentive during those videos and their behavior bordered on disruptive. Apparently, K.P. told her mother, D.P., that Dr. Allen told the class that he did not plan to teach for the rest of the school year since the AP Chemistry exam had now been administered. After K.P. described the classes to her mother, on Friday, May 6, 2016, D.P. sent the following email to Ms. Batista and school counselors, asking about Dr. Allen's lesson plans for the remainder of the school year:

> Good morning all on this very wet, yet again, dreary day! Hope this finds you all well. Question pertaining to K.P.'s Chem class. The students were informed this week by Dr. Allen that he has decided this year "due to lack of interest and effort" on the students part,

> that he will no longer be basically teaching them for the rest of the school year. That for the next six weeks, they will be watching videos and having study halls where they can complete their other work. This past Tuesday was free time and yesterday they watched a video. I am fully aware that at the AP level, their finals are over and so is the AP Exam but there is nothing else these kids can be doing? Mini-labs, anything? That does not sound right to me giving the amount of time left. This to me sounds like a perfect opportunity to give assignments to help boost their grades. I understand that these types of lessons don't have to be everyday but to just sit there in a block length course with nothing to do is ridiculous. Other AP classes are slowing down but still giving some type of assignment. I am not trying to ruffle anymore feathers at this point but I do find this academically sad and a waste of school time.
>
> Thanks for listening to me and hoping that maybe something can be resolved from this.

Upon receiving D.P.'s email during the afternoon of May 6, Ms. Batista responded to her and assured her that Dr. Allen was most likely trying to make a point and that she would speak to him. Ms. Batista forwarded D.P.'s email to Dr. Allen, seeking his response. Ms. Batista's email to Dr. Allen read as follows:

> Dan,
>
> Do you have a response to this? I'm assuming that you are trying to make a point. If not, understand that you are under contract (even if the new one hasn't been negotiated yet) until June 30th.
>
> Karen

Ms. Batista expected that she and Dr. Allen would have a discussion about D.P.'s email and she would learn what caused K.P.'s impression. Dr. Allen was angered by Ms. Batista's email and initially sent three brief emails to her during that evening.

> At 6:37 p.m., Dr. Allen sent an email providing:
>
> Wow. What the f*** is that? Maybe ask about it me first before you accuse me of violating my f****ing contract?
>
> A moment later, at 6:38 p.m., he wrote:
>
> I'm too angry to reply now. Later

Then, at 6:51 p.m., he followed up, again expressing his anger, and listing the Chemistry lectures he was showing in class:

> I am so angry right now. Here is the title of the Eric Smith video I showed on Thurs (Paste it into youtube) & the Robert Hazen one I am showing on Mon. Please watch them (1hr each) before I talk to you again, so you have some background. Just f****ing unbelievable.
>
> ...
> McCloskey Speaker Series – New Theories on the Origin of Life with Dr. Eric Smith
>
> ...
> ROBERT HAZEN - CHANCE, NECESSITY, AND THE ORIGINS OF LIFE

Dr. Allen testified that he was "upset" and very "angry" when he sent these three emails. Dr. Allen mentioned D.P.'s email to his wife and daughter and then took a walk and did some gardening. Dr. Allen, believing that he had calmed down, then composed, and sent, the following response to Ms. Batista, the two counselors, D.P. and his wife (agape). Dr. Allen's response, at 8:40 p.m. on May 6, 2016, reads as follows:

> Hi Karen.
>
> Well, first off, that is certainly an interesting version of what goes on in my class. Here is my version:
>
> There are about 16 class days for each section of AP Chemistry after the final exam & national AP Exam. Last year I gave the students a large list of possible research topics that tied into the course material & that they might find interesting. The assignment was for each student to pick three topics to research -- followed by the submission of a two page summary and a short presentation to the class. Each report/presentation was worth a lab grade. Unfortunately, a majority of the (very grade-savvy) kids realized that three lab grades would not statistically affect their overall course grade and thus did a barely acceptable, low-effort job on the reports. Frankly it was a waste of everybody's time. Just one girl did serious research on a topic she eventually went on to study in college, but the other 59 students basically gave me crap -- just good enough to no drop their overall grade. One obvious option on

my part would be to bump up the worth of these assignments so the kids would have a penalty for bad work. But I rejected that option because most would just bump up the quality slightly (still crap) to stay even. Some would do a great job to get a better grade but (from experience) these kids would be mostly kids who already had an A. And in my opinion, the "AP Chemistry" grade at HCRHS should be based solely on the "AP Chemistry" curriculum, which has now ended.

So this year I decided to do something different. I conceived a sort of mini-course of video lectures by college professors that would show the kids real-world & scientific research applications of the things we learned in class. I came up with seven "units" (origin of life, biogeochemistry, climate change, energy, limits to growth, etc.) for which I would devote two class periods each (an hour-long lecture in each block). I am developing this on the fly based on my feel for the material and the kids. At first I was thinking I would just show the videos and that was that. After showing the first video that way and gauging their reaction, I am reconsidering -- now planning a mini-discussion before & after, along with a two-paragraph summary and reflection (with course tie-ins) of the video. I'm feeling my way through this, my first foray into video lectures.

My first video was (search youtube) "McCloskey Speaker Series - New Theories on the Origin of Life with Dr. Eric Smith" I showed this to A-day on Thurs and B-day today. I encourage you to watch it in its entirety. On student applauded after the video ended. My second (and last) video of the first unit will be "Robert Hazen - Chance, Necessity and the Origins of Life". Again, highly recommended. This stuff is the real deal -- a good metric for them to see if science is really what they want to do, and which parts of real-world science do they find most interesting and necessary.

Unfortunately I did have some trouble with two students for most of the block: C------- N-------- and K----- P------ were talking loudly and laughing in the back of the room -- loudly enough that I had to interrupt the video and ask them to quiet down THREE different times during the block. I had to speak to nobody else in either block I showed this video. I suspect this may be partially why K---- P---- did not join in the applause at the end -- I don't think she actually saw the video, which I would consider one of the very best lectures I have ever seen in my life (-- a life where I have seen hundreds of them).

> One other note about K----- P------: after entering the final exam grades, she actually ended up with an F in AP Chemistry. I understand that she was exempted into the class -- an error of judgement for which I don't think she deserves blame. So I bumped up her final exam grade until she just barely had a D. I did not inform her of this because I didn't want to embarrass her. Nice guy, huh?
>
> So...here's the way it'll go: I'm bumping her grade back down to the original F (I will inform her). And from now on I'll collect and grade the class reflection on each video.
>
> Karen, I am deeply disappointed in your handling of this matter. "Understand that you are under contract"???!!! Frankly, f*** you. I work my f***ing ass off to be a great teacher and I expect the common courtesy of at least checking in more tactfully (or in person!) when receiving second hand (and erroneous) information you received from the parent. But a threat right off the get go? No thanks.
>
> Have a great weekend & thank you for ruining mine – Dan

Only moments after sending the 8:40 p.m. May 6th email, Dr. Allen forwarded that email to Sean Chappe, a science teacher who was also an HCEA representative with this note: "See you in court, my friend :-)." Shortly after he sent the email, both Dr. Allen and his wife, Lisa Allen, were concerned about the content of the email and called Mr. Chappe for advice.

Suzanne Cooley, then HCRHS Principal, received the email from one of the counselors and forwarded it to Superintendent Christina Steffner. Over the weekend, Ms. Steffner sought and received permission from the Board President to suspend Dr. Allen, and commence an investigation into his actions.

D.P. replied to Dr. Allen's May 6th email on May 7, 2016, copying Ms. Batista, and asking Dr. Allen to please reconsider lowering K.P.'s grade and promising to speak with K.P. regarding Dr. Allen's contention that she was talking while he was showing the class videos. Also over the weekend, C.L. learned that Dr. Allen named her child, C.N. in his May 6th email, and that he copied "agape" on the email. C.L. emailed Ms. Batista to express her concern. She questioned why C.N. had been brought into the discussion, and asked for the "name and title of the individual with the agape email."

On Monday, May 9, 2016, Superintendent Steffner interviewed Dr. Allen. Director of Curriculum John Fenimore, Manager of Human Resources, Sara Jane Mahan, Shari Calabrese, President of the Hunterdon Central Education Association and Sean Chappe, another HCEA representative were present.

At the May 9th meeting, Dr. Allen was asked about his AP Chemistry lesson plans for the remainder of the 2015-2016 school year. At that time, approximately twenty-six (26) school days, including approximately 15 AP Chemistry classes, remained in the 2015-2016 school year. Dr. Allen responded "[t]hat class is over." Dr. Allen explained that he was not able to give a full answer or explanation, but that he was "outrageously excited" about his planned lecture series for the remainder of the school year. Dr. Allen was also asked about his lesson plans for his CP Chemistry class. Dr. Allen advised that the class was preparing for a test later in the week. Dr. Allen acknowledged that the test had not yet been prepared, and that his ICS (in-class support) teaching partner had not been provided with the test.[3] Dr. Allen explained that his ICS partner did have a collection of unit worksheets and she was aware that the test would "closely mirror" the worksheets.

Dr. Allen's emergency lesson plan folder in Ms. Batista's office contained only class rosters from his classes for the 2014-2015 school year and an instruction to complete an assignment that was not provided. Dr. Allen testified that his emergency lesson plans for the 2015-2016 school year, along with current rosters, were in his mailbox and were easily accessible to any substitute teacher. Some science teachers testified that emergency lesson plans were typically filed with Ms. Batista and other science teachers typically provided necessary information to the substitute when one was needed at the last minute.

At the conclusion of the meeting, Dr. Allen was advised that he was being suspended with pay pending the outcome of an investigation into his conduct.

The administration sets aside time designated as "PLC (professional learning community) time" for all teachers within each department, to learn from and collaborate with one another. Mr. Fenimore testified that Dr. Allen did not meet regularly with his PLC. Chemistry Teacher Sharon Cooper recalled that Dr. Allen participated in Chemistry PLCs. Ms. Batista did not recall that there was any issue regarding Dr. Allen's attendance at PLCs.

As part of the investigation, Vice Principals Matthew Thompson, and Michael Carr, interviewed eight students from Dr. Allen's two AP Chemistry courses. Each student was asked the same set of questions: 1) Have you taken

[3] The ICS teacher's role is to support special education students and/or students with § 504 plans. This entails reviewing lesson plans and tests to ensure that students are provided with the accommodations set forth in their IEP and/or § 504 plans, as required by law.

any AP tests yet? How have they gone? How many AP classes are you currently taking?; 2) What do you think you'll be doing from now on since you've taken your AP test?; 3) How do you know that?, and 4) What did you do last week after your test?

The AP Chemistry students interviewed generally confirmed that they had watched videos on chemistry topics during the week that began with the AP exam. The students believed that they would continue to watch videos for the remainder of the school year and did not believe that they would be required to complete assignments or otherwise be graded based on the videos.

After the meeting with Dr. Allen, Ms. Steffner asked Mr. Fenimore to speak with the supervisors from each department that offers AP coursework, to ensure that other teachers of AP classes were continuing to teach for the remainder of the school year. In response to Mr. Fenimore's inquiry, the Social Studies, Math, Fine Art, World Language, Science and English Department Supervisors all confirmed that their AP teachers were still teaching, and had lesson plans in place for post AP coursework. Mr. Fenimore also conducted seventeen (17) "drop-ins" of AP courses, to observe that AP instruction was still occurring. The drop-ins confirmed other AP teachers were providing instruction and assessment.

Ms. Steffner was also concerned that Dr. Allen had copied his wife (agape) on the May 6, 2016 email so she reviewed all of Dr. Allen's emails to his wife from his HCRHS email from September 4, 2013 through his May 9, 2016 suspension. At Ms. Steffner's direction, the Board's IT manager, Michael Marron, searched Dr. Allen's email for any other emails between his school email and his wife's email address, agape7769@comcast.net. The search yielded ten (10) additional instances of Dr. Allen disclosing student information to his wife from his HCRHS email account. Eight of these emails were sent during the 2015-2016 school year. Dr. Allen's emails that included his wife are as follows:

On April 3, 2014, Dr. Allen forwarded an email to his wife, containing a string of emails between himself and M.K., the parent of a student, E.K., discussing E.K.'s progress in his class. M.K. expressed concern over E.K.'s stress levels. E.K. is a friend of Dr. Allen's daughter.

On April 23, 2014, Dr. Allen forwarded an email that came directly from a student, who inquired about her grade to his wife. Dr. Allen forwarded the email to his wife stating "Here's the email the student sent to me before her charade was revealed. ..."

Hi Dr. Allen,

I logged into Aspen yesterday and noticed that the report card for Marking period 3 was very different from quarters 1 and 2.

I saw that my averages were C+ and C but on the report cards from the beginning of the year, my averages showed as A- and A. I was wondering if we could resolve this problem as soon as possible.

Thank you.

Hey babe. Here's the email the student sent to me before her charade was revealed. Tsk tsk tsk. What was she thinking I would do—forger her grades for the whole class & give her a A?! luv u!

On October 8, 2015, Dr. Allen forwarded an email to his wife from D.P., mother of K.P. D.P. emailed Dr. Allen to introduce herself, apparently having missed the opportunity to do so at back to school night. In Dr. Allen's response, he notes that his wife says hello. D.P. returned the greeting, and Dr. Allen forwarded the email to his wife.

Good morning. Hope this finds you well. I unfortunately cannot attend this evening's Back to School night but wanted to touch base to say hi and introduce myself. I am K.P.'s mom, D. If at any time there are any questions or concerns, please feel free to contact me at your convenience. My information is listed below.

Dr. Allen replied as follows, also copying his wife:

Hi D. Lisa (my wife) says hi. :-) ... K's done better on the past 2 tests, so as long as she keeps up the effort she'll be fine. Make sure she's keeping up with the problem set on a daily basis -- since getting even a day behind is a bit deadly with the amount of content they get each day. Let me know if you have any questions! -- Dan :-)

On November 16, 2015, Dr. Allen forwarded another email containing student information to his wife. Dr. Allen initiated this email exchange with M.W., parent of W.W. Dr. Allen reached out to express concern for W.W.'s response to his latest grade. M.W., who responded, thanking Dr. Allen. Dr. Allen then forwarded the email to his wife with the subject line "haha from M------."

> Hi M. R. seemed bummed out about his last test (84 on Liquids & Solids), but I just wanted to say that he's doing a really great job -- working really hard to understand the material. It's nice to have kids who care about their work as much as R.!! Some units he'll find easier than others, so just tell him to keep up the good work & he'll be fine. -- Dan :-)
>
> --
>
> Thanks for the note.

Four days later, on November 20, 2015, Dr. Allen sent his wife an email that simply stated "there's gonna [sic] be hell to pay—[W.W.] got a 64% on test today :-)."

On December 1, 2015, in an email exchange with his wife, Dr. Allen responded to her inquiry about his day "...going ok...the annoying kid who kept pushing back his makeup test got his deserved bad grade (hee hee)..." The student was not named in the exchange.

> How's your day?
>
> Lis
>
> ---
>
> hey :-) going ok...the annoying kid who kept pushing back his makeup test got his deserved bad grade (hee hee)
>
> otherwise going well. low stress day :-)
>
> how about you?

On February 29, 2016, Dr. Allen forwarded emails to his wife from a student's parent, C.L., mother of C.N., and his response. C.L. emailed Ms. Batista to express concern over C.N.'s performance in Dr. Allen's class, and questioned Dr. Allen's teaching skills based on her assessment of C.N.'s efforts as compared to the grades she was receiving. Ms. Batista forwarded the email to Dr. Allen, who wrote a lengthy response. Dr. Allen then forwarded the email to his wife, who responded:

> Wow!! She's a jerk. So her kid is finally being challenged and she is attacking you? What will Karen respond?

Dr. Allen wrote back to her:

> I'm sure Karen will just try to defuse it. I mean, it's the first kid in 10 years of AP to say I don't do it right :-)

Mrs. Allen replied:

> Interesting fact-- lady is friends with D.P. I would hope that Karen has your back bc it's clearly not you with your exemplary track record.
>
> Lis

And Dr. Allen finished the conversation:

> Ha ha. Her and D. (or D.'s kid at least) really laying into me this year. :-) Maybe invite them over for tea so they can fill you in. :-)

Dr. Allen again included information about C.N. in an email to his wife on March 3, 2016. Apparently, Ms. Batista met with C.L. to discuss her email, later providing an email summary of the meeting to Dr. Allen. Dr. Allen responded referencing his opinion on C.L.'s parenting skills and C.N.'s character. He then forwarded Ms. Batista's email, along with his response, to his wife with the message "This is my response to Karen's email—she met with C.N.'s mom yesterday. Bold type is Karen & normal type is mine. :-)."

> This is my response to Karen's email--she met with C.'s mom yesterday. Bold type is Karen & normal type is mine. :-)
>
> Hi Karen. Lots of stuff, so I'll respond within your text:
>
> *The meeting was actually cordial. She asked me to look at your review sheets as compared to the tests to make sure there was alignment. *
>
> The review sheets are the problem sets. I'll let you look at them if you want, but it'd be hard to decipher without actually doing all the problems, which would take days. I can tell you that they are COMPLETELY in alignment. One thing I'm very good at is picking out the essence of each unit -- i.e. the key points/skills/ideas that they need to get. I make sure I stress them during class & I pick the key problems from the book (often spanning several chapters) that illustrate them. ...That said, C. has several times approached me after a test & said that the material on the test did not match the

problem set. This is a refrain I ONLY ever hear from kids who don't understand the material. Check in with kids who do and you'll hear the opposite of what C. says. It's a "let me blame someone else" tactic, and it's use at this stage is a sign of some really bad parenting. Although I don't say anything, it reflects VERY poorly on the kid's character.

I told her I'd look at C.'s four worst tests. She also asked for a grade distribution, which I did yesterday afternoon. (everything looks well within the norm, btw) She said that they already hired a tutor (Carolyn Wilheim from North Hunterdon). I told her I would contact her to see if there is anything that we could provide to help.

I can speak with (or email) the tutor too if you like.

*She liked the idea of you checking in (with formative assessments) for the remainder of the year with C. to gauge her understanding. *

Fire drill caused B3 test to be postponed until Monday (so observation would be Wed or Fri now).

To be honest, C. mostly just screws around during class. She has her work open, but she's constantly getting sidetracked by her phone or her friends (mostly K.P. who has a D. & is also blaming me for her trouble). I can give her assigned seat, but I think you didn't want me to single her out, right? She asks me token questions & makes token appearances at tutorial. She is just not a serious student in Chemistry for whatever reasons. I usually let the AP kids check in with me as needed, so it would feel weird to check in only for C.

I certainly can do it (& will if you want), but personally I think it's a disservice to the AP kids for me to babysit them at this age because they need to start transitioning to college. They need to start figuring out (1) the work and discipline it takes to master a difficult subject, (2) if they like it (3) if they're good at it.

*She did not get personal at all. (Which is good because I was prepared to nip that in the bud.) She was concerned about curves being applied unevenly, but I assured her that you and Leon speak often about lessons, labs, tests and grading. By the end of the meeting, she was looking to get an accurate assessment of C.'s abilities. At one point she said, "look, if she's not a chemistry type,

that's okay. It's just that no one has actually said that to me." I told her that I would speak to you, Cindy Fink (her hon chem teacher) and the tutor to try to get an accurate picture for her.*

Repeat after me: "My daughter is not the chemistry type" :-) C. doesn't seem like the material much, she doesn't try very hard at understanding it, and she doesn't seem quick to pick up even the simpler concepts that the "chemistry types" absorb immediately. What kind of parent is confused about something like that at this age? Her Dad (a horse breeder) came up to me at BTS and said very jovially, "I heard you like farming -- we'll need to talk about that sometime instead of this boring Chemistry stuff." ...Ummm...Mom...maybe your daughter is a bit more like her Dad?

That's it in a nutshell. I need to take a look at the 4 tests and would like to just speak to you about the latest one to see how you are going to handle the situation (10 failures and a D class average). I don't want to add fuel to the fire. Can you swing by after class, or would you like me to go to you during block 5?

Don't worry about this one. We'll answer some of the questions and let this blow over.

The best thing for C. at this point is to work very hard with her tutor at one of those AP Exam Chemistry review books -- e.g. Princeton Review, Barrons, or the one I lent the students. There is simply no time for her to go back and nitpick over some questions on a few bad tests when an epic twenty-unit test is staring her in the face in 8 weeks. AP Chem is like a firehose of material (that's still going full blast for the next 7 weeks), and her micro-examining a few bad tests is like stopping down to gather a few cupfuls of water that spilled. That said, I understand if the Mom is insistent on this. I fully understand that this is not a good model for education, but that's the requirements of this AP model we're implementing.

So ... let me know if you have any more questions -- Dan

Dr. Allen again forwarded his wife a lengthy email exchange between Ms. Batista and C.L. on March 18, 2016. This email contained C.N.'s test scores, as well as class averages and median grades for several tests.

Finally, on March 21, 2016, Dr. Allen forwarded his wife an email that he sent to HCRHS administrators earlier in the day. Dr. Allen's email to his wife said

"Ugh. One of the General Chemistry students, J.B., released a wildly inappropriate video last night. It's on youtube under "J BloG p*$$y destroyer."

> Ugh. One of my General Chemistry students, J.B., released a wildly inappropriate video last night. It's on youtube under "J BLoG p*$$y destroyer."
>
> Not sure what jurisdiction you have over off-campus-filmed youtube video, but he's waving a fake gun around.
>
> I really really really like J.B., but he worries me sometimes, and this video is a good example.
>
> PLESE DO NOT TELL HIM I 'RATTED HIM OUT'!!!!
>
> Thanks, Dan

When asked why he copied his wife on the May 6th email, Dr. Allen testified as follows:

> I didn't know they were FERPA violations at the time. This is not -- even in my -- even in my not quite complete understanding of FERPA at this stage, I would have to know that copying my wife where other people can see she's copied is completely inappropriate. But back to your question, the reason is, because she's my advisor in the sense that she's my better half. She's good under pressure, she's good in emergency situations, she cool-headed, and I'm emotional. And she's my sounding board for things, you know, as we'll get to. Not in the sense where I should pass on names and grades to her. But she's in a true sense, she is my -- she is my -- she is my partner in teaching, you know. So that's why.

Dr. Allen's testimony was similar to his wife's understanding of FERPA. She believed that an educator could not share student information with the public, but believed that there was an exception for one's spouse.

Dr. Allen's May 6, 2016 email had further repercussions within the school.

On May 12, 2016, C.N.'s mother, C.L., wrote to Ms. Steffner advising that other students were accusing C.N. of being responsible for Dr. Allen getting "fired." C.L. included a social media post by C.N. where she attempted to set the record straight in an effort to end the attacks on her.

On May 15, 2016, D.P. sent a letter to the Board raising concern that K.P. might be exposed to Dr. Allen in the future, as well as questioning his fitness to be in a teacher. D.P. pointed to the vindictive and threatening tone of his email, and noted his inclusion of her on an email wherein he used profanity toward his supervisor. D.P. directed that neither of her children be placed in Dr. Allen's classes in the future.

The Board met on May 16, 2016 to discuss his employment. The meeting was in an open session at Dr. Allen's request. The meeting room was filled mostly with Dr. Allen's supporters. At that meeting, Dr. Allen addressed the Board and apologized for his actions. Many parents and students spoke. The vast majority expressed their support for Dr. Allen. Both before and after the meeting, the Board received many letters of support for Dr. Allen's teaching.

For example, one current student wrote, "AP Chemistry was one of the classes that made coming to school worth it every day..." Another former student wrote, "Dr. Allen's passion for the subject is part of what gave me the drive to pursue a degree in biochemistry..." A parent wrote that Dr. Allen "cares about his students and teachers in an engaging and interesting manner." Another parent, S.P., testified that her daughter had Dr. Allen as a teacher for AP Chemistry and it "was an extremely challenging class ... it was the kind of class I would want for her." That parent described Dr. Allen as "very fair" and always available after school if the kids needed help..." Science teacher Sharon Cooper described Dr. Allen's teaching as "engaging" and using cartoon characters and music to illustrate points and reach students. Ms. Cooper also testified to Dr. Allen's positive interaction with Ms. Batista and Dr. Macai, the previous science supervisor.

In addition to those letters, several students and parents testified to Dr. Allen's skills as a teacher, motivating students to pursue higher education and careers in science. Parents also testified to his good character and his contributions to the community, including a community garden. Had time permitted, numerous additional students, parents, colleagues, former colleague and members of the community were eager to testify to Dr. Allen's skills as a teacher and his good character and reputation. The record reflects that these potential additional character witnesses would have provided testimony that is substantially similar and complementary to the supportive character testimony described above.

After the May 16th Board meeting, many members of the administrative staff, which includes the department supervisors, among others, expressed concern that Dr. Allen's behavior would be viewed as a minor infraction. The Board President received letters from Edward Brandt, President of the Hunterdon Central Administrator's Association, as well as Sandra Chronic, Supervisor of

Health and Physical Education, Sara Jane Mahan, Human Resources Manager, Don Thornton, Operations Manager, Sue Cooley, HCRHS Principal, and Gymlyn Corbin, School Business Administrator/Board Secretary. These letters urged the Board's to support appropriate consequences commensurate with Dr. Allen's actions.

Dr. Allen admits that there were "so many warning signals to [him] along the way," which should have prevented him from sending the emails. He acknowledged that his wife told him not to send the email until she read it, although he ignored that advice. He further acknowledges that the series of emails he sent only to Ms. Batista in the lead up to the May 6th email were the result of a "gross overreaction." He characterizes his tone in those emails to Ms. Batista as "scolding her like she's a kid" and "ordering" her to watch the videos he references. With respect to his email to Mr. Chappe, Dr. Allen testified that he was not intended to show disdain, but rather was letting Mr. Chappe know he had "screwed up." He further claimed that the ":)" was not intended to be a happy smiley face, but was instead a "rueful" smiley face.

Dr. Allen testified that he was upset because D.P.'s email "grossly misrepresented what was happening in his class." He explained that his anger toward Ms. Batista derived from his perception that she accepted D.P.'s statements as true. Dr. Allen took issue with D.P.'s statement that Dr. Allen told the class that "due to lack of interest and effort" he would not be teaching them for the rest of the year. Dr. Allen acknowledged that he had permitted students to do other work during an AP Chemistry the day after the AP Chemistry exam. Dr. Allen explained that he recognized students had additional AP exams that week and it was time to "pull back a little bit." Dr. Allen denied that he would not be teaching for the rest of the school year and cited his excitement about the lecture series he was developing. Dr. Allen knew that D.P. was "not privy" to his excitement for the lecture series he had planned, but nonetheless was very upset and hurt by D.P.'s email.

DISCUSSION

N.J.S.A. 18A:6-10 provides that no tenured employees of the public school system "shall be dismissed or reduced in compensation ... except for inefficiency, incapacity, unbecoming conduct, or other just cause." The District bears the burden to establish that it met this standard.

The New Jersey Supreme Court has defined "unbecoming conduct" as conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." In re Young, 202 N.J. 50, 66 (2010) (quoting Karins v. City of Atl. City, 152 N.J. 532, 554

(1998) (citation omitted). The New Jersey Supreme Court further defined "unbecoming conduct" as that which violates "the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Bound Brook Bd. Of Ed. v. Ciripompa, Dkt. No. A-57-15, __ N.J. __ (February 21, 2017) (quoting Karins v. City of Atlantic City).

With this standard in mind, I turn to Dr. Allen's conduct in sending the four emails on May 6, 2016, as well as the remaining charges that arose from the investigation. In evaluating these charges, I have reviewed and considered the testimony, documentary evidence and arguments submitted by both parties. That consideration is incorporated into the discussion of the charges.

COUNT ONE-UNBECOMING CONDUCT
(Retaliation)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

COUNT NINE-UNBECOMING CONDUCT
(Retaliation)
(Violation of National Education Association Code of Ethics/Board Policy 3211)

Most troubling is the charge that Dr. Allen expressed an intention to retaliate against K.P. by lowering her grade from a D to an F after her mother D.P., sent the original email to Ms. Batista suggesting that Dr. Allen did not intend to teach AP Chemistry for the remainder of the school year because the AP Chemistry exam had been completed.

That portion of the May 6 email provided as follows:

> One other note about K----- P------: after entering the final exam grades, she actually ended up with an F in AP Chemistry. I understand that she was exempted into the class -- an error of judgement for which I don't think she deserves blame. So I bumped up her final exam grade until she just barely had a D. I did not inform her of this because I didn't want to embarrass her. Nice guy, huh?
>
> So...here's the way it'll go: I'm bumping her grade back down to the original F (I will inform her). And from now on I'll collect and grade the class reflection on each video.

Ms. Steffner, Ms. Batista and D.P. all interpreted this portion of the email to threaten retribution. Ms. Steffner testified that she was "concerned that there was a tone of retribution, that because mother had sent an e-mail apparently asking about the practice of teaching after the AP exam, that we were going to drop a student's grade..." Ms. Steffner cited "the volatile manner in which he responded and his threat of lowering a student's grade because a parent asked a question was deeply concerning..." and created concerns about him returning to the classroom. Ms. Batista also read Dr. Allen's words as threatening retaliation:

> What did become very upsetting to me was the part about K's grade being changed in particular as a result of the e-mail sent by the mom.
>
> Q. So let's get to that. That's the next paragraph. The next paragraph, so, it reads, quote, So. . .here's the way it'll go. I'm bumping her grade back down to the original F (I will inform her). And from now on I'll collect and grade the class reflection on each video, close quote.
>
> Q. So what's your reaction to that?
>
> A. Clearly it's retaliation for something that a parent had written, a parent questioned what was going on in the class, and as a result, he was going to change a grade.

Ms. Batista further stated "As I read through the e-mail, it looked to me like after he gave the explanation of what he was going to do, he still was angry and mentioned that he was going to change a student's grade, which, of course, is the worst thing he could have possibly said."

That D.P. believed that Dr. Allen might retaliate against K.P. is expressed first in a May 7 email to Dr. Allen where she seeks to insulate K.P. from blame for her previous emails:

> ... As for the info I received, I heard not from K.P. or C.N. but another student in your class on Tuesday. I never spoke to K.P. about it until Thursday night. I was just hoping, call it greedy, that maybe she would have the opportunity, not just for her but for others too, to maybe bump up her grade slightly more. My apologies for being presumptuous. As for the talking and disturbing class, they said they were told they could talk. I will speak to her about her volume. She can be loud. Any further questions/ concerns you have please feel free to contact me. I seriously hope

you will consider my request and continue in with your plan as you feel necessary.

D.P.'s May 15, 2016 letter to the Board of Education crystalized her concerns that her daughter K.P. might be the victim of retribution by Dr. Allen:

> I recently sent an email questioning if during the last few weeks of school the students might have the opportunity to "lift" their grades slightly. In response, I received a very disturbing reply that I felt not only threatened my child, but myself. The email also contained vulgarities directed towards Dr. Allen's supervisor, which I know you have read. How Dr. Allen believes a response can be sent in that tone makes me even more concerned about his mental equanimity and classroom behaviors.

D.P. continued "I am appalled that he felt he could threaten me and my child in writing instead of reaching out to me to explain the situation."

Ms. Batista also spoke to this specific issue of the apparent threat and the ever present parents' concern that a teacher will retaliate against their child when a parent complains:

> I mean, as a supervisor, one of the things that happens, parents will call about a complaint about a particular teacher, and you'll say to the parent, well, you know, can I speak to the teacher about their complaint, and their first response is well, please don't use my student's name. And, in fact, you know it's not that you don't -- you wouldn't go to a teacher and give the student's name, but, of course that's the first thing the teacher asks when you go to the teacher and say, you know, I've gotten this complaint from a parent. You know, the first question the teacher will ask: Well, which parent? And the implication is that it's a kid that's a problem in class and therefore that's why there's a parent complaint. On the parent's side of that issue is that, you know, if you mention my kid's name, the teacher is going to retaliate against my kid. I mean, this is the exact thing that you don't want to get to a parent, and he's put it in writing now, and has notified people, and so now, you know, every other parent has now got something that they can use to say that a teacher is retaliating against their kid because in fact, here's a teacher that did it.

Ms. Steffner also emphasized the importance of being able to maintain parents' trust:

> ... the trust that has to be placed between parents and teachers was seriously compromised. In the 40 plus years that I've been doing this, I often hear from parents oh, I would never say anything because the teacher will take it out on my child. And I as an administrator have always said that doesn't happen. It won't happen. You know, you have a right, this is your child. You have a right to ask questions. You have a right to be a part of it. A teacher, a professional would never take it out on a child. This e-mail spoke to me about the serious interruption of that trust, the serious breakdown and it reinforced that constant comment that we hear from parents often that I'm afraid to say anything because my child will suffer.
>
> This e-mail from D. was almost apologetic, not almost, it was apologetic and it was almost pleading please don't take it out on my daughter. I found that very disconcerting, very upsetting and certainly is not the kind of relationship we want with our parents.

Dr. Allen acknowledged that his language was "ambiguous-ish." As such, regardless of his intention, Dr. Allen's words were perceived as threatening to lower K.P.'s grade in response to D.P.'s email. Dr. Allen claims that he did not intend to fail K.P. He testified that when he wrote "I'm bumping her grade back down to the original F (I will inform her). And from now on I'll collect and grade the class reflection on each video..." Rather, this language reflected "a change in strategy." He testified as follows: "This reflects a change in strategy, that I was saying, look, I'm not -- I am not going to be able to, I'm not going to be able to not give grades for the rest of the course and have kids pay attention at all."

Dr. Allen testified that he does not fail students, and that he would have bumped K.P.'s grade back up to a "D" at the end of the course. In other words, Dr. Allen planned to lower K.P.'s grade back to the "F" she had earned to allow her to improve her grade for the remainder of the school year, and if she did not improve her grade on her own, he would then bump K.P.'s grade back to a "D".

To Dr. Allen, if he left K.P.'s grade as a "D" and then allowed her to earn extra credit and perhaps raise her grade to a "C", that would be a "gift onto a gift." Dr. Allen believed that D.P. was trying to get her daughter's grade to improve to a "C", which, to his mind, K.P. had not earned.

Dr. Allen testified that he made it a practice not to fail students and he did not intend the email as retaliation against K.P. Rather, Dr. Allen explained that he had already bumped K.P.'s grade from an F to a "D" because he had not planned additional assignments. Once he determined to grade assignments

related to the videos, he no longer needed to bump up K.P.'s grade, because she would have an opportunity to bump her own grade up from an F to a D. Dr. Allen acknowledged that he was "borderline off the rails" when he wrote this but thought it would be a "logical solution to a problem" rather than a "vindictive grade change."

Dr. Allen testified both that he was concerned not to embarrass K.P. and his view of K.P.'s visits to her counselor concerning AP Chemistry:

> So, yeah, I don't want to embarrass K.P. even if she was -- I knew she was coming at me the whole year. I knew she was going to her counselor, I didn't know exactly what she was saying to her counselor, but I knew it probably wasn't true..."

Dr. Allen characterized K.P.'s actions in going to her counselor as "unprecedented" for him in that he had never "had a kid go behind [his] back."

Turning to the question of whether Dr. Allen threatened retaliation against K.P. and, if so, whether this conduct violated Standard Eleven of Professional Standards for Teachers, N.J.A.C. 6A:9-3.3 and/or the National Education Association Code of Ethics/Board Policy 3211, I must look beyond Dr. Allen's intent to his actual words. Dr. Allen did not explain that he intended to knock K.P.'s grade back to the grade she had actually earned, to allow her the opportunity to increase her grade through additional assignments or extra credit assignments as suggested by her mother. Rather, Dr. Allen wrote that K.P. "ended up with an F in AP Chemistry" and he bumped her final exam grade up "until she just barely had a D." He continued:

> So...here's the way it'll go: I'm bumping her grade back down to the original F (I will inform her). And from now on I'll collect and grade the class reflection on each video.

Returning to Dr. Allen's words in his email, he stated "I'm bumping her [K.P.'s] grade back down to the original F..." He then indicated that he would grade the class reflections from the video, but did not explain that K.P. would have the chance to improve her grade, and once the school year was completed he would bump her grade back to a passing grade if she did not do so on her own.

Dr. Allen also stated, "I will inform her," lending credence to the thought that he would inform K.P. that she would get an "F" for the class. When taken in context of the entire email, including the angry and disgruntled tone, and the inappropriate language directed at Ms. Batista, it is difficult to interpret his statement that he would lower K.P.'s grade as anything but retaliation for her

mother's email. When viewed in light of his testimony that he knew she was coming at him the whole year, the notion that Dr. Allen had a retaliatory motive is reinforced.

Regardless of whether Dr. Allen actually intended to fail K.P., he unquestionably created the impression that he would, and compromised the necessary trust between parents and the Board. In doing so, he has irreparably damaged his own credibility with both the Board and parents. Dr. Allen had made it almost impossible for the Board to ask parents to trust him.

Accordingly, I find that Dr. Allen's statement that he would bump K.P.'s grade back to an F, by itself, leads to the conclusion that Dr. Allen engaged in conduct unbecoming a public employee. This statement, on its own, by apparently threatening to lower K.P.'s grade in retaliation for her mother's email, cannot be tolerated from any teacher. Such a statement breaches the trust between teacher and student, teacher and parent, and teacher and Board of Education. That trust is necessary for the teacher to be a successful educator. The charge of retaliation, by itself, is sufficiently serious to sustain tenure charges against Dr. Allen, but must be viewed in light of all of the facts and circumstances, including those supporting Dr. Allen.

COUNT TWO-UNBECOMING CONDUCT
(Disrespect for Supervisor)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

COUNT TEN-UNBECOMING CONDUCT
(Violation of Board Policy 3281-Inappropriate Staff Conduct)

I now turn to the charges that Dr. Allen was knowingly and deliberately hostile and disrespectful to his supervisor, Ms. Batista by using profane language in his May 6, 2017 email, by copying both colleagues and D.P., a parent with this disrespectful electronic communication.

In response to Ms. Batista's email forwarding and asking about D.P.'s email, Dr. Allen initially sent three brief emails to her, two of them using some version of "f***" or "f***ing", but not necessarily directing the profanity at Ms. Batista. For example, in his first email at 6:37 p.m., Dr. Allen wrote, "[W]ow. What the f*** is that? Maybe ask ... before you accuse me of violating my f***ing contract?"

Then, in the lengthy email sent to Ms. Batista with copies to colleagues and D.P. at 8:40 p.m., Dr. Allen directed profanity at Ms. Batista as follows:

> Karen, I am deeply disappointed in your handling of this matter. "Understand that you are under contract"???!!! Frankly, f*** you. I work my f***ing ass off to be a great teacher and I expect the common courtesy of at least checking in more tactfully (or in person!) when receiving second hand (and erroneous) information you received from the parent. But a threat right off the get go? No thanks.
>
> Have a great weekend & thank you for ruining mine – Dan

Administration officials, parents, students and other teachers uniformly testified that Dr. Allen's use of profanity, even in its censored state was inappropriate. Ms. Steffner testified to her concern both "about the use of abject profanity" and the "continued escalation of Dr. Allen's anger." John Fenimore, then the Director of Curriculum, testified that use of such language was inappropriate in any professional setting. The profanity was directed at Ms. Batista who testified that she was "offended, shocked and disappointed." Dr. Fink, a science teacher, agreed that Dr. Allen's email was "disrespectful." Another chemistry teacher, Ms. Cooper, thought directing the phrase "fuck you" to a supervisor was "inappropriate." Numerous other colleagues, as well as parents and students supporting Dr. Allen found such language to be unprofessional and/or inappropriate. D.P. cited Dr. Allen's use of profanity in her May 15, 2016 letter to the Board of Education noting that Dr. Allen's response to her email included "vulgarities directed towards Dr. Allen's supervisor." In that letter, D.P. also stated her belief that Dr. Allen needed to "accept full responsibility for his behaviors, threats, outbursts and obscenity laced emails."

Dr. Allen agreed and has apologized both to Ms. Batista and to the Board of Education. There is no dispute that Dr. Allen's use of profanity in his May 6, 2016 emails directed at Ms. Batista was both inappropriate and disrespectful. Such conduct from a teacher meets the definition of conduct unbecoming in that it violates the "implicit standard of good behavior" expected of a teacher. See Karins v. Atl. City, 152 N.J. 532, 554-555 (1998). Dr. Allen's May 6, 2016 email also violates Board Policy 3281 which provides "[i]nappropriate conduct and conduct unbecoming a school staff member will not be tolerated ..."

Dr. Allen's use of profanity directed at Ms. Batista in an email that was also sent to colleagues and a parent is unbecoming conduct. The use of profanity directed at a supervisor in this situation is serious, but on its own might not be sufficient to warrant removal. Dr. Allen's use of profanity cannot be examined in a vacuum but must be considered in light of all of the facts and circumstances present in this case.

COUNT FIVE-UNBECOMING CONDUCT
(Failure to Teach)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

COUNT THIRTEEN-UNBECOMING CONDUCT
(Violation of Board Policy 3270-Professional Responsibilities)

The Board has charged Dr. Allen with a failure to teach by failing to complete lesson plans, failing to have current emergency lesson plans on file, refusing to teach AP Chemistry after the AP Chemistry exam, failing to provide tests and lesson plans to his ICS teacher, and refusing to use common assessments.

Citing Mr. Fennimore's testimony, the Board contends that Dr. Allen failed to complete lesson plans and failed to have current emergency lesson plans on file. Mr. Fennimore testified that he checked Dr. Allen's emergency lesson plan folder in his mailbox in the 11/12 building and found only a class roster from the prior school year and a direction to work on "problem set 912". Mr. Fennimore viewed this and similar instructions as an activity rather than a lesson plan. Mr. Fennimore also expressed concern that Dr. Allen had not supplied lesson plans for CP Chemistry and in particular, had not supplied lesson plans to his ICS teacher.

Dr. Allen's supervisor, Karen Batista recalled that if she asked for lesson plans, Dr. Allen would typically be one of the first teachers to turn them in. Ms. Batista did not recall an issue with Dr. Allen turning in either lesson plans or emergency lesson plans. Ms. Batista also acknowledged that she permitted tenured teachers to submit unit plans but required non-tenured teachers to submit weekly lesson plans. Dr. Allen had provided unit plans to his ICS teacher. Dr. Allen testified that his emergency lesson plans could be found in his mailbox.

Science teachers, including Dr. Leon Copeland and Sharon Cooper, testified that when a science teacher would be absent unexpectedly, the teacher would typically call another teacher and ask that colleague to make sure that the substitute had whatever was necessary for lessons.

The Board contends that Dr. Allen planned simply to show videos during the gap period between the AP Chemistry exam and the end of the school year. It is not disputed that Dr. Allen did show a video lecture "McCloskey Speaker Series – New Theories on the Origin of Life with Dr. Eric Smith" to his AP Chemistry classes between May 2, 2016, the date of the AP Chemistry exam and May 6, 2016, his last day in the classroom. Dr. Allen described his thoughts and plans for the video lecture series in his May 6, 2016 email as follows:

> So this year I decided to do something different. I conceived a sort of mini-course of video lectures by college professors that would show the kids real-world & scientific research applications of the things we learned in class. I came up with seven "units" (origin of life, biogeochemistry, climate change, energy, limits to growth, etc.) for which I would devote two class periods each (an hour-long lecture in each block). I am developing this on the fly based on my feel for the material and the kids. At first I was thinking I would just show the videos and that was that. After showing the first video that way and gauging their reaction, I am reconsidering -- now planning a mini-discussion before & after, along with a two-paragraph summary and reflection (with course tie-ins) of the video. I'm feeling my way through this, my first foray into video lectures.
>
> My first video was (search youtube) "McCloskey Speaker Series - New Theories on the Origin of Life with Dr. Eric Smith" I showed this to A-day on Thurs and B-day today. I encourage you to watch it in its entirety. One student applauded after the video ended. My second (and last) video of the first unit will be "Robert Hazen - Chance, Necessity and the Origins of Life". Again, highly recommended. This stuff is the real deal -- a good metric for them to see if science is really what they want to do, and which parts of real-world science do they find most interesting and necessary.

However, in his May 6, 2016 email, Dr. Allen, also expressed his opinion on the grading of AP Chemistry and the period between the AP Chemistry exam and the end of the school year:

> And in my opinion, the "AP Chemistry" grade at HCRHS should be based solely on the "AP Chemistry" curriculum, which has now ended.

During the meeting on May 9, Mr. Fenimore asked Dr. Allen about lesson plans for AP Chemistry for the remainder of the year. According to Mr. Fenimore, Dr. Allen reiterated the sentiment from his email and replied, "that class is over." But during his testimony, Dr. Allen testified that he realized after his classes on May 5th and May 6th that he was going to need some sort of "carrot stick" mechanism to keep his students engaged for the remainder of the year.

Mr. Fenimore also asked Dr. Allen about his plans for CP Chemistry and he indicated that students were working on a test review sheet but he had not yet written the test. Mr. Fenimore expressed concern because this meant that Dr.

Allen's ICS partner, who was relatively new, did not have a copy of the test and she was legally bound to work on accommodations. Dr. Allen had not provided a test to be administered at the end of the week to his ICS partner by the morning of May 9, but had provided the unit worksheets and his ICS partner was aware that the test would closely track the problem sets included with the worksheets.

Mr. Fenimore distinguished between Dr. Allen's idea to use a video lecture series and Dr. Allen's implementation of the lecture series. According to Mr. Fenimore, "the actual implementation wasn't occurring." Mr. Fenimore based this conclusion on Dr. Allen's statement at the May 9 meeting as well as the May 6 email.

The Board has not established that Dr. Allen failed to continue to teach AP Chemistry by May 9, 2016. Rather, the AP Chemistry exam was administered on May 2, the previous Monday. The AP Chemistry exam is among the first AP exams administered and many students in AP Chemistry were absent during that week as they took other AP exams. Many students who did attend the class were focused on other AP exams they would take later in the week. Dr. Allen testified that he knew when "to pull back a little bit" as he was after the AP Chemistry exam. So, for the remainder of that week, Dr. Allen had shown the first of the video lectures in the lecture series he had developed. As noted in his May 6 email, he had initially conceived of the lecture series to complement the topics covered in AP Chemistry, but without related assignments. Dr. Allen acknowledged that he was "feeling... [his] way through" his first series of video lectures, but had already determined to add assignments and grades to the lecture series.

There is no doubt that Dr. Allen believed that the AP Chemistry class should end after the AP Chemistry exam, and that he had not developed formal lesson plans for his lecture series. Nonetheless, Dr. Allen was aware that he was required to teach for the remainder of the school year. He had developed a lecture series and was showing the lectures to his students. Given the block scheduling, Dr. Allen had shown only the first video in the lecture series without a graded assignment while students were in the process of completing other AP exams. At this point, Dr. Allen was removed from the classroom and had no further opportunity to develop his anticipated lecture series. Based upon this evidence, I find that the Board has established only that Dr. Allen had a personal belief that AP Chemistry should end with the AP exam. The Board has not established that Dr. Allen failed to teach or intended to stop teaching after the AP exam.

Mr. Fenimore testified that Dr. Allen participated in PLCs (Professional Learning Communities) only occasionally and did not use common assessments that were developed in the PLCs. This testimony was not fully supported. Ms.

Batista did not recall that Dr. Allen failed to attend or participate in PLCs. Ms. Batista recalled only one PLC meeting where Mr. Fenimore attended and had found that Dr. Allen was inattentive. Mr. Fenimore offered no evidentiary support for his allegation that Dr. Allen did not use common assessments in either CP Chemistry or AP Chemistry. Dr. Copeland testified that he and Dr. Allen collaborated on the teaching of AP Chemistry and that he used Dr. Allen's handouts and worksheets with his students.

In sum, I find insufficient evidence that Dr. Allen failed or refused to teach AP Chemistry after the AP exam, failed to provide tests and lesson plans to his ICS teacher, and refused to use common assessments. Dr. Allen did have current lesson plans, though the emergency lesson plans in the folder in his mailbox were not current. Dr. Allen attended and participated in PLC meetings and collaborated with his colleagues. Dr. Allen had not provided a single test to his ICS partner one week before the test. Dr. Allen did not fail to meet his professional obligations. To the extent that these charges are supported, they are not sufficient to warrant tenure charges. Charges 5 and 13 are dismissed.

COUNT THREE-UNBECOMING CONDUCT
(Violation of Student Confidentiality)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

COUNT SIX-UNBECOMING CONDUCT
(Violation of Student Confidentiality)
(Violation of National Education Association Code of Ethics/Board Policy 3211)

COUNT EIGHT-UNBECOMING CONDUCT
(Violating Student Confidentiality)
(Violation of National Education Association Code of Ethics/Board Policy 3211)

COUNT ELEVEN-UNBECOMING CONDUCT
(Violation of Board Policy 3150-Discipline)

COUNT TWELVE-UNBECOMING CONDUCT
(Violation of Board Policy 3360-Acceptable Use of District Technology)

These charges allege that Dr. Allen breached student confidentiality, violated the Federal Educational Rights and Privacy Act (FERPA) and Board Policies involving Discipline (3150) and Acceptable Use of Technology (3360) by sharing confidential student information with his wife Lisa Allen for no valid educational purpose. The charges also allege that Dr. Allen breached the

confidentiality of student C.N. when she was discussed in the May 6, 2016 email sent to D.P. as well as to Lisa Allen.

The Board contends that Dr. Allen engaged in unbecoming conduct when he sent four (4) unprofessional, insubordinate and hostile emails to his supervisor, including the May 6th email, which included the counselors, D.P., and his wife; violated the confidentiality rights of C.N. and K.P. by virtue of copying his wife, and D.P. on the May 6th email; threatened to lower K.P.'s grade as a result of D.P.'s email; and habitually violated student confidentiality rights by emailing his wife confidential student information.

Dr. Allen copied his wife on a total of ten emails referencing students and/or confidential student information, such as grades in addition to the May 6, 2016 email. That email referenced K.P. and C.N., their conduct in AP Chemistry, and K.P.'s final grade. In addition to confidential information, Dr. Allen demeaned and mocked students in some of the emails to Lisa Allen, referring to a student's "charade" and labeling another student "annoying."

Turning to the May 6, 2016 email, Dr. Allen discussed his difficulties with K.P. and C.N., and then copied D.P., K.P.'s mother, as well as Mrs. Allen on the email. Specifically, Dr. Allen discussed C.N. and K.P.'s lack of focus on the video as follows:

> Unfortunately I did have some trouble with two students for most of the block: C------- N-------- and K----- P------ were talking loudly and laughing in the back of the room -- loudly enough that I had to interrupt the video and ask them to quiet down THREE different times during the block. I had to speak to nobody else in either block I showed this video. I suspect this may be partially why K---- P---- did not join in the applause at the end -- I don't think she actually saw the video, which I would consider one of the very best lectures I have ever seen in my life (-- a life where I have seen hundreds of them).
>
> One other note about K----- P------: after entering the final exam grades, she actually ended up with an F in AP Chemistry. I understand that she was exempted into the class -- an error of judgement for which I don't think she deserves blame. So I bumped up her final exam grade until she just barely had a D. I did not inform her of this because I didn't want to embarrass her. Nice guy, huh?

As a result of this email, C.N. believed her confidentiality and privacy was violated. C.N.'s mother, C.L., learned of the email on Saturday, May 7, 2016 and

promptly sent an email to Ms. Batista asking the identify of "agape" and expressing concern that her daughter "had been brought into this discussion."

Subsequently, C.L., C.N.'s mother, explained that C.N. was concerned about discussion on social media that "plastered" her name everywhere in connection with Dr. Allen's suspension. On May 12, 2016, C.N.'s mother sent an email to Ms. Steffner expressing her concern for her daughter stating:

> My daughter came home today and informed me that members of the senior and junior class have accused her of "getting Dr. Allen fired." She is very upset. She feels helpless and harassed.

The Board would tie C.N.'s concern to a social media post from Dr. Allen's stepdaughter asking students to attend the upcoming Board of Education meeting and to write letters in support of Dr. Allen. The Board bases its conclusion on its assumption that Dr. Allen's stepdaughter sought students' support at his behest. The record does not establish that Dr. or Mrs. Allen urged or directed Dr. Allen's stepdaughter to post this request to social media. Although there is insufficient support for the Board's contention that his stepdaughter's post was at Dr. Allen's behest, this post, which did not include C.N., along with other posts circulated by students seemed to result in C.N. being perceived by other students as the reason for Dr. Allen's suspension. Regardless of the factual basis that led to Dr. Allen's suspension and subsequent tenure charges, Dr. Allen's inclusion of C.N. in his email to D.P., a parent, but not C.N.'s parent, and to his wife, led to C.N.'s name being connected to his tenure charges. Thus, the result of Dr. Allen's violation of C.N.'s privacy and confidentiality under FERPA and Board Policy 3360 may have lead to negative publicity for C.N.

Dr. Allen also violated both K.P.'s and C.N.'s confidentiality as students when he copied his wife on the May 6, 2016 email. That email included specific information about K.P.'s grades and K.P.'s and C.N.'s conduct. While Dr. Allen regards his wife as his "sounding board," "advisor" and "partner in teaching," she is not employed by the District and plays no role in the education of Dr. Allen's students, including K.P., C.N. and the other students specifically referenced in Dr. Allen's emails. By sending emails to his wife that included confidential student information, Dr. Allen violated the privacy rights of these students pursuant to FERPA, and Board Policy 3360 (Acceptable Use of District Technology) which requires users of the Board's email system to comply with FERPA. That policy also provides:

> Except in instances as specifically provided by law, any student records which are made, maintained, or transmitted technologically must be kept confidential.

Both Dr. Allen and Mrs. Allen seemed to think their emails were permitted as some sort of spousal privilege or exception to the student privacy requirements included in Board Policy and in FERPA. Dr. Allen acknowledged receiving FERPA training each year for the past five years but did not pay sufficient attention and take the training seriously because it was computer-based training, and thus did not think it applied to communications with his wife.

Dr. Allen explained that the emails "were just between me and my wife and not to be shared further." Dr. Allen testified that he "didn't know they were FERPA violations at the time." Explaining why he copied his wife on emails, Dr. Allen characterized his wife as his "advisor" who is "cool-headed" and his sounding board and "partner in teaching." Yet Dr. Allen acknowledged his error stating that "I would have to know that copying my wife where other people can see she's copied is completely inappropriate."

It is not clear whether Dr. Allen acknowledged that copying his wife on emails is inappropriate or that allowing others to see that she received the email is his mistake. It is troubling that Dr. Allen seemed to focus on whether others were aware that he copied his wife rather than the fact that he did so, thus violating student privacy and confidentiality.

Dr. Allen relies upon what he believed to be spousal privilege to suggest that he had a right to share confidential student information with his wife. Spousal or marital privilege as codified in the New Jersey Rules of Evidence 509 permits spouses to refrain of disclosure of spousal "communications made in confidence" without the consent of the spouse. N.J.S.A. 2A:84A-22. Rule 509 does not address the situation where one spouse presumes that he or she is able to disclose confidential information about another individual, in this case a student, to the other spouse because the information will then be protected from disclosure. Regardless, the Board's policy directs that any student records which are made, maintained, or transmitted technologically must be kept confidential. Additionally, FERPA prohibits the disclosure of student records, which include, but are not limited to, grades and student disciplinary files.

By copying his wife on the May 6, 2016 email which included K.P.'s grade in AP Chemistry, as well as several other emails disclosing student grades, Dr. Allen violated both FERPA and Board Policy 3360. Dr. Allen also violated C.N.'s privacy by disclosing her conduct in his class to both his wife and to D.P. These violations of privacy and confidentiality constitutes unbecoming conduct which violates "the implicit standard of good behavior" expected of a teacher. The charges of violating student privacy and confidentiality on their own might warrant discipline short of removal. Dr. Allen's violation of student privacy and confidentiality, as with other charges, cannot be examined in a vacuum, but it must be considered in light of all of the facts and circumstances present in this case.

COUNT FOUR-UNBECOMING CONDUCT
(Disrespect for Students)
(Violation of N.J.A.C. 6A:9-3.3, Standard Eleven)

COUNT SEVEN-UNBECOMING CONDUCT
(Disparaging Students)
(Violation of National Education Association Code of Ethics/Board Policy 3211)

Dr. Allen is charged with disparaging and disrespecting students by speaking in a derisive and pejorative manner about them. The Board relies upon the series of emails Dr. Allen either forwarded to his wife or copied to her that include unprofessional statements such as calling a student "annoying" or laughing at a bad grade.

The language and tone of Dr. Allen's emails to his wife were, on occasion, derisive. For example, Dr. Allen forwarded one email to his wife on April 23, 2014 where a student asked about her grades. Dr. Allen's comment was "[]here's the email the student sent to me before her charade was revealed. Tsk tsk tsk." In another email on December 1, 2015, Dr. Allen referred to a student as annoying, stating "... the annoying kid who kept pushing back his make up test got his deserved bad grade (hee hee)." Dr. Allen also seemed to mock C.L.'s parenting skills and C.N.'s interest in chemistry in a March 3, 2016 email exchange with Ms. Batista.

Standard Eleven of Ethical Practice requires teachers to maintain "professional relationships with students ..." and to "conduct themselves in a sound and professionally responsible manner."

The NEA Code of Ethics as incorporated into Board Policy 3211 provides that teachers "[s]hall not expose the student to embarrassment or disparagement."

While these email exchanges were not public and did not expose students to public disparagement, they were unprofessional and inappropriate in that they mocked, disparaged and laughed at students and suggested that Dr. Allen took pleasure or felt vindicated in his opinions when students who did not excel met his expectations with poor grades, conduct or performance. These exchanges were unprofessional and violate the implicit standard of good behavior expected of a teacher. These emails disparaging students constitute unbecoming conduct. As with each of the charges, the charge that Dr. Allen disparaged students must be considered in light of all of the facts and circumstances present in this case.

Based upon the foregoing, Dr. Allen engaged in conduct unbecoming a teacher when he threatened retaliation against student K.P.; directed profanity at his supervisor, Ms. Batista in an email sent to colleagues, a parent and his wife, as well as Ms. Batista; violated the confidentiality of students K.P. and C.N., as well as others by copying his wife on emails discussing their grades and classroom behaviors; and by disparaging or mocking students in email exchanges with his wife over the District's email server.

As the appropriate penalty for Dr. Allen's misconduct is evaluated, the question of progressive discipline and mitigating factors warrants consideration. The New Jersey Supreme Court explained:

> [T]he concept of progressive discipline has been utilized in two ways: (1) to 'ratchet-up' or 'support imposition of a more severe penalty for a public employee who engages in habitual misconduct'; and (2) 'to mitigate the penalty' for an employee who has a record largely unblemished by significant disciplinary infractions.' On the other hand, progressive discipline is not 'a fixed and immutable rule to be followed without question' because 'some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record.'

In re Stallworth, 208 N.J. 182, 196 (2011) (citations and internal punctuation omitted). The Court explained the analytic framework to be considered in evaluating the issue of progressive discipline:

> To assure proper progressive discipline, and a resulting penalty based on the totality of the work history, an employee's past record with emphasis on the reasonably recent past should be considered. This includes consideration of the totality of the employee's work performance, including all prior infractions.... Progressive discipline is a flexible concept, and its application depends on the totality and remoteness of the individual instances of misconduct that comprise the disciplinary record. The number and remoteness or timing of the offenses and their comparative seriousness, together with an analysis of the present conduct, must inform the evaluation of the appropriate penalty.

Id. at 199.

Virtually all of Dr. Allen's misconduct occurred in a series of emails on May 6, 2016 and approximately ten emails with his wife from September 2014 through May 6, 2016. The question of penalty and any circumstances which might

mitigate the penalty begins with Dr. Allen's repeated apologies to the Board and to Ms. Batista. Dr. Allen has recognized that he should not have sent the May 6, 2016 emails in anger and that he overreacted to Ms. Batista's inquiry. This acknowledgement of fault is one of the several factors that Dr. Allen cites in support of a penalty short of removal. Dr. Allen also cites Ms. Steffner's alleged grudge against him, disparate treatment when compared to other District teachers, that students did not witness the conduct, his personal circumstances, his relatively clean record and his reputation as a popular and exciting teacher.

Dr. Allen has asserted that Ms. Steffner held a grudge and was out to get him both for his inadvisable comments to parents about her compensation in 2012 and because his mother, a local political force, is asserted to have backed successful board of education candidates Lori Blutfield and Vincent Panico and is asserted to have worked to defeat current Board President Deb Labbadia's candidacy for board of education in another district. Dr. Allen suggests that this family grudge caused Ms. Steffner to recommend termination rather than a lesser penalty. While Dr. Allen's testimony supports his contentions, this testimony is comprised predominantly of suggestion and innuendo rather than direct evidence. Dr. Allen went to great lengths to explain the intricacies of local board of education politics and established that his mother and Ms. Steffner were in opposing political camps, but did not offer direct and credible evidence connecting any possible animosity between Ms. Steffner and Dr. Allen's mother to his removal. Given that the allegation was not proven, it cannot be treated as a mitigating factor when considering the appropriate penalty for Dr. Allen's misconduct.

Similarly, Dr. Allen sought to establish a connection between the present tenure charges and the basis for his 2012 reprimand. In 2012, Dr. Allen received a written reprimand after he opined to parents at a Back to School Night that the push to increase the number of students taking AP exams was tied to Ms. Steffner's compensation. In support of this theory, several teachers testified to their perceived concern or fear that Ms. Steffner might have harmed their careers or make their work life more difficult based upon real or perceived past infractions. There were no examples of Ms. Steffner either disciplining teachers or seeking to enhance negative consequences based upon this testimony. There is insufficient evidence that Ms. Steffner held a grudge against Dr. Allen for his conduct in 2012 or that this influenced her recommendation that the Board terminate Dr. Allen.

To the extent that the Board relies upon the reprimand Dr. Allen received in 2012 and suggests that this reprimand supports removal in this instance, Dr. Allen has been disciplined for his statements to parents in 2012 suggesting that Ms. Steffner's compensation may have been placed ahead of the best interests of students. For purposes of progressive discipline, the issues in dispute in this

instance also involve incautious statements. The import of Dr. Allen's 2012 reprimand, however, is limited to the fact that he received it.

Dr. Allen compares his conduct to that in In re Geiger, 2015 WL 721458 (N.J. Super. Ct. App. Div. Nov. 18, 2015) and In re Watson, 2014 WL 2480173 (N.J. Super. Ct. App. Div. June 4, 2014). Specifically, in In re Watson, a teacher called educationally disabled students who were predominantly African American "stupid" and said they were "acting like monkeys." This teacher also grabbed a student's shirt and hit him, cursed at students and snapped a rubber band against a student's wrist. Although profanity was used in both cases, In re Watson is not analogous to Dr. Allen's situation in that there, the totality of the circumstances resulting in dismissal included corporal punishment against middle school age students. Dr. Allen emphasizes that no students witnessed his misconduct. While that is true, a situation where a teacher used profanity, made racially insensitive remarks and hit a student is not analogous to retaliation by lowering a student's grade.

Similarly, Dr. Allen would compare his circumstances, where his inappropriate conduct was not in the presence of students to In re Geiger, where students overheard two teachers making racially insensitive and profane remarks. In that instance, teachers made comments including "[t]hese negros think they're fucking tough shit," and "yeah, that's what they are, they're fucking, negros, negros, negros, negros." The Appellate Division found removal to be too extreme a penalty for Appellants because the "punishment is so disproportionate to the offense, in light of all of the circumstances, as to be shocking to one's sense of fairness." In re Geiger at 7 quoting In the Matter of Polk, 90 N.J. 550, 578 (1982).

Dr. Allen notes that this case does not include racially charged statements, but does include profanity or an edited stand-in for profanity, i.e. f***. As noted above, Dr. Allen's situation is not analogous to Geiger, but Dr. Allen suggests that it raises factors that must be considered, including whether the statement at issue were directed at students, whether the statements were intended to be heard by students, his prior record, and disparate treatment of other teachers.

In support of a lesser penalty, Dr. Allen also asserts that removal would amount to disparate treatment. Dr. Allen points to another situation in the District where a tenured teacher allegedly swore at her class, then left the class and the school and abandoned her class. Dr. Allen knew about this incident from a former student who was in the class. Dr. Allen was not aware of any of the circumstances surrounding this incident. In that instance, the teacher received a letter of reprimand for a first infraction similar to the letter Dr. Allen received for his misconduct in 2012. Dr. Allen also points to instances where teachers at

HCRHS engaged in misconduct without investigation or charges. These allegations include two different DUIs.

It is difficult to compare the other disciplinary situations that have arisen at HCRHS in recent years because the facts and circumstances are different. It is important to distinguish between these other situations, none of which included retaliation against a student, and the instant case. Those circumstances did not include a teacher's plan to lower a student's grade after a parent sent an email critical of the teacher. I find the other instances of discipline at HCRHS are not comparable and do not support a claim of disparate treatment.

Dr. Allen asserts that his conduct, although regrettable, does not rise to the level of warranting termination in light of all of the circumstances at issue in this case. Dr. Allen cites his distinguished career as a teacher and relatively unblemished disciplinary record. Dr. Allen cites testimony by parents, students and colleagues revealed how Dr. Allen went above and beyond in order to encourage and inspire his students. Dr. Allen also cites the numerous letters of support, as well as the approximately 150 individuals, mostly character witnesses, who were willing and eager to testify on his behalf.

Dr. Allen also sought to put the May 6th email in context by explaining the "stress" he was under both as a result of K.P. and C.N. challenging his teaching and grading all year and stress related to the illness of his eleven year old daughter. Dr. Allen also cites his efforts over the school year to assist C.N., while C.L., her mother continued to complain about his teaching causing him great stress. Dr. Allen emphasizes that the May 6, 2016 email was out of character and an aberration. This helps to explain, but does not excuse, Dr. Allen's conduct on May 6, 2016.

Dr. Allen has offered substantial support for his popularity as a teacher. Indeed, almost 150 individuals, including parents, students and colleagues were prepared to testify to his inspiring teaching ability and good character. Dr. Allen's teaching skills and character are significant and notable, and provide some defense to the pending charges.

The record establishes that Dr. Allen is an exciting and inspiring chemistry teacher who is beloved by many students and parents. Dr. Allen influenced and encouraged many students to pursue a career in science, including many who had been previously discouraged or turned off by science classes. The importance of this teaching skill and character evidence cannot be over emphasized. This evidence might be sufficient to outweigh the angry and disrespectful tone and language of Dr. Allen's May 6, 2016 email as well as his failure to maintain strict confidentiality of student information. It does not

outweigh his apparent threat to retaliate against K.P. for her mother's email to Ms. Batista questioning Dr. Allen's teaching for the remainder of the school year.

Dr. Allen has raised many factors supporting the use of progressive discipline and/or forming a basis to mitigate his termination, most notably his reputation and skills as a science teacher. As noted in In re Stallworth,

> [P]rogressive discipline is not 'a fixed and immutable rule to be followed without question' because 'some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record.'

Threatening or planning to retaliate against a student as a response to criticism from that student's parent is one such infraction. Retaliation by lowering a student's grade or even suggesting that the grade might be lowered eviscerates the trust necessary for teaching and learning to occur. In this instance, Dr. Allen responded to a parent's email critical of his use of class time with a statement that he would lower the student's grade from a "D" to an "F". There can be no mitigation of such apparent retaliation. Although each of the remaining infractions might be mitigated by Dr. Allen's record of exciting and inspiring teaching, the retaliatory language in his May 6, 2016 email, which was copied to the parent of the student at issue cannot be revoked. Likewise, Dr. Allen's reputation and the ability of the Board, parents and students to trust Dr. Allen cannot be rehabilitated. Threatening retaliation against a student is not suitable for progressive discipline.

In sum, I find that Dr. Allen engaged in unbecoming conduct when he threatened retaliation against student K.P., directed profanity at Ms. Batista, his supervisor; violated the confidentiality and privacy of students K.P., C.N. and others, and by disparaging or mocking students in email exchanges with his wife over the District's email server. The significant mitigating circumstances of Dr. Allen's popularity as a teacher might serve to reduce the penalty for most of the proven charges, but cannot overcome the charge that Dr. Allen threatened to lower K.P.'s grade in retaliation for her mother's email to Ms. Batista which angered him. As a result of his threat, which was sent to K.P.'s parent, there is no basis for the Board, parents or students to trust him as a teacher in the future. Accordingly, I find that the Board has established that Dr. Allen has engaged in unbecoming conduct that supports his dismissal from his position as a tenured teacher at HCRHS.

Hunterdon Regional High School
District Board of Education
and Richard D. Allen
Agency Docket No. 191-7/16

AWARD

The Hunterdon Regional High School District Board of Education had just cause to dismiss Dr. Richard D. Allen from employment.

Dated: June 7, 2017
Ocean Grove, New Jersey

Joyce M. Klein

State of New Jersey }
County of Monmouth } ss:

On this 7th day of June, 2017, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

CAROLINE E. GLYNN
NOTARY PUBLIC OF NEW JERSEY
I.D. # 2291875
My Commission Expires 10/1/2017

160-17

160-17L

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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

KIMBERLEY HARRINGTON
Acting Commissioner

June 12, 2017

Arsen Zartarian, Esq.
Deputy General Counsel
Newark Public Schools
2 Cedar Street
Newark, New Jersey 07102-3091

B[redacted], *Pro Se*
[redacted]
Newark, New Jersey 07104

Re: *B.J., on behalf of minor child, T.J. v. State-Operated School District of the City of Newark, Essex County, OAL Dkt. No. EDU 8133-16, Agency Dkt. No. 134-5/16.*

Dear Counsel:

I have considered the papers filed in connection with the respondent's request for interlocutory review of ALJ Richard McGill's Order of May 23, 2017, denying the respondent's motion for summary decision on Count Two of the Amended Petition in the above-captioned matter. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

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

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: Honorable Richard McGill, ALJ
County Superintendent
State Law Library

KH/MKD/JKH
Via Facsimile and Regular Delivery

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division in accordance with the applicable Appellate Division Rules.

161-17M

161-17

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

June 12, 2017

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Fair Lawn, New Jersey 07410

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Lori Prapas, DAG
Division of Law
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625

Re: *In the Matter of the Princeton Charter School's Application to Amend its Charter, ~~Appellate~~ Division Docket No. A-2765-16*

Dear Counsel:

I have reviewed the materials filed in connection with the Princeton Board of Education's (Board) Motion to Stay my February 28, 2017 decision granting Princeton Charter School's (PCS) request to amend its charter, pending appeal of the decision to the Superior Court, Appellate Division.

The February 28, 2017 decision approved an application submitted by PCS to amend its charter, permitting it to: (1) implement a weighted lottery to provide economically disadvantaged students a 2:1 enrollment preference, and; (2) expand enrollment. Thereafter, on March 10, 2017, the Board appealed the decision to the Appellate Division, and on March 17, 2017, the Board requested a stay to enjoin PCS from implementing the weighted lottery and expansion pending resolution of the appeal.

By way of background, PCS has been operating a charter school in Princeton, New Jersey since the 1997-1998 school year. Prior to the February 28, 2017 amendment, PCS had been serving 348 students in grades K through 8, with principal entry points in Kindergarten and 3rd grade. On November 28, 2016, PCS filed an application to amend its charter to implement a weighted lottery and expand enrollment by 76 students. The integrated plan, designed to achieve the goals of diversity and increased access for disadvantaged students, was proposed to phase in beginning in September of 2017.

According to documents submitted in connection with its application, PCS's Charter mission articulates a goal of bridging the gap in achievement that is based on low socio-economic status, yet it was concerned that it wasn't serving a proportionate share of economically disadvantaged students. PCS requested approval to implement a weighted lottery to directly increase the proportion of economically disadvantaged students at PCS, and encourage a larger pool of economically disadvantaged applicants through public awareness.

In addition, PCS sought to add a second section to its Kindergarten and first grade classes for the 2017-2018 academic year; an additional second grade class in 2018-2019. These changes were proposed to remedy a number of practical issues. PCS has a large number of applicants, and must waitlist many students due to an established sibling preference. By expanding enrollment, more families will be given an opportunity to attend, which may also help to diversify the student body.

After PCS submitted its application, the Board filed a complaint in Superior Court on December 27, 2016, citing violation of the Open Public Meetings Act (OPMA). PCS subsequently filed a counterclaim.

On January 30, 2017, the Board sent a letter to the Department contesting the amendment application. The same day, PCS filed a supplemental memorandum in further support of its application. Based on my review of all of the submissions by the parties, I approved PCS's application to amend its charter. According to PCS's brief opposing the stay, once the decision was issued, it began taking certain steps toward implementing the amendment. PCS asserts that it engaged in extensive, multi-lingual outreach, and conducted a lottery for admission for the 2017-2018 school year (including the additional newly approved 54 seats). The results of that lottery were shared with the parents of applicants that same day. PCS also represents in its brief that it entered into a contract with a modular building vendor to accommodate the additional students, and began activities to recruit additional personnel.

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that petitioner has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

Upon review of the parties' submissions, I find that the Board has failed to meet the standard required for a stay of the February 28, 2017 decision, for the reasons set forth more fully below. Accordingly, the Board's request for a stay is denied.

(1) The Board Has Not Demonstrated That It Is Likely to Prevail on the Merits of its Underlying Claim

The Board suggests that the February 28, 2017 approval decision is "insufficient" to withstand scrutiny on appeal, and thus, it is likely to prevail on the merits. The scope of judicial review of agency action is limited. *In the Matter of the Proposed Quest Academy Charter Sch. of Montclair Founders Group*, 216 *N.J.* 370, 386 (2013) (citation omitted). An agency's final decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable. *Id.* Three channels of inquiry inform the appellate review function: (1) whether the agency's action violates express or implied legislative policies; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. *Id.* In this case, as set forth in greater detail below, the record clearly supports the decision to approve PCS's application and so the Board is not likely to prevail on the merits of its appeal.

Many factors are considered in deciding whether to approve a charter school amendment request. Although the overall analysis is holistic, pursuant to *N.J.S.A.* 18A:36A-1 *et seq.*, I chiefly consider the charter school's potential to improve pupil learning and increase the educational options available to New Jersey families. My decision to approve PCS's application was specifically informed by a review of

student performance on statewide assessments, operational stability, fiscal viability, public comment, and fiscal impact on sending districts.

A. Performance on Statewide Assessments

Student performance at PCS is remarkable. In weighing the amendment request, we analyzed the performance of PCS students on statewide assessments over a four year period. In 2012-13 and 2013-14, PCS received the highest rank possible based on the standards outlined in the Office of Charter and Renaissance School's Performance Framework – a Tier Rank 1. In 2014-15 and 2015-16, based on PARCC results, the school outperformed both the state and home district of Princeton in English language arts (ELA) and mathematics in the elementary grades 3-5 and middle grades 6-8. For the 2015-16 school year, PCS students ranked in the 99th percentile statewide for ELA and the 100th percentile statewide for math on the PARCC. Even though PCS only serves students in grades K through 8, 95 percent met or exceeded expectations in Algebra 1, and 100 percent of them met or exceeded expectations in Geometry. The school-wide median growth scores in both subjects exceeded statewide averages. Student growth in 2015-16 was 67 in ELA and 66 in math, above the statewide median of 50 in both subjects.

B. Operational Stability

PCS's initial charter was granted in 1997 and the school is currently in its 20th year of operation. After the first initial four year charter term, PCS has undergone comprehensive reviews every five years. The most recent comprehensive review was performed in 2015-16, when the school was granted another charter term. There is no record of PCS ever receiving a warning of probation or being placed on probation during its twenty years of operation.

The record reflects a strong community demand for additional enrollment slots. Pursuant to *N.J.A.C.* 6A:11-2.2, all charter schools are required to submit an annual report including, among other things, enrollment data and the number of applicants who were placed on a waitlist in accordance with *N.J.A.C.* 6A:11-4.5. In considering PCS's amendment application, the Department analyzed the reports submitted by PCS between 2013 and 2015 and found that enrollment has remained at or near maximum each year. Further, the school has maintained a waitlist in each of those years of between 92 to 133 students, suggesting a strong demand for the charter school within the community. PCS has requested an increase of 54 students for the 2017-18 school year, and an additional 22 students for the 2018-19 school year for a total of 76 additional students. According to the most recent annual report (from 2015-16), 122 students were waitlisted that year. That is nearly twice the number of additional seats requested through 2019, indicating that PCS has the potential to easily fill the slots.

PCS's former (pre-amendment) admissions policy allowed for 19 new students in kindergarten, two in first grade, one in second grade, and 24 in third grade. According to the amendment request, and confirmed by the grade delineated waitlist numbers, parents are less inclined to move their children from the Princeton Public School elementary schools in third grade due to disruption in academics, social relationships, and in the case of disadvantaged students, services they may be receiving in the District's schools. The amended enrollment configuration allows for a greater number of students to be enrolled in kindergarten, reducing the number of students who would suffer a break in educational continuity during the elementary school years.

In its amendment request, PCS indicated that there would be no change to the current administrative structure. However, to accommodate the additional students, the school will add instructional and special education positions. PCS's history of successful comprehensive charter reviews, record of outstanding academic results, desirability in the community, and implementation of a weighted

lottery, all support the conclusion that the current administrative structure will not only support the expansion request, but also provide the community with a greater opportunity to serve its economically disadvantaged students.

C. Fiscal Viability

Since 2012, PCS has remained at or near maximum enrollment every year. Between 2012 and 2016, final enrollment counts were between 344 and 348. Such consistently high enrollment assists the school in maintaining a fund balance year after year. The school's financial stability is corroborated by a review of the independent audits submitted annually to the Department since 2012 (the review period), none of which resulted in any findings.

D. Public Comment

Pursuant to *N.J.A.C.* 6A:11-2.6(c), the Board exercised its right to submit comments regarding the amendment request. I also received correspondence from members of the public whose children attend Princeton Public School District. In assessing PCS's request, my staff and I reviewed the public comments that we received both in favor of the amendment request, and opposed to it. I took those opinions into account when making my determination, in conjunction with the other factors, as part of a holistic analysis.

E. Fiscal Impact on Sending Districts

Based on the October 15, 2016 count, there were approximately 348 students enrolled at PCS. The expansion request increased PCS enrollment to the requested 424 students. Assuming stable enrollment in the Princeton Public School district (which has a current resident enrollment of 3,672) this would result in a minor increase of the district's enrollment going to PCS through 2022. The impact on the sending district would be an approximate 2 percent enrollment reduction over the next four years.

Because the February 28, 2017 decision is supported by the record and is not arbitrary or capricious, PPS is unlikely to prevail on the merits of its appeal, and thus, the stay must be denied. Moreover, the February 28, 2017 decision is sufficient. *N.J.A.C.* 6A:11-2.6 governs amendments to charters, and provides that the Department shall determine whether amendments are eligible for approval, and evaluate the amendments based on the Charter School Program Act, *N.J.S.A.* 18A:36A-1 *et seq.*

> [T]he Commissioner may approve or deny amendment requests of charter schools and shall notify charter schools of decisions. If approved, the amendment becomes effective immediately unless a different effective date is established by the Commissioner.
>
> [*N.J.A.C.* 6A:11-2.6(d) (emphasis added)].

The Board's argument that the February 28 decision will be overturned as "insufficient" fails to acknowledge the distinction between the level of detail required in decisions approving amendment or renewal applications, versus decisions to deny initial charter school applications. Decisions approving amendment or renewal applications need not set forth detailed or formalized reasoning, because the school's performance record is available for evaluation. Therefore, the supposition and predictions that necessarily permeate the approval process for initial applications no longer exist. *See I/M/O Grant of Renewal Application of the Red Bank Charter Sch., Monmouth Cnty.*, 367 *N.J. Super.* 462, 474-75 (App. Div. 2004).

An extensive record was available to support the approval of PCS's request, including standardized test scores, a history of successful comprehensive reviews conducted pursuant to charter term renewals, annual waitlist figures, enrollment data, and audits.

(2) The Board Has Not Shown That It Will Suffer Immediate Irreparable Harm if a Stay Is Not Granted

The Board articulates three alleged harms that would occur if a stay is not granted. First, it asserts that a PCS expansion will require the Board to begin paying more tuition for charter school students, resulting in concomitant budget cuts requiring the elimination of programs and staff. The funding impact of charter school enrollment on public schools was contemplated by the Legislature as an appropriate allocation of resources to foster the policy goals of the Charter School Program Act, *N.J.S.A.* 18A:36A-1 *et seq.* *See N.J.S.A.* 18A:36A-12; *N.J.S.A.* 18A:36A-2. Financial impact is only a basis for denying a charter amendment application if the District can make a preliminary showing that the effect of funding a charter school would render the district unable to provide a thorough and efficient education to the pupils it serves. *See In Re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 *N.J.* 316 (2000). Here, the Board has made no such claim. The only issue the Board raises is a concern that a denial of the stay could result in layoffs, and the same teachers that may be laid off may not be available for rehire should the Board ultimately prevail in its appeal. The Board has not suggested that the amendment would impact its ability to provide a thorough and efficient education. Princeton Public Schools are the 5th highest spending district in the state for a district of its size, and one of the top rated school districts in the State. The district spends approximately $24,000 annually per pupil—around 25 percent more than the statewide average of $19,000. The PCS expansion will only result in a two percent reduction in the Board's budget through 2022.

In the absence of showing harm to itself, the Board asserts potential harm on behalf of students, and, remarkably, PCS as a basis for the stay. These alleged harms fail to meet the *Crowe* standard: whether the movant will suffer irreparable injury. The Board asserts that if a stay is not granted, the additional students enrolled in PCS would suffer from a break in educational continuity if the Board prevails and they must be returned to the District. However, as discussed at length above, the Board is unlikely to prevail on the merits of its appeal. In the unlikely event the Board does prevail, nothing prevents the Appellate Division from fashioning an Order that would prevent a mid-year disruption in affected students' education.

Finally, the Board's suggestion that PCS itself faces a risk of harm if the stay is not granted is meritless. PCS has full knowledge of the risk in implementing an expansion project while an appeal is pending, and chooses to move forward based on its assessment of that risk.

(3) The Board Has Not Established the Remaining *Crowe* Factors

Balancing the equities, PCS has taken steps in reliance on the decision, and a stay would disrupt the reasonable expectations of families that are planning to send their children to PCS in the upcoming school year. The Board has also failed to demonstrate that the legal right underlying its claims is well-settled. As demonstrated above, the record supports the approval of a weighted lottery in favor of economically disadvantaged students, and expanded enrollment to further goals of diversity.

Accordingly, as the Board has not demonstrated that it is likely to prevail on the merits of its underlying claim, and has not satisfied any of the other *Crowe* factors, its request for a stay of the February 28, 2017 decision is hereby DENIED.*

Sincerely,

Kimberley Harrington

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

KH/MKD/BON

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

164-17

OAL DKT. NO. 07078-16
(EDU 9446-12 ON REMAND)
AGENCY DKT. NO. 148-5/12

TRENTON EDUCATION ASSOCIATION, NAOMI JOHNSON-LAFLEUR, TWANDA TAYLOR AND BENJAMIN JENKINS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's May 9, 2016 determination that the prior Settlement Agreement did not comply with *N.J.A.C.* 6A:3-1.13, as it was signed by Naomi Johnson-Lafleur on behalf of the petitioners, without evidence that petitioners had authorized Naomi Johnson-Lafleur to sign the Agreement on their behalf; neither did the Settlement Agreement contain a signature of petitioners' attorney, who is their duly authorized representative in this litigation. Since the Agreement now contains the signatures of all the petitioners in this matter, the Commissioner can approve the within Agreement in its present form.

Accordingly, the Commissioner approves the settlement terms, and adopts the Initial Decision as the final decision in this matter. The matter in hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/15/17
Date of Mailing: 6/16/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07078-16

(ON REMAND OAL DKT. NO. EDU 09446-12)

AGENCY DKT. NO. 148-5/12

TRENTON EDUCATION ASSOCIATION, NAOMI JOHNSON-LAFLEUR, TWANDA TAYLOR AND BENJAMIN JENKINS,

Petitioners,

v.

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

Respondent.

Aileen O'Driscoll, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Perry L. Lattiboudere, Esq., for respondent (Adams Gutierrez and Lattiboudere, LLC, attorneys)

Record Closed: April 17, 2017 Decided: May 1, 2017

BEFORE **PATRICIA M. KERINS**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on May 10, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

May 1, 2017
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: 5/2/17

Date Mailed to Parties: 5/2/17

/mel

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 623-1822
Attorneys for Petitioners

TRENTON EDUCATION ASSOCIATION, NAOMI JOHNSON-LAFLEUR, President of the Trenton Education Association, TWANDA TAYLOR, Resident Taxpayer, and BENJAMIN JENKINS, a Resident and Parent Petitioners, v. BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION AGENCY DOCKET NO.: 148-5/12 OAL Docket No.: EDU 09446-2012 S EOE 07078-16 SETTLEMENT AGREEMENT

As the result of a Petition of Appeal filed by the Petitioners against the Respondent, the Trenton Board of Education, before the Commissioner of Education, alleging violations of N.J.A.C. 6A:13-3.1, and an Answer having been filed by Respondent, and the matter having been transmitted to the Office of Administrative Law, and the parties having resolved their differences in connection with the Petition of Appeal, and in full and final settlement of the above captioned matter, but without prejudice in asserting any future claims that may occur, the parties hereby agree to resolve the dispute as follows:

1. The Trenton Board of Education shall abide by and comply with the class sizes set forth in N.J.A.C. 6A: 13-3.1;

2. The Trenton Board of Education, in conjunction with representatives from the Trenton Education Association will establish schedule and conduct meetings on a monthly basis during which the issue of class size shall be reviewed and discussed.
3. At each meeting (or if a meeting for some reason does not occur on a given month), a report shall be generated through the PowerSchool or comparable portal system and distributed to the Trenton Education Representatives.
4. The report shall include a school by school and teacher by teacher breakdown of class sizes; and notice of registrations/transfers, and shall be generated for grades k-12.
5. The Enrollment committee shall be comprised of the following representatives:
    a. State Fiscal Monitor, or one of his/her representatives with decision-making authority;
    b. The Superintendent of Schools, or his/her designee;
    c. A representative from the Data and System Management office responsible for or with knowledge of enrollment data;
    d. A member of the Board of Education;
    e. A member of the Trenton Administrator's Supervisors Assn.;
    f. A member(s) of the Trenton Education Association;
    g. Representative(s)s from the Paraprofessional Assn.;
    h. System, Data Management and Accounting representative
6. If a report indicates that action is warranted, the District shall remedy any violation of the law within seven (7) business days of the notice of the violation, and if no such action is taken in a timely manner, the Petitioners may, upon an Affidavit submitted by Petitioners, seeking to enforce this Agreement, before the Superior Court, and seek a judgment accordingly;
7. An agenda and minutes shall be kept and made available to the members of the committee or its designee(s) on a regular and monthly basis.

8. Upon the execution and final approval of this settlement agreement, it shall be read to and incorporated as a part of the minutes of the then scheduled enrollment committee meeting.
9. The PowerSchool (or alternate portal system that may be used in the future) shall set caps that are consistent with any and all laws and regulations which address class size, including, but not limited to N.J.A.C. 6A:13-3.1.

On behalf of the Petitioners Dated

Naomi Johnson-Lafleur 3-22-17

Printed Name

Naomi Johnson-Lafleur

_____

On behalf of the Respondent Dated

_____ _____

Printed Name

_____

9. The PowerSchool (or alternate portal system that may be used in the future) shall set caps that are consistent with any and all laws and regulations which address class size, including, but not limited to N.J.A.C. 6A:13-3.1.

Twanda Taylor — 3-22-17

On behalf of the Petitioners — Dated

TWANDA TAYLOR — 3-22-17

Printed Name — Dated

_____ — _____

On behalf of the Respondent — Dated

_____ — _____

Printed Name — Dated

9. The PowerSchool (or alternate portal system that may be used in the future) shall set caps that are consistent with any and all laws and regulations which address class size, including, but not limited to N.J.A.C. 6A:13-3.1.

On behalf of the Petitioners — Dated 3.22.17

Benjamin Jenkins — Printed Name — Dated 3.22.17

On behalf of the Respondent — Dated

Printed Name — Dated

165-17

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

GLENN CIRIPOMPA,
SCHOOL DISTRICT OF THE BOROUGH
OF BOUND BROOK, SOMERSET COUNTY

Agency Docket #177-7/14

Walt De Treux, Esq., Arbitrator

Exhibits and Briefs Received: 5/15/17
Decision Date: 6/16/17

Appearances: For the School District – Robert J. Merryman, Esq., APRUZZESE McDERMOTT
For the Respondent – Arnold M. Mellk, Esq.; Edward A. Cridge, Esq. and Gidian R. Mellk, Esq. (on brief), *MELLK O'NEILL*

Procedural History

On July 14, 2014, the Bound Brook Board of Education considered tenure charges against Bound Brook High School math teacher Glen Ciripompa. The charges alleged conduct unbecoming a teacher related to Respondent's inappropriate use of the District's computer network and his District-provided computer and IPad (Count I) and inappropriate interactions with female staff members (Count II). The Board of Education found merit to the charges and certified the charges to the New Jersey Commissioner of Education. An arbitrator was assigned to hear the charges, and hearings were conducted in September 2014. On October 20, 2014, the Arbitrator issued an Award finding that the District proved the allegations in Count I, but failed to prove the allegations in Count II because Respondent's interactions with the female staff members did not "meet the generally recognized definition of *hostile environment sexual harassment." (emphasis in original)* As to Count I, the Arbitrator found that the District had not

shown that the charges "justify the removal of Respondent from his tenured teaching position." His finding was based, in part, on the testimony of a psychiatrist, who testified that Respondent "understood his lapse in judgment and was extremely unlikely to engage in the behavior again." He reduced the disciplinary penalty to a suspension without pay of 120 days.

The District filed an action in the Superior Court of New Jersey to vacate the Award. On January 8, 2015, the Court responded affirmatively, vacating the Award because the Arbitrator erroneously considered the conduct under New Jersey's sexual harassment laws, improperly excluded evidence related to a Twitter posting that prompted the District's investigation into Respondent's computer use, and allowed and relied on testimony from the psychiatrist. The Court remanded the case to be heard by a different arbitrator.

The Superior Court was reversed by the Appellate Division on October 29, 2015, and the Award was reinstated. On February 21, 2017, the New Jersey Supreme Court reversed the Appellate Division. The Award was once again vacated and remanded to a different arbitrator.

After the initial remand, the undersigned Arbitrator was appointed to hear the case, but the matter was held in abeyance pending the appeal process. After the Supreme Court decision, the arbitration process resumed. The parties agreed to forego further hearings. Instead, they submitted the transcripts and exhibits from the earlier hearings, excluding the testimony of the psychiatrist and admitting the previously-excluded Twitter post. The parties filed briefs in support of their respective positions, and the matter was submitted to the Arbitrator for a decision.

Statement of Relevant Facts

During the 2013-14 school year, a teacher/coach in the School District reported to then-Assistant Superintendent Daniel Gallagher that a student/athlete had told him about a Twitter posting that indicated Bound Brook teacher "Mr. C" (as Respondent is often called) was "sending out nudes." Dr. Gallagher instructed the Director of Technology to retrieve Respondent's laptop computer. The laptop was turned over to Dr. Gallagher, who conducted a search and found "probably a hundred or more emails with photos attached." The photos included pictures of "[n]aked women, body parts. Sexual body parts."

Dr. Gallagher reported his findings to the Superintendent, who instructed him to contact the Bound Brook Police Department. The police and the local prosecutor's office arrived at the school and took possession of Respondent's laptop and IPad. Dr. Gallagher retrieved copies of the emails and photos from the District's server. The District submitted into evidence 183 pages of emails and photos that were of a sexual nature. Only a few were sent during the school day, but all were sent or received on the District's computer network through Respondent's laptop or IPad.

During the same school year, the District investigated several complaints from female staff members regarding interactions with Respondent that they deemed inappropriate and made them feel uncomfortable.

ESL teacher Kristin Brucia testified that Respondent would "come up behind me and whisper that I looked nice that day or it was a nice dress or something close to my ear quietly." On Valentine's Day two years earlier, he had bought carnations from students for a fundraiser and had them delivered to her by students with anonymous notes. Later in the day, he sent her

an email revealing that he had purchased the carnations and wishing her a nice Valentine's Day. She thanked him for the flowers, but told him she had a boyfriend. Before Mother's Day one year, he told her he was sending his wife to a spa for the day and asked if she wanted to bring her sons to a play date with his son. She declined.

Special Education teacher and softball coach Alexandra Shafi reported to the Athletic Director that Respondent, in the presence of two students, asked her if she "wanted to go out with him after the softball game." She refused, and he asked again. She replied no again. Later that day, he attended the softball game for a short period of time, which gave her "an eerie feeling."

Music teacher Marian Stewart testified that Respondent made her "uncomfortable" when he made a joking comment, in the presence of a student, implying that her pants were too tight.

Art teacher Elizabeth Levering testified that Respondent overheard her conversation with a co-worker about her boyfriend's work travel. Respondent approached her and offered his assistance "if I needed anything while the boyfriend was away." Another time, while she was hanging art projects, Respondent "was in my personal space a little bit" and told her "how good I looked in a pair of jeans."

The discovery of sexually related emails on his computer and IPad and the reports from female staff members of inappropriate interactions led the District to file the tenure charges for conduct unbecoming a teacher.

Issue

Has the School District of Bound Brook Borough established the allegations of conduct unbecoming against Respondent Glenn Ciripompa as set forth in the tenure charges? If so, do those charges warrant dismissal? To what remedies are the parties entitled?

Relevant Board of Education Policies

3321 – ACCEPTABLE USE OF COMPUTER NETWORKS/COMPUTERS AND RESOURCES BY TEACHING STAFF MEMBERS

***

Standards for Use of Computer Network(s)

Any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s) /computers shall be subject to discipline or legal action;

A. Using the computer network(s)/computers for illegal, inappropriate or obscene purposes, on in support of such activities. Illegal activities are defined as activities which violate federal, state, local laws and regulations. Inappropriate activities are defined as those that violate the intended use of the network(s). Obscene activities shall be defined as a violation of generally accepted social standards for use of publicly owned and operated communication vehicles.

***

Violations

Individuals violating this policy shall be subject to appropriate disciplinary actions as defined by Policy No. 1350, Discipline which includes but are not limited to:

1. Use of the network(s)/computers only under direct supervision;
2. Suspension of network privileges;
3. Revocation of network privileges;
4. Suspension of computer privileges;
5. Revocation of computer privileges;
6. Suspension;
7. Dismissal;
8. Legal action and prosecution by the authorities; and/or
9. Any appropriate action that may be deemed necessary as determined by the Superintendent and approved by the Board of Education.

3362 – SEXUAL HARASSMENT (M)

...Offensive speech and conduct are wholly inappropriate to the harmonious employment relationship necessary to the operation of the school district and intolerable in a workplace to which the children of this district are exposed.

Sexual harassment includes all nonwelcome sexual advances, requests for sexual favors, and verbal or physical contacts of a sexual nature that would not have happened except for the employee's gender...

The sexual harassment of any employee of this district is strictly forbidden. Any employee or agent of this Board who is found to have sexually harassed an employee of this district will be subject to discipline which may include termination of employment...

4281 – INAPPROPRIATE STAFF CONDUCT

***

School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils...

***

The Commissioner of Education had determined inappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Therefore, school staff members are advised to be concerned with such conduct which may include, but are not limited to, communications and/or publications using e-mails, text-messaging, social networking sites, or any other medium that is directed and/or available to pupils or for public display.

A school staff member is always expected to maintain a professional relationship with pupils and school staff members shall protect the health, safety and welfare of school pupils...

Analysis and Decision

Respondent did not testify at the arbitration hearing. Accordingly, the evidence and testimony offered by the School District is uncontroverted. The issue, therefore, is whether the proven conduct constitutes conduct unbecoming a teacher; and if so, does it warrant dismissal? In the appeal of the first arbitration award in the present case, the New Jersey Supreme Court addressed the standard for unbecoming conduct as follows,

> "A charge of unbecoming conduct requires only evidence of inappropriate conduct by teaching professionals. It focuses on the morale, efficiency, and public perception of an entity, and how those concerns are harmed by allowing teachers to behave inappropriately while holding public employment." *Bound Brook Board of Education v. Ciripompa,* 288 N.J. 4, 14 (2017)

Count I – Network/Computer Use

There is no real dispute that Respondent's use of the School District computer and IPad and the District's computer network to send and receive emails of a sexual nature, including naked photos, is inappropriate conduct by a teaching professional and constitutes conduct unbecoming. Although Respondent argues that his conduct does not warrant dismissal, he does not challenge the conclusion that he engaged in unbecoming conduct. Even though he does not contest the charge of conduct unbecoming, it is necessary to highlight the number and nature of those emails to appreciate the severity of Respondent's infractions.

The District submitted 183 pages of inappropriate emails and emailed photos. Respondent notes that only 4 emails were sent during the school day (another 13 were received during the school day), and none were sent when Respondent had students in the classroom. But whether they were sent during or outside the school day, the fact remains that

all the emails were sent or received on a District computer and IPad and on the District's network in clear violation of the Acceptable Use Policy.

The emails were directed at contacting and engaging sex partners through craigslist or other websites and included Respondent and the potential sex partners exchanging naked or near naked photos. I see no reason to repeat in this Award, which will become public, the exact quotes from the emails. But in many instances, Respondent contacted the potential sex partners, and they asked him to verify his age and identity through certain websites. In at least one case, a woman quoted prices for her services; and in others, the potential sex partners and/or Respondent described the sexual activities in which they wanted to engage. Many of the emails included naked pictures of the potential sex partners and pictures of Respondent.

The District Policy on Acceptable Use of Computer Network(s)/Computers clearly prohibits any use for illegal, inappropriate, or obscene purposes. Although, as noted, at least one potential sex partner quoted prices for her services, the District cannot show that Respondent's computer activities were illegal in any way. The police and prosecutor were called into the case, and the record does not indicate that Respondent was ever charged with criminal activity. The emails, however, are clearly inappropriate and obscene as defined by the Policy.

"Inappropriate activities" indicate any activities "that violate the intended use of the network(s)." The Policy states, "The Board provides access to computer network(s)/computers for administrative and educational purposes only." Solicitation of sex serves no administrative or educational purpose for the benefit of the District or its students.

"Obscene activities" are defined as "a violation of generally accepted social standards for use of *publicly owned and operated* communication vehicles." *(emphasis added)* If Respondent engaged in these activities through his own computer, the District would arguably have no basis for discipline absent some greater nexus to the workplace. But Respondent sent these emails and photos on District computers and on the District network for his own purposes. It seems obvious to state that the use of the District computers and network to engage in personal behavior of a sexual nature is in violation of generally accepted social standards, and therefore, constitutes "obscene activities" under the Policy.

Respondent's use of the District's computer network and computers for these purposes is inappropriate conduct for a teaching professional and in violation of the Acceptable Use policy. For these reasons, I find that the District has established the allegation of conduct unbecoming in Count I of the tenure charges.

Count II – Interaction with Female Staff

Respondent challenges the assertion that his interactions with female staff members Brucia, Shafi, Stewart, and Levering were inappropriate and constituted conduct unbecoming.

The Inappropriate Staff Conduct Policy requires staff to "be appropriate at all times" when completing their professional responsibilities. It focuses mainly on interaction with students, but cautions that staff "shall not engage in inappropriate language or expression in the presence of pupils." The Sexual Harassment Policy recognizes "[o]ffensive speech and conduct" as "wholly inappropriate;" and it defines sexual harassment to include "unwelcome sexual advances" and "verbal or physical contacts of a sexual nature."

Respondent violated those policies in his interactions with female staff. Respondent would come up behind Brucia and whisper comments about her physical appearance or dress. If he was simply complimenting her, his behavior may be viewed innocently. But the fact that he came up to her from behind and whispered "close to my ear quietly" is more indicative of contact of a sexual nature. He also sent her carnations with his identity unknown to her but known to the students who sold the carnations and had to deliver them to Brucia – an inappropriate expression in the presence of the students in violation of the Inappropriate Conduct Policy. Finally, he suggested a play date between their sons because he had send his wife away for the day – a suggestion that could reasonably be taken as an unwelcome sexual advance when considered in light of his other inappropriate behavior toward Brucia.

Despite Shafi's "eerie feeling," Respondent's attendance at her softball game does not violate any policy, particularly since he did not engage in any inappropriate activity at the game. But he asked her out on a date in the presence of students – another clear violation of the Inappropriate Staff Conduct Policy. It may be acceptable to ask her out, but it was wholly inappropriate to do so in front of students.

Similarly, he made a joking reference to Stewart's tight pants, which should not have been done in front of a student. The student questioned Stewart as to the meaning of Respondent's comment, which drives home the point that the behavior was inappropriate in front of the student and was in violation of the Inappropriate Staff Conduct Policy.

Respondent's offer of assistance to Levering while her boyfriend was away is subject to interpretation. It may be a kind offer of help, or it may be an unwelcome sexual advance, depending on how it was said and intended. There is not enough evidence to label it a violation

of policy. But his comment about how good she looked in jeans while standing "in [her] personal space" is similar to his quiet whisper into Brucia's ear. The context and substance of the comment suggest an unwelcome sexual advance or contact of a sexual nature in violation of the Sexual Harassment policy.

The policies define and regulate appropriate conduct among and between staff. Violations of the policies, by definition, constitute inappropriate conduct by a teaching professional. Accordingly, I find that the District has established the allegation of conduct unbecoming in Count II of the tenure charges.

Appropriate Disciplinary Penalty

The egregiousness of Respondent's behavior should be evident. Entrusted with the education of high school students and expected to further the mission of the School District, he used District resources and equipment for his own personal use and in a manner that would be offensive to students, parents, and the public. He engaged in personal and private matters on the District's time and over the District's computer network. The exchange of naked pictures and the search for sex partners have no place in an educational setting. He blatantly disregarded and repeatedly violated District policies. His interactions with female co-workers were unwelcome, made them feel uncomfortable, and caused them to try and avoid him during the school day. Because of the number of times he used the computer for inappropriate reasons and the number of times he conducted himself inappropriately with female staff, his behavior cannot be attributed to a lapse in judgment. Rather, his conduct demonstrated a

pattern of willful violations of policy and an astounding lack of any sense of boundaries for a teaching professional who is well-trained in the appropriate conduct expected of him.

Respondent cites *In re Fulcomer,* 93 N.J. Super. 401 (App. Div. 1967) for its holding that a determination of penalty requires consideration of the nature and gravity of the offense under all the circumstances involved; any extenuating or aggravating circumstances; and the harm or injurious effect the conduct may have had on the maintenance of discipline and the proper administration of the school system. (at 422) The paragraph above adequately captures the serious nature and gravity of the Respondent's infractions. He has offered no mitigating circumstances or other justification or explanation for his behavior. And as the District argues, he has shown no remorse for his actions. The repetitive nature of the violations serve as aggravating circumstances. And his actions had an injurious effect on the maintenance of discipline and the proper administration of the school. Respondent's actions led the District to conduct an investigation that led to an embarrassing and shocking discovery, compelled the District to contact local police and prosecutor, would tend to negatively affect the public's view of the District and its administration and staff if it learned of the conduct, and revealed the uncomfortable and humiliating situations in which he placed female staff in the presence of students.

Courts have held that focus in determining the penalty should be on the employee's fitness to discharge the duties and functions of his position. *In re Grossman,* 127 N.J. Super. 13, 29 (App. Div. 1974); *In re Young,* 202 N.J. 50 (2010). Respondent's computer activities, repeated numerous times in willful disregard of the Acceptable Use Policy, call into serious question his fitness as a teacher. His lack of any sense of boundaries and his abdication of his

professional responsibilities as an educator make his judgment suspect. Respondent's absence of remorse does not offer any reason to conclude that he will not engage in similar behavior in the future. His interactions with his female colleagues reinforce the questions about his judgment, sense of responsibility and propriety, and ultimately, his fitness as a teacher.

Respondent contends that the Acceptable Use Policy mandates progressive discipline. But its reference to the sanctions that may be imposed for computer/network misuse is not couched in terms of a progressive disciplinary approach; but rather, it is a listing of the possible sanctions for such misuse from supervised computer privileges to criminal prosecution, depending on the nature or severity of the conduct. It makes clear that "any appropriate action" may be taken by the District.

In the present case, due to the egregiousness of Respondent's conduct and the repeated nature of the violations in willful disregard of District policies, dismissal is an appropriate penalty.

For these reasons, I find that the tenure charges in Counts I and II warrant dismissal.

Award

The School District of Bound Brook Borough has established its allegations of conduct unbecoming in Counts I and II of the tenure charges against Respondent Glenn Ciripompa. The charges are sufficient to warrant dismissal.

Walt De TReux

WALT De TREUX

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

GLENN CIRIPOMPA,
SCHOOL DISTRICT OF THE BOROUGH
OF BOUND BROOK, SOMERSET COUNTY

Agency Docket #177-7/14

Walt De Treux, Esq., Arbitrator

Exhibits and Briefs Received: 5/15/17
Decision Date: 6/16/17

Affirmation

I, Walt De Treux, affirm that I am the individual who executed this Decision and Award.

Walt De Treux

WALT De TREUX

166-17

OAL DKT. NO. EDU 17188-16
AGENCY DKT. NO. 257-9/16

R.B. and J.B., on behalf of minor child, K.G.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/19/17

Date of Mailing: 6/20/17

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 17188-16
AGENCY DKT. NO. 257-9/16

R.B. AND J.B. ON BEHALF OF MINOR CHILD, K.G.,
Petitioners,
v.
TOWNSHIP OF MAHWAH BOARD OF EDUCATION,
BERGEN COUNTY,
Respondent.

Linda George, Esq. for petitioners (Law Office of Linda George, attorney)

Marc. H. Zitomer, Esq. for respondent (Schenck, Price, Smith and King, attorneys)

Record Closed: May 3, 2017 Decided: May 3, 2017

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 14, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and Board resolution.

2. The agreement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the agreement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

May 3, 2017
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: 5-4-17

Mailed to Parties: MAY 4 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

2017 MAY -3 P 12:34

SCHENCK, PRICE, SMITH & KING, LLP
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P.O. Box 991
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(973) 539-1000
Attorneys for Respondent
Mahwah Board of Education

R.B. and J.B. o/b/o K.G., Petitioner, v. MAHWAH BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OAL Dkt. No. EDU 17188-16 Agency Ref. No. 257-9/16 SETTLEMENT AGREEMENT

This Agreement is made and entered into by and between Petitioners, R.B. and J.B., individually and on behalf of K.G., a minor child, and the Respondent, Mahwah Board of Education ("Board").

RECITALS

WHEREAS, in or about September of 2016, Respondent Mahwah Board of Education determined that minor student K.G. was not domiciled in the Mahwah School District ("District") and thus not entitled to a free, public education in the District, and therefore denied enrollment for K.G.; and

WHEREAS, Petitioner thereafter commenced an administrative action to challenge the Board's residency determination with regard to K.G.; and

WHEREAS, this administrative action is captioned R.B. and J.B. o/b/o K.G. v. Mahwah Board of Education, and is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 17188-16, Agency

Dkt. No. 257-9/16 ("the Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, having carefully reviewed and considered the information provided by Petitioners in connection with the Litigation, and taking all facts presented therein as true, the Board has determined that K.G.'s mother is domiciled in the District as will K.G. once this agreement is approved, and is therefore eligible to receive a free, public education in the District; and

WHEREAS, by this Agreement, Petitioner will voluntarily dismiss the Litigation with prejudice, without costs to any party as against the other;

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. The Parties mutually agree that K.G. shall be eligible for a free, public education in the District only if K.G.'s parent(s) and K.G. continue to be domiciled in the District.
2. The Board reserves all rights, as provided by statute, to commence disenrollment procedures against K.G. if it is found that K.G. and K.G.'s parent(s) are not domiciled in the district, pursuant to N.J.S.A. 18A:38-1(a).
3. Petitioners acknowledge and agree that K.G., like all District students, is subject to residency verification to determine whether K.G. and her parent(s) remain domiciled in the District.
4. The Parties further acknowledge and agree that if K.G. is enrolled in the District, but K.G. and her parent(s) are not domiciled in the District, the Board reserves its right to

assess tuition for any period of ineligible attendance consistent with the provisions of N.J.A.C. 6A:22-6.1.

5. Petitioners, in consideration of this Stipulation of Settlement, and in full, final, and complete settlement of the matter, hereby agree to a withdrawal and/or dismissal, with prejudice, of their Petition of Appeal in this matter.

6. This Agreement is subject to approval by the Mahwah Board of Education. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

7. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

8. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

9. Petitioners warrant that they have the authority to enter into this Agreement individually as well as on behalf of K.G. and her parents.

10. This Settlement may be subject to the approval of the Office of Administrative Law and the Commissioner of Education. In the event that such approval is necessary, the terms of this Agreement shall not be binding until said approvals are received.

11. This Agreement shall be binding upon all parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors, predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, *shareholders, members, employees, agents and assigns.*

12. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements,

understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioners and Respondent.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, consisting of four pages, effective on the day and year first above written.

PETITIONERS

Date: 3/21/17

R.B., Petitioner

Date: 3/21/17

J.B., Petitioner

FOR RESPONDENT,
MAHWAH BOARD OF EDUCATION

Date: 4/26/17

Kim Barron, Board President

EXTRACT FROM THE MINUTES OF A MEETING OF THE
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH,
BERGEN COUNTY, N.J. AS RECORDED IN THE
OFFICIAL MINUTE BOOK

The Board of Education of the Township of Mahwah in the County of Bergen, New Jersey, convened in public session Monday, April 26, 2017, at 7:00 p.m. in the Administrative Offices, 60 Ridge Road, Mahwah, New Jersey.

The following members of the Mahwah Board of Education were present:

Mesdames Konikow, Mavretish, Moorthy and Barron
Messrs. DeSilva Dinice, Kezmarsky and Wendrychowicz

The following member of the Mahwah Board of Education was absent:

Mr. Galow

The following resolution was moved by Mr. Wendrychowicz, seconded by Ms. Mavretish.

SETTLEMENT AGREEMENT – (04-055-16/17)
RESOLVED: that the Board of Education hereby approves the Settlement Agreement in the matter captioned R.B. and J.B. o/b/o K.G. v. Mahwah Board of Education, OAL Docket No. EDU17188-16, in accordance with the terms and conditions therein; and

Be it further resolved that the Board President is hereby authorized to execute the Agreement on behalf of the Board.

ROLL CALL VOTE on the above resolution. Motion carried 8-0.

STATE OF NEW JERSEY)
COUNTY OF BERGEN)

I, Kyle J. Bleeker, Secretary of the Board of Education of the Township of Mahwah, in the County of Bergen, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Mahwah Board of Education duly called and held on Wednesday, April 26, 2017, has been compared by me with the original minutes as officially recorded in my office in the minute book of said Mahwah Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract. In witness I have hereunto set my hand and affixed the corporate seal of the Mahwah Board of Education this 3rd day of May 2017.

SEAL

Kyle J. Bleeker
Business Administrator/Board Secretary

OAL DKT. NO. EDU 06241-17
AGENCY DKT. NO. 85-5/17

DREW PACKARD,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ, for the reasons thoroughly set forth in the recommended Order, that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *N.J.A.C.* 6A:3-1.6 and *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/19/17
Date of Mailing: 6/20/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 06241-17
AGENCY DKT. NO. 85-5/17

DREW PACKARD,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,
Respondent.

Carol R. Smeltzer, Esq., for petitioner (Foundation for Education Administration, attorneys)

Arlene Quinones Perez, Esq., for respondent (Decotis, Fitz, Patrick and Cole, L.L.P., attorneys)

BEFORE **PATRICIA M. KERINS**, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF FACTS

This emergent matter arises from a dispute between petitioner Drew Packard (Packard) and the Board of Education of the Borough of Carteret (Board) in which Packard challenges the Board's decision to suspend him from his position as a Supervisor of Buildings and Grounds and seeks immediate reinstatement to his position. Packard, who has worked for the Board since 1974, is currently employed as Supervisor of Buildings and Grounds. He is a tenured employee.

At a meeting on April 26, 2017, the Board voted to suspend Packard indefinitely and without pay, beginning on April 27, 2017, "for theft of services from the District as well as creating a hostile work environment for the employees in Building and Grounds."[1] Certification of Martin Murray, Board President, ¶ 3. The Board's Superintendent, Kevin Ahern, was present at the meeting, but he neither affirmatively recommended nor opposed Packard's suspension. Id. at ¶¶ 5, 7; Certification of Kevin Ahern, ¶¶ 2-3. After the meeting, Superintendent Ahern notified another Board employee, Jon Toth, that he would assume Packard's duties "until further notice." April 26, 2017, Email from Ahern to Jon Toth, P-1.

On May 3, 2017, Packard filed with the Commissioner of Education a petition of appeal and a request for emergent relief seeking his immediate reinstatement to his position, with pay, retroactive to April 27, 2017. In the petition, Packard argues that he is entitled to reinstatement for two reasons. First, "N.J.S.A. 18A:6-8.3 expressly provides that no school district employee may be suspended without pay other than by reason of indictment or certified tenure charges," but that, at the time of his suspension, Packard had neither been indicted on criminal charges nor subject to tenure charges. Petition of Appeal, ¶¶ 6-8. Second, Packard argues that "N.J.S.A. 18A:27-4.1 expressly provides that a board of education cannot remove a school district employee in the absence of the recommendation of the chief school administrator," but that Superintendent Ahern never recommended Packard's suspension to the Board. Id. at ¶¶ 9, 13.

In its answer, the Board asserts that "[a]s of May 9, 2017, the District has authorized payment to [Packard], inclusive of all back pay due and owed at this time" and that Packard "will receive his salary moving forward while he remains on suspended status." Answer, ¶ 3. The Board denies that its action to suspend Packard violated N.J.S.A. 18A:6-8.3 or N.J.S.A. 18A:27-4.1.

On May 4, 2017, the Commissioner transmitted Packard's request for emergent relief to the OAL for an immediate hearing. At the hearing, which was held on May 10,

[1] The Board notified Packard of the meeting beforehand. Murray Cert., ¶ 2.

2017, Packard argued that he is entitled to emergent relief in the form of immediate reinstatement to his position, with pay, because, otherwise, his reputation in the community will be irrevocably damaged; because the Board violated N.J.S.A. 18A:27-4.1 by suspending him without Superintendent Ahern's recommendation;[2] and, because he will suffer more than the Board will suffer if emergent relief is not granted.[3]

LEGAL DISCUSSION

The regulations governing controversies and disputes before the Commissioner of Education provide that "[w]here the subject matter of the controversy is a particular course of action by a district board of education. . . the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case." N.J.A.C. 6A:3-1.6(a). The regulations further provide that the Commissioner may "[t]ransmit the motion to the OAL for immediate hearing on the motion." N.J.A.C. 6A:3-1.6(c)(3). At such a hearing, the petitioner must show by clear and convincing evidence that he satisfies each of the following four standards:

---

[2] In light of the fact that he is now suspended with pay and will receive back pay for the period in which he was suspended without pay, Packard no longer maintains that his suspension violates N.J.S.A. 18A:6-8.3, under which,

> [a]ny employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary[.]
>
> [Ibid.]

However, the Board is reminded that N.J.S.A. 18A:6-8.3 does not authorize Packard's indefinite suspension with pay for an unreasonable amount of time. See Migliaccio v. Bd. of Educ. of the City of Paterson, 1990 S.L.D. 294 (concluding that a suspension with pay "levied against a tenured employee may not be continued indefinitely in derogation of the employee's tenure rights" and that "as suggested by N.J.S.A. 18A:6-8.3, the intendment of any paid suspension is to conduct an investigation, hearing or trial, absent the filing of tenure charges or, perhaps, to await disposition of an indictment").

[3] At the hearing, the Board stated that it has referred the matter involving Packard to the county prosecutor's office.

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> 2. The legal right underlying petitioner's claim is settled;
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
> [N.J.A.C. 6A:3-1.6(b) (citing Crowe v. DeGioia, 90 N.J. 126 (1982)); Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (citation omitted).]

Importantly, the purpose of emergent relief is "to 'prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.'" Crowe, supra, 90 N.J. at 132 (citing Thompson ex rel. Bd. of Chosen Freeholders v. Paterson, 9 N.J. Eq. 624, 625 (Sup. Ct. 1854)).

Irreparable Harm

First, Packard has failed to show that he will suffer irreparable harm if the requested relief is not granted. Under this standard, "harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages," Crowe, supra, 90 N.J. at 132-33. Here, Packard is now suspended with pay, and will receive back pay for the period in which he was suspended without pay. Thus, in this regard, Packard's continued suspension will not cause him irreparable harm.

Moreover, Packard has failed to show how any damage to his reputation due to his suspension constitutes irreparable harm. In support of this argument, Packard relies on Sanchez, v. Bd. of Educ. of the City of Camden, Commissioner's Decision 107-03 (March 6, 2003), affirmed, State Bd. of Educ. (June 4, 2003) <http://www.nj.gov/education/legal/commissioner/>, in which the Commissioner found that a tenured principal who was transferred to an acting vice principal position without any loss of salary would, nonetheless, suffer irreparable harm to her reputation if not returned to a principal position to which she was legally entitled, because "the illegal transfer and the consequent de facto demotion to the separate and subordinate position of Acting Vice Principal can never be adequately addressed over time, nor can

monetary damages ameliorate the blemish on her professional standing among her peers and her reputation in the school district and in the community."

Here, however, the situation is more akin to Lewis v. Bd. of Educ. of the City of Asbury Park, EDU 8425-09, Comm'r (September 16, 2009), in which the Commissioner determined that the petitioner, a tenured principal whom the school board declined to appoint to a principal position after his superintendent contract had expired, failed to provide any support for his claim that he would suffer irreparable harm to his reputation if was not immediately placed in a principal position. Like in Lewis, Packard has failed to clearly and convincingly show that his reputation will be damaged irreparably if he is not immediately reinstated, but has instead offered vague descriptions of community gossip and rumors about him due to his suspension. And, unlike in Sanchez and as discussed more fully below, it is not apparent that Packard's suspension is illegal.

Settled Legal Right

Second, Packard has failed to show that the legal right underlying his claim is settled. In this regard, emergent relief "should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe, supra, 90 N.J. at 133 (citing Citizens Coach Co. v. Camden H. R. Co., 29 N.J.Eq. 299, 304-305 (E & A 1878)). Here, it is not settled that, as Packard argues, a school board must act in accordance with N.J.S.A. 18A:27-4.1 if it seeks to suspend a tenured employee for suspected misconduct, such that a school board cannot suspend a tenured employee without a prior recommendation from its chief school administrator.

Under N.J.S.A. 18A:27-4.1(a), "[a] board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board." Ibid. The parties do not dispute that the Board, by a majority vote, suspended Packard from his position, but do dispute whether the Board could do so without Superintendent Ahern's recommendation. While N.J.S.A. 18A:27-4.1 prohibits a school board from appointing, transferring, or *removing* an employee without the chief school administrator's recommendation, that provision does

not explicitly address a school board's authority to *suspend* a tenured employee such as Packard without the chief school administrator's recommendation.[4] Here, Packard was suspended, and not removed, from his position.

Packard's legal right to reinstatement under N.J.S.A. 18A:27-4.1 simply is not apparent from a reading of that statutory provision. Nonetheless it is important to note that, while Superintendent Ahern did not affirmatively recommend Packard's suspension, he was not oblivious to, or blindsided by, the Board's action. Instead, Superintendent Ahern was present at the meeting in which the Board voted to suspend Packard and he took action to ensure that someone carried out Packard's duties during his suspension.[5]

Likelihood of Success on the Merits

Under the third emergent relief standard, "a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits." Crowe, supra, 90 N.J. at 133 (citing Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115-16 (E. & A. 1930)), but Packard also fails to meet this standard because he has not shown that the Board did not have the authority to suspend Packard without Superintendent Ahern's affirmative recommendation.

Balancing of the Equities

---

[4] N.J.S.A. 18A:25-6 specifically addresses the procedure for suspending assistant superintendents, principals, and teachers, but not employees such as Packard. Under that provision, "[t]he superintendent of schools may, with the approval of the president or presidents of the board or boards employing him, suspend any assistant superintendent, principal or teaching staff member, and shall report such a suspension to the board or boards forthwith" and "[t]he board or boards, each by a recorded roll call majority vote of its membership, shall take such action for the restoration or removal of such person as it shall deem proper[.]" Ibid.

Certainly, the chief school administrator plays an important, and in many instances, legal, role in personnel decisions. However, again, Packard has not shown that the Board acted in violation of N.J.S.A. 18A:27-4.1 or otherwise did not have the authority to suspend Packard without Superintendent Ahern's prior recommendation.

[5] The Board also suggested, albeit vaguely, at oral argument on Packard's motion for emergent relief that Superintendent Ahern's ability to recommend Packard's suspension may have been compromised as his conduct is under current review as well.

Lastly, Packard fails to meet the fourth emergent relief standard, which involves "the relative hardship to the parties in granting or denying relief." Crowe, supra, 90 N.J. at 134 (citing Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J.Eq. 506, 515 (Ch.1941), mod. on other grounds, 132 N.J.Eq. 613 (E. & A. 1942)). If emergent relief is denied, Packard will continue to serve a suspension *with pay*. However, if emergent relief is granted, the Board will be forced to reinstate an employee who has been accused of serious misconduct, including "theft of services" resulting in a referral to the county prosecutor's office as well as creating a hostile work environment. Thus, the equities favor the Board.

CONCLUSION

Emergent relief in favor of Packard is inappropriate because he has failed to show by clear and convincing evidence that he meets any of the four standards for emergent relief.

ORDER

Petitioner's request for emergent relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Patricia M Kerins

May 11, 2017
DATE

PATRICIA M. KERINS, ALJ

/mel

168-17

J.T., ON BEHALF OF MINOR CHILDREN, J.T., A.T., AND B.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

In November 2016, *pro se* petitioner appealed the determination of the respondent Board that his children are ineligible for a free public education in respondent's school district. Petitioner contended that he resides at an address in Monmouth Junction, which is within the South Brunswick school district. The Board contended that a residency investigation revealed that petitioner and his children actually reside in Franklin Township. The Board filed a motion to dismiss, asserting that the petition was late filed. An Initial Decision was issued in this matter on March 8, 2017, wherein the ALJ concluded that the petition was late filed pursuant to *N.J.S.A.* 18A:38-1(b). The ALJ denied the petitioner's appeal and ordered tuition reimbursement for the period of ineligible attendance. The Commissioner subsequently remanded the case to the OAL, finding that the ALJ had failed to include a factual discussion or make any factual findings in his decision, as is required under *N.J.A.C.* 1:1-18.3.

On remand: the ALJ laid out findings of fact related to the timeliness of the petition, and found that the facts of this matter were set forth in respondent's brief in support of its motion to dismiss and in a certification from the Superintendent of Schools, both of which were incorporated in the decision as attachments; and the tuition cost per pupil for grades 6-8 was $11,873 for the 2015-2016 school year, or $66.00 per day. The ALJ concluded that: petitioner failed to timely file a residency appeal in accordance with *N.J.S.A.* 18A:38-1(b); neither petitioner nor his children resided in respondent's school district, and petitioner failed to sustain his burden of proof to establish that J.T., A.T., and B.T. were entitled to attend school in the South Brunswick school district; and the Board is owed tuition in the amount of $66.00 per day, per child, for the period of ineligible attendance.

The Commissioner noted that the ALJ erred in determining that the petition should be dismissed as untimely; further, the ALJ again failed to make factual findings or include the factual discussion that is required under *N.J.A.C.* 1:1-18.3. Accordingly, the Commissioner summarized the facts of the matter in the final decision in order to provide support for the legal conclusion that petitioner was not domiciled in the school district, and therefore his children were not entitled to a free public education in South Brunswick schools. In addition, the Commissioner corrected the amount of tuition due, and ordered that petitioner owes the respondent Board tuition reimbursement in the total amount of $35,462. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 6/19/17

OAL DKT. NO. 05426-17
(EDU 19075-16 ON REMAND)
AGENCY DKT. NO. 298-11/16

J.T., ON BEHALF OF MINOR CHILDREN, J.T., A.T., AND B.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed – mindful of the Commissioner's April 20, 2017 decision remanding this matter for inclusion of a factual discussion. The parties did not file exceptions.

While the Initial Decision contains some findings of fact, such findings relate solely to the timeliness of the petition. The remaining factual findings appear to have been incorporated through a 60 page attachment – including the Board's entire brief in support of its motion to dismiss, the exhibits attached to the brief, and the certification of Gary McCartney and the exhibits attached thereto. As the ALJ did not make specific factual findings regarding the merits of whether petitioner resides in South Brunswick, the facts of this matter are summarized as follows.[1]

Petitioner enrolled his three children in the District's schools for the 2016-2017 school year, and provided a copy of a lease indicating that he lived at a South Brunswick rental

[1] The Certification of Interim Superintendent Gary McCartney is undisputed as the petitioner did not file opposition to the Board's motion to dismiss, nor exceptions to the Initial Decision.

property. (Certification of Gary McCartney, ¶ 3-4) Upon discovering that petitioner did not live at the South Brunswick rental property, the Board initiated a residency investigation. (*Id.* at ¶ 5-6) The Board's investigator conducted surveillance between September 1 and October 24, 2016, at the South Brunswick rental property, as well as at petitioner's Franklin Township home. (*Id.* at ¶ 7-8) The investigator observed the South Brunswick rental property on 27 occasions and never saw petitioner or any activity at the home. (*Id.* at ¶ 10) By contrast, the investigator observed the Franklin Township home on 31 occasions and saw petitioner's cars parked outside and in the garage on 28 occasions, and the same cars were also seen dropping off the minor children at the bus stop near the South Brunswick property several times. (*Id.* at ¶ 11-12)

On October 13, 2016, the Board informed petitioner of a residency hearing before the Board to be held on October 24, 2016. (*Id.* at ¶ 13) By letter dated October 25, 2016, the Board informed petitioner of its determination that petitioner resides in Franklin Township and, therefore, the minor children are ineligible to attend the District's schools. (*Id.* at ¶ 14)

The Commissioner finds as a preliminary matter that the instant petition should not be dismissed as out of time. As the Commissioner previously noted in her April 20, 2017 decision, pursuant to *N.J.S.A.* 18A:38-1, when an appeal is filed within 21 days of the date of the district's decision, no child shall be removed from the school during the pendency of the proceedings before the Commissioner. Nevertheless, appeals may be filed after expiration of the 21-day period, but the student's right to attend school during the pendency of the appeal is not guaranteed by operation of statute. See *Attendance at School Based on Domicile or Residency in the School District: Sample Forms, Notices, and Informational Documents*, http://www.state.nj.us/education/code/current/title6a/chap22sample.pdf, p. 15.

Upon a comprehensive review of the record, the Commissioner notes that the Initial Decision did not contain any support for its legal conclusion except "See Certification of Gary McCartney and the investigator's report attached thereto as Exhibit A." (Initial Decision at 8). There is no explanation as to the facts on which the ALJ is relying for these conclusions of law, and indicating that the Commissioner should refer to a certification is not a substitute for written legal analysis. *N.J.A.C.* 1:1-18.3(c). Nevertheless, the Commissioner agrees with the ALJ that petitioner failed to sustain his burden of establishing that he was a domiciliary of South Brunswick for the 2016-2017 school year. The Board's investigation showed that – over nearly a two month period – on no occasion was petitioner present at his South Brunswick rental property, while on nearly every occasion, petitioner's cars – the same cars that were observed dropping the minor children off at the bus stop in South Brunswick – were at the Franklin Township location. As such, the Board's determination that petitioner did not reside in South Brunswick was not arbitrary, capricious, or unreasonable. The Commissioner further concurs with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in the District's schools during the 2016-2017 school year.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor children were ineligible to attend school in South Brunswick. Therefore, the Board is entitled to tuition reimbursement in the amount of $35,462.00[2] ($11,873.00 each for A.T. and B.T. to attend middle school, and $11,716.00 for J.T.

[2] It appears that the ALJ used the tuition rate for grades 6-8 ($11,873.00) for all three students. The Certification of Gary McCartney indicates that A.T. and B.T. attended middle school and J.T attended high school. (¶ 16-17). The per pupil tuition costs issued by the Department of Education on February 17, 2017 indicates that the annual tuition cost for grades 6-8 is $11,873.00 and the annual tuition cost for grades 9-12 is $11,716.00.

to attend high school – based on the tuition rates for the entire 2016-2017 school year, during which petitioner's minor children were ineligible to attend).[3]

Accordingly, the recommended decision of the ALJ is modified as stated above and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/19/17

Date of Mailing: 6/20/17

[3] The Initial Decision does not indicate the number of days in which the children were ineligible for school during the 2016-2017 school year and does not calculate the total amount of tuition reimbursement owed. It appears from the record that the minor children are still attending school in South Brunswick, and have for the entire school year. As the school year will be concluded by the time the parties receive this decision, the Commissioner assumes that the children attended school in the district for the full 180 days; accordingly, her assessment of tuition owed is based on attendance for the full 180 day school year.

[4] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO.: EDU 05426-17
AGENCY REF. NO.: 298-11/16

J.T. O/B/O MINOR CHILDREN J.T., A.T. AND B.T.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, COUNTY OF MIDLLESEX,

Respondent.

ON REMAND
OAL DKT. NO.: EDU 19075-16

J.T., Petitioner, pro se

Adam S. Herman, Esq., for Respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: April 20, 2017

Decided: May 3, 2017

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The matter is before the undersigned on remand pursuant to the Decision of the Acting Commissioner of Education, dated April 20, 2017, requiring the undersigned to set forth a recitation of facts. (J-1)

Petitioner challenges Respondent Board of Education's residency determination.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on December 20, 2016, as a contested case. N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to –13, bearing OAL Docket No. EDU 19075-16.

A prehearing conference was held on January 6, 2017. A prehearing order, dated January 6, 2017, was entered by the undersigned.

Respondent filed a motion to dismiss the petitioner's appeal with the Bureau of Controversies and Disputes on December 16, 2016, prior to the matter being transferred to the OAL, and before a decision on said motion was made. Respondent simultaneously filed its Answer and Cross Petition with the Bureau of Controversies and Disputes.

Pursuant to the pretrial Order entered on January 6, 2017, Petitioner was permitted ten days from the receipt of said motion to respond. No response was submitted.

On February 24, 2017, Respondent filed a certification of Gary McCartney, Superintendent of the South Brunswick Board of Education.

On March 3, 2017, Respondent's counsel provided a letter from the New Jersey Department of Education setting forth Tuition Costs per Pupil for the 2015-2016 school year.

ISSUES

1. Did Respondent err in its determination that Petitioner's three children did not reside in South Brunswick and were ineligible to attend school in the South Brunswick School District; and, is petitioners claim time barred?
2. Are Respondent's entitled tuition reimbursement?

FACTUAL DISCUSSION

The Preliminary Statement and the Factual Background set forth in Respondent's brief in support of its motion to dismiss, which are attached hereto and made a part hereof, are adopted herein as if set forth at length. (R-3)

The facts set forth in the Certification of Gary McCartney, which are attached hereto and made a part hereof, are adopted herein as if set forth at length. (R-4)

FINDINGS OF FACT

1. The residency decision of Respondent was adopted on October 24, 2016, which determined that petitioner's children did not reside with the District, and a letter setting forth the same was mailed to the petitioner on October 25, 2016. (R-4, pg. 3, paragraphs 13 and 14)

2. Petitioner was advised in said October 25, 2016 letter that should he disagree with the District's decision he had the right to appeal within 21 days of the notice. (Exhibit C of R-3)

3. Petitioner did not file an appeal until November 22, 2016.[1] (P-1)

4. Petitioner's appeal was filed more than twenty-one days after notice of the District's decision.

[1] There are two identical residency appeals, one dated November 22, 2016 and one dated November 25, 2016. For purposes of this decision the November 22, 2016 filing date shall be used.

5. The tuition cost per pupil for grades 6-8 is $11,873 for the 2015-16 school year, or $66.00 per day. (R-5)

6. Petitioner's children did not reside with the District, and have not so resided from the 2015-2016 school year to the present. (R-2, page 2, paragraph 4; R-3; and, R-4)

7. On February 9, 2016, the District determined that neither petitioner or his children resided within the District. (R-2, pg. 2, paragraph 4)

8. The District and petitioner had previously entered into a settlement agreement on August 31, 2016, wherein petitioner represented that he was in the process of renting an apartment in the District. (R-2, pg. 2, paragraph 5)

9. The District became aware that petitioner and his children were not residing in the District and commenced a residency investigation which determined that petitioner and his children did not reside in the District. (R-2, pg. 2, paragraph 6; R-4)

LEGAL ANALYSIS AND CONCLUSION

Standard of Review

N.J.A.C. 6A:3-1.5(g) states, "Nothing in this section precludes the filing of a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. Briefing on such motions shall be in the manner and within the time fixed by the Commissioner, or by the ALJ if the motion is to be briefed following transmittal to the OAL."

In ruling on a motion to dismiss:

> The judge considers whether all of the evidence together with all legitimate inferences could sustain a judgment in favor of the party opposing the motion. The judge is not concerned with the weight, worth, nature or extent of the evidence. The judge must accept all evidence supporting the party defending against the motion and accord that party

> the benefit of all inferences that can and legitimately be deducted therefrom...

Myles Hart v. New Jersey State Board of Examiners, 2014 WL 3708621 (citing New Jersey Practice, Administrative Law and Practice, §5, 19, at 259-60).

Petitioner did not file a response to Respondent's motion to dismiss. N.J.S.A. 18A:38-1 provides that public schools shall be free to the following persons over five and under 20 years of age:

a. Any person who is domiciled within the school district;

b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in

> this subsection. The board of education shall, at the time of its decision, notify the resident in writing of his right to contest the board's decision to the commissioner within 21 days. No child shall be denied admission during the pendency of the proceedings before the commissioner. In the event the child is currently enrolled in the district, the student shall not be removed from school during the 21-day period in which the resident may contest the board's decision nor during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the resident, parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner.

In the instant matter, Respondent notified Petitioner of the residency hearing by letter dated October 13, 2016. The residency hearing was held on October 24, 2016. By letter dated October 26, 2016, Petitioner was advised of Respondent's determination that his children were not eligible to attend school in the Respondent School District. Petitioner was advised in said letter of his right to contest Respondent School District's decision within twenty-one days. Petitioner did not file the pro se residency appeal until November 22, 2016. Said appeal was dated November 20, 2016. The twenty-one day period in which to file expired on November 15, 2016.

Right to a Free Public Education

N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a) sets forth the right of a student to a free public education, which in pertinent parts states:

> Public schools shall be free to the following persons over five and under twenty years of age:
>
> a. Any person who is domiciled within the school district[.]

Consideration in proving residency for purposes of establishing eligibility for school district placement is found at N.J.A.C. 6A:22-3.4(a),

> (a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:
>
> 1. Property tax bills, deeds, contracts of sale, leases, mortgages, signed letters from landlords and other evidence of property ownership, tenancy or residency;
>
> 2. Voter registrations, licenses, permits, financial account information, utility bills, delivery receipts, and other evidence of personal attachment to a particular location;
>
> . . .
>
> 3. Court orders; State agency agreements; and other evidence of court or agency placements or directives;
>
> 4. Receipts; bills; cancelled checks; insurance claims or payments; and other evidence of expenditures demonstrating personal attachment to a particular location or to support the student;
>
> . . .
>
> 6. Affidavits, certifications and sworn attestations pertaining to statutory criteria for school attendance, from the parent, guardian, person keeping an "affidavit student," adult student, person(s) with whom a family is living, or others as appropriate;
>
> . . .
>
> 8. Any other business record or document issued by a governmental entity.

> (b) A district board of education may accept forms of documentation not listed in (a) above, and shall not exclude from consideration any documentation or information presented by a person seeking to enroll a student.
>
> (c) A district board of education shall consider the totality of information and documentation offered by an applicant, and shall not deny enrollment based on failure to provide a particular form of documentation, or a particular subset of documents, without regard to other evidence presented.

In S.S. ex rel. A.S. and A.S. v. Bd. of Education of the Township of Marlboro, Monmouth County, EDU 192-12, Initial Decision (August 26, 2013), http://njlaw.rutgers.edu/collections/oal, evidence submitted by an investigator hired by the Marlboro New Jersey School District to determine whether certain minor children who were enrolled in the school district in fact were domiciled therein within the meaning of N.J.A.C. 6A:22-3.1(a) was sufficient to establish that the children in fact were not domiciled in the district during the period in question and, instead, supported a conclusion that the minors resided at their grandmother's home in Edison New Jersey. Even though their mother had submitted documentation of the type described in N.J.A.C. 6A:22-3.4(a) that supported her claim that the minors were domiciled in Marlboro, the circumstances of the mother's employment, which included late hours, was such that the minors were properly found to be residing with their grandmother. On that basis, the administrative law judge recommended that the Department of Education find the mother liable for tuition for the minors.

In the instant matter, it is clear that neither Petitioner, nor his children, resided within Respondent's school district. (See Certification of Gary McCartney and the investigator's report attached thereto as Exhibit A)

N.J.A.C. 6A:22-6.2 states:

> (a) If an appeal to the Commissioner is filed by the parent, guardian, adult student, or school district resident

> keeping an "affidavit" student and the petitioner does not sustain the burden of demonstrating the student's right to attend the school district, or the petitioner withdraws the appeal, fails to prosecute, or abandons the appeal by any means other than settlement agreeing to waive or reduce tuition, the Commissioner may assess tuition for the period during which the hearing and decision on appeal were pending, and for up to one year of a student's ineligible attendance in a school district prior to the appeal's filing and including the 21-day period to file an appeal.
>
> 1. Upon the Commissioner's finding that an appeal has been abandoned, the district board of education may remove the student from school and seek tuition for up to one year of ineligible attendance pursuant to N.J.A.C. 6A:22-6.1(a) plus the period of ineligible attendance after the appeal was filed. If the record of the appeal includes a calculation reflecting the tuition rate(s) for the year(s) at issue, the per diem tuition rate for the current year and the date on which the student's ineligible attendance began, the Commissioner may order payment of tuition as part of his or her decision. In doing so, the Commissioner shall consider whether the ineligible attendance was due to a school district's error. If the record does not include such a calculation and the district board of education has filed a counterclaim for tuition, the counterclaim shall proceed to a hearing notwithstanding that the petition has been abandoned.
>
> 2. An order of the Commissioner assessing tuition is enforceable through recording, upon request of the district board of education pursuant to N.J.A.C. 6A:3-12, on the judgment docket of the Superior Court, Law Division, in accordance with N.J.S.A. 2A:58-10.

Cleary, Petitioner has failed to sustain the burden of proof to demonstrate J.T., A.T. and B.T. have the right to attend the Respondent school, and Respondent is entitled to tuition reimbursement.

N.J.A.C. 6A:22-6.3 states in pertinent part: a) Tuition assessed pursuant to this section shall be calculated on a per-student basis for the period of a student's ineligible enrollment, up to one year, by applicable grade/program category and consistent with

the provisions of N.J.A.C. 6A:23A-17.1. The individual student's record of daily attendance shall not affect the calculation.

Tuition for the 2015-2015 school year is $11,873.00, or $66.00 per day.

I **CONCLUDE** that petitioner failed to timely file a residency appeal in accordance with N.J.S.A. 18A:38-1(b), and therefore the same is time barred.

I further **CONCLUDE** that petitioner's motion to dismiss should be **GRANTED.**

I further **CONCLUDE** neither Petitioner, nor his children, resided within Respondent's District during the 2015-2016 school year to the present and Respondent is entitled to the relief requested in its Answer and Cross Petition: reimbursement for tuition for the period of ineligible attendance for each child.

I further **CONCLUDE** that Respondent is entitled to an order excluding Petitioner's children from the Respondent school district.

ORDER

Based upon the foregoing it is **ORDERED** that Respondent's motion to dismiss Petitioner's residency appeal is granted: and,

It is further **ORDERED** that Petitioner's residency appeal is dismissed with prejudice; and,

It is further **ORDERED** that Petitioner's children, J.T., A.T. and B.T. are not entitled to attend school in the Respondent school district and are excluded therefrom; and,

It is further **ORDERED** that Respondent is entitled to tuition reimbursement from Petitioner in the amount of $66 per day per child for each day J.T., A.T. and B.T.

attended school in the Respondent school district up to one year in accordance with N.J.A.C. 6A:22-6.3.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 3, 2017

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Exhibits

For Petitioner:

P-1 Pro se Residency Appeal dated November 20, 2016, and filed with the Bureau of Controversies and Disputes on November 22, 2016.

For Respondent:

R-1 Notice of Motion to Dismiss dated December 15, 2016, and filed with the Bureau of Controversies and Disputes on December 16, 2016.

R-2 Answer and Cross Petition dated December 15, 2016 and filed with the Bureau of Controversies and Disputes on December 16, 2016.

R-3 Brief in support of motion to dismiss the residency appeal December 15, 2016 and filed with the Bureau of Controversies and Disputes with Directions for Appealing Local Board's Residency Determination to on December 16, 2016, together with Exhibits A through D.

R-4 Certification of Gary McCartney, Superintendent of Respondent school district, with Exhibits A though D.

R-5 Letter from the New Jersey Department of Education, dated February 17, 2017, with tuition costs per pupil for the 2015-2016 school year.

169-17

SHANE BERGER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
GLADYS RIVERA AND BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner – a former member of the Bloomfield Board of Education (Board) – challenged the eligibility of respondent, Gladys Rivera – currently a member of the Board – to serve in that capacity, based on a residency requirement. Petitioner asserted that Rivera had not been a resident of Bloomfield for one year immediately preceding the board election as is required by *N.J.S.A.* 18A:12-1. Petitioner filed an application for emergency relief in this matter, which was denied. A plenary hearing was held in the matter on February 7, 2017, after which the record was closed.

The ALJ found, *inter alia*, that: the question posed in this matter is when did respondent Rivera become a bona fide resident of Bloomfield; Rivera was elected to the Board in November 2016; petitioner ran for re-election to a third term in the same race, but failed to earn enough votes to continue his service on the Board; soon after the election, questions were raised about the residency of respondent, and whether she had lived in town for the requisite one year prior to running for the Board; petitioner retained the services of a detective agency to conduct a residency investigation on respondent; the resulting detective's report concluded that respondent lived in Elizabeth rather than Bloomfield; on the other hand, respondent provided testimony from herself and others that contradicted the facts and assumptions of the detective's report, and indicated that respondent had relocated to Bloomfield after beginning a romantic relationship with her now-fiancé in April 2015; and the pivotal issue here is whether petitioner has satisfied his burden of proving by a preponderance of the credible evidence that respondent did not reside in Bloomfield for the requisite period of time. The ALJ concluded that the competent, credible evidence in this matter does not establish that respondent was not a resident of Bloomfield for the requisite one year prior to her election to the Bloomfield Board of Education. Accordingly, the petition was dismissed.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision was adopted as the final decision in this matter and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

June 20, 2017

169-17

OAL DKT. NO. EDU 19266-16
AGENCY DKT. NO. 319-12/16

SHANE BERGER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
GLADYS RIVERA AND BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Shane Berger. This matter involves a claim by the petitioner that respondent, Gladys Rivera – a current member of the Bloomfield Board of Education (Board) – was not a resident of Bloomfield for one year immediately preceding the school board election as required by *N.J.S.A.* 18A:12-1.[1] In this case, the relevant school board election was held on November 8, 2016. Following a hearing at the OAL, the Administrative Law Judge (ALJ) found that the petitioner did not present sufficient evidence to establish that the respondent was not a resident of Bloomfield for the requisite one year prior to her election to a seat on the Board. Therefore, the ALJ dismissed the petition.

In his exceptions, the petitioner maintains that the ALJ erred when she concluded that the competent, credible evidence in this matter does not establish that the respondent was not a resident in Bloomfield for the requisite one year period prior to the school board election. In

[1] Pursuant to *N.J.S.A.* 18A:12-1, "[e]ach member of any board of education shall be a citizen and a resident of the district ... and shall have been such for one year immediately preceding his appointment or election."

support of his argument, the petitioner offers witness testimony that he contends demonstrates by a preponderance of the evidence that it is more likely than not that the respondent did not live in Bloomfield one year prior to the election. The petitioner stresses that the respondent is "a literal ghost" when it comes to evidence that she resided in Bloomfield on or before November 8, 2015. (Petitioner's Exceptions at 4) The petitioner also emphasizes that the ALJ herself stated: "[c]learly, significant question remains as to whether respondent was domiciled in Bloomfield for the requisite one year prior to her election." (*Id.* at 2) Based on the totality of the circumstances, the competent, credible evidence contradicts the respondent's assertion that she lived in Bloomfield for the requisite one year prior to her election. Therefore, the petitioner argues that he has met his burden of proof, and the respondent should be removed from her position on the Board.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the petitioner did not present sufficient evidence to establish that the respondent was not a resident of Bloomfield for the requisite one year prior to her election to a seat on the Board. In this case, the petitioner alleges that the respondent was not a bona fide resident of Bloomfield for one year prior to the election, while the respondent maintains that she was in fact a resident of Bloomfield. Importantly, it is the petitioner who carries the burden of proving by a preponderance of the evidence that the respondent was not a resident of Bloomfield as of November 8, 2015.

Although there may be questions regarding the respondent's residency[2], based on her overall assessment of the evidence and witness testimony, the ALJ found that the respondent's testimony that she was a resident of Bloomfield for the requisite period was not

[2] The Initial Decision outlines the details and the circumstances surrounding the respondent's residential history and the residency investigation.

successfully challenged. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [*N.J.S.A.* 52:14B-10(c)].

The respondent maintains that she moved into her fiancé's residence in Bloomfield before November 8, 2015. The ALJ found that the respondent testified plausibly and her fiancé testified credibly in connection with concerns raised by the petitioner regarding where the respondent resided during the relevant period. It is clear that the ALJ's ultimate determination in this matter was dictated by which party had the burden of proof. Notwithstanding the petitioner's contentions to the contrary, the Commissioner finds no basis in the record to reject either the ALJ's determinations of witness credibility or her application of the petitioner's burden of proof to find that the petitioner did not present enough evidence to prove that the respondent was not a resident of Bloomfield as of November 8, 2015.

Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/20/17

Date of Mailing: 6/20/17

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 19266-16
AGENCY DKT. NO. 319-12/16

SHANE BERGER,

Petitioner,

v.

GLADYS RIVERA, AND BOARD OF EDUCATION OF BLOOMFIELD, ESSEX COUNTY,

Respondents.

Ciro Spina, Esq., for petitioner (Law Offices of Jef Henninger, attorneys)

James A. Key, Jr., Esq., for respondent Gladys Rivera (Key Law Firm, attorneys)

Jonathan M. Busch, Esq., for respondent Bloomfield Board of Education (Busch Law Group, LLC, attorneys)

Record Closed: February 7, 2017 Decided: May 8, 2017

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, Shane Berger, asserts that Gladys Rivera, currently a member of the Board of Education of Bloomfield, Essex County, New Jersey, had not been a resident of Bloomfield for one year immediately preceding the election as is required by N.J.S.A. 18A:12-1.

Petitioner filed an application for emergency relief seeking an Order voiding the candidacy of Rivera for a seat on the Board and enjoining Rivera from continuing to occupy a seat and/or removing her from her elected position.

Oral argument was heard on January 5, 2017, and on January 6, 2017, an Order was issued denying the emergent relief sought.

The matter was scheduled for plenary hearing on February 7, 2017, and was heard on that date, at the conclusion of which the record closed.

TESTIMONY

Edward Koster

Edward Koster has been the director of the Spartan Detective Agency for three and a half years. He previously served as a police officer for twenty-five years in the Township of Union. He was asked by petitioner to conduct an investigation of Gladys E. Rivera. He generated two reports, one that was later determined to be related to a different Gladys Rivera, and a second that investigated the correct person. (P-2.) The report, dated January 13, 2017, revealed that as of that date Ms. Rivera's address was 542 South Broad Street, in Elizabeth, N.J. Koster used several databases in his research, and checked telephone numbers and cell-phone numbers, and cross-referenced everything, and nothing came up to suggest that Ms. Rivera resided in Bloomfield, N.J., as of January 13, 2017. Her cell-phone bill does not go to the Bloomfield address, nor do any utility bills.

Jill Fischman

Jill Fischman is in her second term on the Bloomfield Board of Education and served as president from June 2016 until December 2016. She was notified in December 2016 that questions had arisen regarding respondent's residency, and whether she had lived in town for the requisite one year prior to running for the Board of Education. Ms. Fischman testified that she sent respondent a text message indicating that there were concerns about her residency, and asked for proof of residency. In turn, respondent sent Ms. Fischman her New Jersey Motor Vehicle Commission (MVC) change-of-address form dated March 24, 2016.[1] Respondent indicated that she would provide additional proofs, or a letter from her landlord; however, none of those things were forthcoming, and Ms. Fischman heard nothing further from respondent regarding the request for additional proofs of residency.

As a result, Ms. Fischman asked Nicholas Dotoli, Esq., Board attorney, to seek the assistance of the police department in determining respondent's residency. She does not know what they did and did not receive any reports. She asked for the inquiry because respondent had said that her campaign manager would provide additional proofs of residency, and did not, and so she asked that a police check be undertaken.

Leonardo Marin III

Leonardo Marin has resided at 329 Ampere Park in Bloomfield for four years with his mother and younger brother. He indicated that he has been the building supervisor for those four years, for which he receives no salary, but does receive additional property privileges, including use of the patio and additional parking. The residence is a three-family house and he lives on the second floor. The third-floor tenant is Richard Mendez, who has lived there approximately nine years, and now Gladys Rivera, respondent, who moved in with Mr. Mendez in April 2016. Marin testified that he had just finished a course of physical therapy for a sports injury at the time, and noted her moving boxes in gradually.

[1] This is only eight months before the election.

Vincent Kearney

Lieutenant Kearney has been employed by the Bloomfield Police Department for sixteen years and is the lieutenant in charge of the Internal Affairs Division. He has been a lieutenant since 2014, and prior to that was a sergeant for five years. He was asked by the police director to do an investigation of respondent, and was provided with the Spartan report and the letter from Mr. Marin. He determined that respondent moved to Bloomfield in the spring of 2016, sometime between the dates of March 9 and April 19, 2016, and that prior to that she resided at 542 South Broad Street in Elizabeth, N.J. An MVC search revealed that on March 9, 2016, the address on her driver's license had been changed to 329 Ampere Parkway in Bloomfield. He checked the voter-registration system, which revealed that respondent changed her voter registration to the Bloomfield address on April 19, 2016. He also found prior voter registrations at 542 South Broad Street in Elizabeth (until September 2016) and a prior voting address of 527 Morris Avenue, also in Elizabeth, N.J.

Lieutenant Kearney then conducted witness interviews, including of Mr. Marin, who indicated that respondent moved into his building in April, and that at some point, "several months ago," Richard Mendez had asked permission for respondent to move in with him. Marin did not recall exactly when Mendez had sought permission, but indicated that it was several months before Lieutenant Kearney spoke to him in January 2017.

Lieutenant Kearney testified that he did not speak to respondent's prior landlord. He also testified that NJ MVC laws require individuals who move to change their address within fourteen days or they can receive a summons.

Shane Berger

Mr. Berger is self-employed and owns a chain of laundromats. He was elected to the Bloomfield Board of Education in 2010 and reelected in 2013, and has served as chairman of every committee. He has also served as the liaison for every school; however, he was not reelected in the last cycle in 2016, and came in fourth place. He

has also previously served on the county school board association, and was the State chairman of the Standards and Assessments Standing Committee.

Mr. Berger testified that many people reached out to him indicating that "someone needs to do something" about the fact that a nonresident had been elected to the Board. He recognized that he would not get the seat if respondent were unseated; however, he felt that residency issues are important matters that the Board has to address, and that if a Board member does not even comply, how can they determine residency compliance by others?

Berger testified that he went to the county superintendent of elections and was advised that the onus is on the district to determine respondent's residency. He then met with the Board attorney, Mr. Dotoli, and the superintendent, Mr. Gonzalez. Soon thereafter, he received a call from the county superintendent's office instructing him how to challenge the election results.

Berger testified that he wants credibility for the Board of Education, and that the residency of Board members cannot be in question. He says he is doing his civic duty. He believes respondent did not live in town for the requisite one year prior to the election, and that she has provided no proof otherwise, despite requests from the then-president of the Board, Ms. Fischman.

Nicholas J. Dotoli

Mr. Dotoli is employed by the Bloomfield Township Board of Education as director of human resources and general counsel. He oversees all employment acts and certification issues and also oversees special education. He advises the Board members and reports to the superintendent.

Residency issues related to respondent came to his attention from members of the community who were concerned whether there had been compliance with N.J.S.A. 18A:12-1, et seq., and whether respondent actually lived in town. He sent an email to the police director (R-1) at the request of the Board president, Ms. Fischman, to investigate

the residency issue. He also spoke to Lieutenant Kearney regarding his report, and was concerned that respondent had moved to Bloomfield in April 2016.

He testified that he has never had to do an investigation of a Board member. He agreed that investigations are conducted of student residency issues, but he does not feel the same standards apply under N.J.S.A. 18A:12-1. A student may not attend school if not a resident of the district, but he does not believe it is within his jurisdiction to make sure the Board members are qualified to sit, and feels that is the responsibility of the County Board of Elections, which has jurisdiction to determine if Board members have met the requirements.[2]

Amarilis Martinez

Ms. Martinez testified that she lives at 511 Fulton Street in Elizabeth, which is a two-family home that she has owned for thirty-six years. She stated that respondent rented a room from her from early 2015 until June 30, 2015, pursuant to her rent receipts. At the end of June 2015, respondent moved out and moved in with her boyfriend, Richard

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[2] Under the school laws governing the qualifications of school-board members, N.J.S.A. 18A:12-1 to -2.2, "[e]ach member of any board of education shall be a citizen and resident of the district . . . and shall have been such for at least one year immediately preceding his appointment or election." N.J.S.A. 18A:12-1. Moreover, "[w]henever a member of a local or regional board of education shall cease to be a bona fide resident of the district . . . his membership in the board shall immediately cease." N.J.S.A. 18A:12-3. And, in the event a school-board member is removed because he is not a resident of the district, the county superintendent of schools shall fill the vacancy. N.J.S.A. 18A:12-15(a).

The Commissioner of Education has "jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9. However, in 1995 the Legislature "transfer[red] responsibility for the conduct of school elections from boards of education to the officials responsible for conducting other elections under New Jersey's election code (Title 19 of the Revised Statutes)," and "jurisdiction over school election-related disputes [was] removed from the Commissioner of Education and State Board of Education, so that such disputes will be handled in the same manner as those arising with respect to other elections." P.L. 1995, c. 278; Statement to Senate Amendments to A1705 (adopted June 12, 1995). As a result of that change, "controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws." N.J.S.A. 18A:6-9.

Thus, while the Commissioner does not have jurisdiction over the conduct of school elections, the Commissioner still has jurisdiction over post-election challenges to a board member's qualifications, including the residency requirement under N.J.S.A. 18A:12-1. See, e.g., Bd. of Educ. of Sea Isle v. Kennedy, EDU 2028-05, Comm'r (June 30, 2005) (confirming that the Commissioner is the one "to whom adjudication of board member qualification is reserved in the event of a dispute, N.J.S.A. 18A:6-9"), aff'd, State Bd. of Educ. (January 4, 2006), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, 393 N.J. Super. 93 (App. Div. 2007) (stating that "[c]laims regarding an individual's qualifications to serve on a local board fall under the Commissioner.s jurisdiction"), aff'd, modified for other reasons, 196 N.J. 1 (2008).

Mendez, in Bloomfield. She believes that they became engaged on July 5, 2015, and moved in together around that time. Her daughter is married to respondent's son, and both her sons now live in the building as of June 2015, when respondent moved out. She testified that respondent paid $300 a month for the room. She stated that respondent still receives mail at her address, and that she comes there every weekend, because "she is family," as they are both grandmothers to the same children.

Aida Ortiz

Ms. Ortiz testified that she lives at 12 Turnbridge Place in Bloomfield, N.J., where she has lived for seventeen years. She has known respondent since Mother's Day 2015, when her son introduced Rivera as his fiancée. Her son resides at 329 Ampere Parkway, Bloomfield, and Ms. Ortiz testified that she was there when respondent moved in with her son at that address. She testified that she helped bring some things upstairs. Respondent was unsure of the security of the mail at the Bloomfield address because she did not trust the residents there, and so she still sends mail to Ms. Ortiz's home in Bloomfield. Respondent asked her almost a year ago if she could use her address to send mail to. She also stated that respondent took a "small bedroom set" into the apartment, and that she unpacked clothes and dishes for about two hours, helping to empty out a small truck they rented.

Richard Mendez

Mr. Mendez testified that he has lived at 329 Ampere Parkway in Bloomfield for three and a half or four years, and that respondent is his fiancée. He testified that they met online on April 10, 2015; started dating about a week later; and became engaged on July 5, 2015. He testified that he introduced her to his mother, Ms. Ortiz, on Mother's Day of 2015, and that she moved into his apartment at the end of June or in early July 2015. Mr. Mendez provided a receipt for the engagement ring dated June 8, 2015. (R-2.) He agrees that respondent asked his mother if her mail could go to his mom's house because they felt there was mail tampering since she moved in with him.

Mendez stated that when his mother met respondent in May 2015 she was not yet his fiancée, and so his mother was incorrect when she said that respondent was introduced to her as his fiancée.

He also stated that his mail was tampered with in July 2015, so they began to send their mail to his mother's address, and that his mother's address is on all his bills and checks.[3] The mailboxes at 329 Ampere Parkway in Bloomfield do not have locks on them; however, the mailbox at his mother's house does, so all the mail goes here. Mendez confirmed that he asked permission of the landlord for respondent to move in around June of 2015. He also stated that respondent does not pay any of the bills.

Finally, Mendez testified that a joint account with respondent was opened on August 3, 2015. (R-3.)

Gladys Rivera

Ms. Rivera testified that from January 2015 until the end of June 2015 she lived at 511 Fulton Street in Elizabeth. She then said she had moved there at the end of August 2014. At the end of June 2015 she moved into 329 Ampere Parkway in Bloomfield, with Richard Mendez. She arranged at the time for her mail to remain coming to the Fulton Street address until she was comfortable with mail going to Bloomfield. She believed that Leo Marin's younger brother would go through the mailbox, and so arranged for bank statements and certain other mail to go to her mother's address, and other mail to continue to go to Martinez's address.

Rivera testified that she "started off fine" with other tenants at the Bloomfield address; however, relationships changed when the Marins had her daughter's car towed from the driveway one day. It was parked in Mr. Mendez's spot at the time, yet it was towed. The Marin boys continued to visit, as they were friendly with Mendez's son; however, their mother, Teresa, no longer spoke to her.

[3] None were produced and there was no indication they had been requested to be produced.

Ms. Rivera testified that her fiancé's mother, Aida Ortiz, helped a bit with the move. They had an SUV that they used, but did not bring any furniture; they had a futon delivered a few weeks later. She stated that she moved in with Mendez in July 2015 after Ms. Martinez needed the room she had been renting for another son, who moved in when she moved out, and remains living there today. She had nowhere to go back to, and so moved in with Mr. Mendez.

Rivera agreed that she had been asked for proof of residency, and only provided an MVC address-change form from March 2016, and that other address changes slipped her mind because a lot was going on. She stated that her cell-phone bill goes to her son because it is in his name, and that the bank statement for her personal account goes to Ms. Martinez's home at 511 Fulton Street in Elizabeth. The statements for the joint account with Mr. Mendez go to 12 Turnbridge Place in Bloomfield, Ms. Ortiz's home. She testified that she changed her voter registration in March or April 2016, and agreed that there are no bills or other utilities in her name, and that she is not on the lease. Rivera again stated that she lived at 542 South Broad Street in Elizabeth from December 2010 until August 2014,[4] and then moved to 511 Fulton Street in Elizabeth, but she did not change her address because she "didn't see a need."

FACTUAL DISCUSSION

Based upon consideration of the testimonial and documentary evidence presented at the hearing and having had the opportunity to observe the demeanor of the witnesses and to assess their credibility, I **FIND** the following **FACTS** by a preponderance of the credible evidence:

Gladys Rivera is a member of the Board of Education of the Township of Bloomfield in Essex County. An election was held in November 2016 for four seats on the Board. Three seats were for three-year terms and one seat was for a one-year term. Respondent earned 4,258 votes for one of the three-year seats, and thus was seated.

[4] This varies from Ms. Martinez's testimony and the rent receipts she referenced, which she indicated reflected that Rivera rented the room from January 2015 through June 2015.

Petitioner ran in the same election, also seeking a three-year term, and placed fourth, with 2,670 votes.

Soon after the election, questions were raised about the residency of Ms. Rivera and whether she had lived in town for the requisite one year prior to running for the Board. The president of the Board at the time, Jill Fischman, advised respondent of the concerns that had been raised as to her residency and asked for proof that Ms. Rivera did indeed reside in Bloomfield. In response to this inquiry, respondent sent Ms. Fischman the New Jersey Motor Vehicle Commission address form dated March 24, 2016. Rivera indicated she would provide additional proofs and a letter from her landlord; however, no additional proofs were received by Ms. Fischman.

Ms. Fischman then requested that the Board attorney, Nicholas Dotoli, Esq., ask the police department for help in determining respondent's residency. That was her last involvement with the issue.

Believing that Rivera had not resided in Bloomfield for the one year immediately prior to the election as is required by statute, petitioner retained the services of the Spartan Detective Agency to conduct a search on Rivera. The investigator reported that as of the date of his report, January 13, 2017, all information came back indicating Ms. Rivera's address to be 542 South Broad Street in Elizabeth, New Jersey. He concluded that she resided at the address following voter-registration searches, motor-vehicle searches, and cell-phone searches, as more fully detailed in a twenty-five-page report he provided to petitioner. He also determined that Rivera was registered to vote in Elizabeth, New Jersey, and therefore also did not meet the requirement of the statute that she be registered to vote in the district. After receiving the report, petitioner filed his application to have her removed from her position on the Board.

Respondent previously resided at 542 South Broad Street, Elizabeth, New Jersey. She then moved to 511 Fulton Street in Elizabeth, New Jersey, and lived there from either August 2014 or January 2015 until the end of June 2015, when she moved out.

Respondent and Richard Mendez met online on April 10, 2015, and started dating about a week later, becoming engaged on July 5, 2015. Respondent moved in with Mendez at 329 Ampere Parkway in Bloomfield, New Jersey, sometime between July 1, 2015, and March 9, 2016. Respondent and Mendez opened a joint bank account on August 3, 2015.

On March 9, 2016, Rivera changed the address on her driver's license to 329 Ampere Parkway in Bloomfield, New Jersey. Respondent changed her voter registration to Bloomfield, New Jersey, on April 19, 2016.

Respondent has her mail delivered to her mother's address, to Ms. Ortiz's[5] address, and to Ms. Martinez's[6] address.

DISCUSSION AND CONCLUSIONS

The statute, at N.J.S.A. 18A:12-1, Qualifications, provides in salient part as follows:

> Each member of any board of education shall be a citizen and resident of the district, or of such constituent district of a consolidated or regional district as may be required by law, and shall have been such for at least one year immediately preceding his appointment or election, he shall be able to read and write, shall be registered to vote in the district, and, notwithstanding the provisions of N.J.S. 2C:51-1 or any other law to the contrary, he is not disqualified as a voter pursuant to R.S. 19:4-1 . . . .

N.J.S.A. 18A:12-2.1, Oaths, provides as follows:

> Each member of the board of education shall, before entering upon the duties of his office, take and subscribe:
>
> (1) An oath that he possesses the qualifications of membership prescribed by law, including a specific declaration that he is not disqualified as a voter pursuant to R.S. 19:4-1 and a specific declaration that

[5] Aida Ortiz is Mr. Mendez's mother.
[6] Martinez's daughter is married to respondent's son.

> he is not disqualified due to conviction of a crime or offense listed in N.J.S. 18A:12-1, and that he will faithfully discharge the duties of his office, and also
>
> (2) The oath prescribed by R.S. 41:1-3.
>
> In the case of a Type I school district the oath shall be filed with the clerk of the municipality and in all other cases it shall be filed with the secretary of the board of education of the district.

The question then is, when did Rivera become a bona fide resident of Bloomfield, New Jersey? The petitioner in this matter asserts that respondent is not eligible for membership on the Board for having failed to meet the one-year residency requirement of the statute. Petitioner seeks to have respondent removed from the Board. Respondent contends that she was a resident of Bloomfield for more than one year preceding her election and that the burden is on the petitioner to prove she was not.

As a threshold matter, it must be presumed that respondent met the requirements of the County Board of Elections, because respondent's name was printed on the ballot. The Board of Elections must therefore, have been satisfied that the candidate was qualified by residence, among other things, to be elected to the Board.

It is well settled that a person can have more than one residence, but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). The domicile of a person is the place where he has his true, fixed permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 517 (1999). The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959).

Respondent testified that she registered to vote in Bloomfield in March or April of 2016; however, no testimony was offered as to whether respondent did in fact vote in

Bloomfield in the following election cycle. However, failure to vote is not proof of lack of residence; indeed, the notion that she was still a resident of Elizabeth would be disproven with the same argument.

The basis of the petition in this matter is primarily threefold: (1) respondent receives no bills or any other mail at the Bloomfield address; (2) respondent was registered to vote in Elizabeth, New Jersey, until March or April 2016; and (3) respondent changed the address on her driver's license in March 2016. When asked by the president of the Board of Education for proof as to her residency, respondent failed to provide any, other than the MVC address change processed less than eight months before the election. While at first blush it appears that respondent had not established domicile in Bloomfield within the requisite one year, she offered the plausible explanation that the mail was not secure at the Bloomfield address, and so all of her bills and bank statements continued to be sent to prior addresses or to her mother's home. The pivotal issue, therefore, in this matter is whether petitioner has satisfied his burden of proving, by a preponderance of the credible, competent evidence, that respondent did not reside in Bloomfield for the requisite period of time.

In connection with that determination, it is necessary for me to assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of facts gives to a witness' testimony. It requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible," and may also reject testimony when "it is inconsistent with other testimony or with common experience" or

"overborne" by the testimony or other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

It is also necessary to consider the nature of the evidence presented. Hearsay evidence is admissible in administrative proceedings and "shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability." N.J.A.C. 1:1-15.5(a). Notwithstanding the admissibility of hearsay evidence, the "residuum rule" requires that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b). In the words of the New Jersey Supreme Court:

> [A] fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.
>
> [Weston v. State, 60 N.J. 36, 51 (1972).]

In this matter, the record includes contradictory testimony related almost solely to the failure to submit changes of address. The Spartan Detective Agency report reflects Elizabeth addresses for everything in respondent's name, through the date of the report in January 2017. The preliminary investigation by the police department reflects largely the same information, along with reports of interviews, including that of Mr. Marin, who

indicated that respondent had only moved in "several months ago."[7] The testimony of Ms. Martinez was of limited usefulness, and the date she alleges respondent began renting a room from her differs from the testimony of respondent. Additionally, the testimony of Ms. Ortiz conflicted with that of respondent in terms of the furniture purportedly moved into the Bloomfield address. Mr. Mendez testified credibly regarding the issues with the mail that respondent experienced at his address. Respondent's testimony regarding those issues with the mail was plausible.

Notwithstanding the efforts of petitioner to attempt to shift the burden of proof to respondent, ultimately the allegations and testimony of respondent have not been successfully challenged, and the burden of proof rests squarely with petitioner. It is the sworn testimony of respondent that she resided in Bloomfield for more than one year preceding the school-board election in November 2016. Her prior residence in Elizabeth has been occupied by the owner's son since respondent moved out, and she cannot return there. The MVC address change in March 2016 and the voter-registration address change in April 2016 are not, by themselves, sufficient to discredit respondent's testimony that Bloomfield was her residence and domicile from and after July 2015. Petitioner's contention that the failure to file change-of-address forms, or to receive mail at the Bloomfield address, is proof of no change in domicile from Elizabeth, is insufficient to refute the limited testimony to the contrary.

Clearly, significant question remains as to whether respondent was domiciled in Bloomfield for the requisite one year prior to her election. However, absent competent, credible evidence of the contrary, no consideration can be given to granting the extraordinary relief sought of removal from the Board.

"The plaintiff's residence will be presumed to be where he alleges it to be, unless the contrary appear." 71 N.J.L. 115 (Sup. Ct. 1904).

[7] Mr. Marin testified on direct examination that he observed Rivera visit the home "on and off" on weekends, commencing in January 2015. This was three months before Rivera and Mendez met. On redirect, he indicated that he began to see her "dating back to July 2015," and that Rivera started moving boxes in around April 2015.

Based upon all of the foregoing, I am constrained to **CONCLUDE** that the competent, credible evidence in this matter does not establish that respondent was not a resident in Bloomfield for the requisite one year prior to her election to a seat on the Bloomfield Board of Education.

ORDER

The petition to declare that Gladys Rivera was not a bona fide resident of the Township of Bloomfield, Essex County, New Jersey, for one year prior to her election to the Board of Education is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 8, 2017
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: May 8, 2017

Date Mailed to Parties: May 8, 2017
dr

APPENDIX

Witnesses

For Petitioner:

Shane Berger
Edward Koster
Jill Fischman
Leonardo Marin III
Vincent Kearney
Nicholas J. Dotoli

For Respondents:

Gladys Rivera
Amarilis Martinez
Aida Ortiz
Richard Mendez

Exhibits

For Petitioner:

P-1 Not in evidence
P-2 Comprehensive Report dated January 13, 2017
P-3 Official Statement from Leonardo Marin III
P-4 Investigation Report dated January 13, 2017

For Respondents:

R-1 Subpoena Ad Testificandum and Subpoena Duces Tecum
R-2 Engagement ring receipt dated June 14, 2015
R-3 TD Bank verification letter dated January 6, 2017

170-17

O.W., ON BEHALF OF MINOR CHILD, I.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY AND BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT,	:	

SYNOPSIS

Pro se petitioner, O.W., filed a petition on September 1, 2016 on behalf of her minor daughter, I.W., who transferred from Newark Public Schools to West Orange Public Schools in March of 2012. The respondent Boards filed separate motions to dismiss in October 2016, asserting, *inter alia*, that the petition is time barred as it was filed outside of the 90 day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i).

The ALJ found, *inter alia*, that: it appears petitioner feels that some inappropriate actions were taken by Newark and West Orange school officials with respect to her daughter, I.W., while she was a student in the respondents' school districts; however, the incoherent nature of the petition in the instant case makes it impossible to discern exactly what petitioner's claims are, or what relief she requests; petitioner lists fourteen separate New Jersey statutes under which she requested a declaratory ruling; the dates of the violations alleged by petitioner are also difficult to discern, but all of the claims appear to reference incidents that allegedly occurred between 2008 and 2012; of the fourteen statutes cited by petitioner, six are not school laws; therefore, the Commissioner has no jurisdiction to hear cases arising under them; as to the remaining statutes, the incidents alleged by petitioner occurred well past the 90 day time limitation on such claims. Accordingly, the ALJ concluded that the petition should be dismissed.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter for the reasons stated therein. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

June 20, 2017

170-17

OAL DKT. NO. EDU 16479-16
AGENCY DKT. NO. 243-9/16

O.W., ON BEHALF OF MINOR CHILD, I.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY AND BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT,	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Commissioner does not have jurisdiction over any of the allegations that do not arise out of the school laws of this State. *N.J.S.A.* 18A:6-9. The Commissioner further agrees with the ALJ that petitioner's claims are time-barred, as the petition references events that took place between 2008 and 2012, while this petition was filed on September 12, 2016. As such, the matter is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i).

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein and the petition is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington
ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/20/17

Date of Mailing: 6/20/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION TO DISMISS
OAL DKT. NO. EDU 16479-16
AGENCY DKT. NO. 243-9/16

O.W. ON BEHALF OF MINOR CHILD, I.W.,
Petitioner,
v.
CITY OF NEWARK STATE-OPERATED SCHOOL DISTRICT, ESSEX COUNTY AND TOWNSHIP OF WEST ORANGE BOARD OF EDUCATION, ESSEX COUNTY.
Respondent.

O.W., petitioner, pro se

Arsen Zartarian, Esq., for respondent City of Newark

Frances L. Febres, Esq. for respondent West Orange BOE (Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys)

Record Closed: May 9, 2017 Decided: May 9, 2017

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petition in this matter was filed on September 12, 2016. Petitioner O.W. is the mother of the minor student, I.W., who transferred from the Newark Public Schools, to the West Orange Public School System, in March of 2012.

Respondent City of Newark filed a Motion for Dismissal of the petition on October 6, 2016. Respondent Board of Education of the Township of West Orange filed a Motion for Dismissal of the petition on October 20, 2016.

FACTUAL DISCUSSION[1]

O.W. ("Petitioner") filed this petition on behalf of I.W., who has been a West Orange student since 2012. The Petition ("Pet.") was filed against both Newark and West Orange. Petitioner has requested a declaratory ruling with respect to the following statutes:

1. N.J.S.A. 18A:3A-2;
2. N.J.S.A. 18A:6-1;
3. N.J.S.A. 26:14-5;
4. N.J.S.A. 52:17B-210;
5. N.J.S.A. 2C:34-3;
6. N.J.S.A. 2C:13-4;
7. N.J.S.A. 2C:13-9;
8. N.J.S.A. 9:2-4.2;
9. N.J.S.A. 18A:38-2;
10. N.J.S.A. 18A:38-25;
11. N.J.S.A. 18A:38-29;
12. N.J.S.A. 18A:20-17;
13. N.J.S.A. 18A:40-5;
14. N.J.S.A. 18A:40A-19.

[See generally, Pet.]

At best, it is possible to gather that the Petitioner feels that some inappropriate actions were taken, in violation of the statutes she cites to, by both Newark and/or West Orange officials with respect to her daughter I.W. while she was a student in the

[1] It is imperative to note that O.W.'s petition is incoherent. As such, the factual discussion presented here is merely an effort to decipher her petition, an attempt aided by Respondent's counsel's similar effort.

Newark and/or West Orange School Districts. However, due to the incoherent nature of the petition, it is impossible to discern what exactly those inappropriate actions are alleged to have been, or whether they were committed by representatives of Newark or West Orange. For example, the petitioner alleges the following with regard to her accusation of a violation of N.J.S.A. 18A:38-29, a statute that addresses truancy:

> Principal Wanda B.-Long noticed Spring 2006 parent habit standing at main entrance beneath posted clock showing correct time, four days alongside entrance meeting with Security. Principal asserted, a call to police to give warning and/or arrest of parent intent continue habitual hourly visits. Principal Long would have exercise right to place child/student with relative(s). The Principal in office on phone for an hour. [Pet. 13]

The relief Petitioner requests is as follows:

> **WHEREFORE**, petitioner requests educators power do not abuse public school student having adequate care in aspiration of bad faith arrange an experience of hardship. The educators' courteous and polite professional mannerism on a daily educational experience is civil and a good. Retiree, experienced and young educators offer public school students professional etiquette as a good deciding whom will receive educator's professional mannerism. Employer regarding placement of professionals in child care should have assessed applicants' personal manner is compatible in public schools attends an educational community for a happening of harm and irresponsible care among attendee. Explain interest is in an employee courteous and polite daily for a school year. Instead, please supervise the school as employee approve, then employee should be complaints to N.J. School Laws and United States laws for citizens. The educators' personal character in control perceive laws a good to public school students and attendee so, who will the laws apply an uninformed citizen, a qualified invitation to terrorism. Educators should work toward the future not rescind to times of retiree no free education supplies, bell ring (300) children in school the parents' responsibility, no DYFS agencies no Union Rights grace period on attendance rights and medical leave rights this is for reindulgement on implementing, employee is initiating dispute. The attendee overseeing child's responsible care and employee charges with instability of family, evident is young educator(s) reciprocated instability on employer's provisions. Parent will continue to restore civil stability in family.
>
> [Pet. 15 (errors in original).]

Petitioner offers descriptions of similar clarity and construction for all of the statutes she alleges Newark and/or West Orange have violated. Moreover, the dates

of these alleged violations are equally difficult to discern, but all of Petitioner's claims appear to reference incidents that allegedly occurred between 2008 and 2012. See generally, Pet.[2]

Petitioner's daughter I.W. was a Newark student until approximately March of 2012, when she transferred to West Orange. See Newark Memorandum in Support of its Motion to Dismiss Dated October 5, 2016 ("Newark Memo"), Page 2; West Orange District's Letter Brief in Support of its Motion to Dismiss Dated October 20, 2016 ("West Orange Brief"), Page 2.

LEGAL DISCUSSION

A. Claims subject to dismissal for lack of jurisdiction:

N.J.S.A. 6A:3-2.1(a) establishes the Commissioner of Education's authority to issue declaratory rulings:

> Pursuant to [statutory authority], any interested persons may petition the Commissioner for a declaratory ruling with respect to rights, responsibilities and status arising from any statute or rule *within the jurisdiction of the Commissioner.*
>
> [Id. (emphasis added).]

N.J.S.A. 6A:3-1.1(a) establishes the Commissioner of Education's authority to hear cases:

> This chapter sets forth the rules of procedure established by the Department of Education for the filing of petitions with the Commissioner of Education to hear and decide controversies and disputes *arising under school laws.*
>
> [Id. (emphasis added).]

[2] There is one reference to September 1, 2016 which reads: "parent on September 01, -2016 West Orange Board of Education request the names of employee dismissed for specific respondent information, Mr. D. Zacwocki requested student's name to enter in computer." Pet. 10 (errors in original). It is not at all clear what this means. Moreover, this quoted portion of the petition is found under the following heading: "7. N.J.S.A. 2C:13-9. Human trafficking as a crime of second degree: elements; proof; penalties." Pet. 9.

I FIND that statutes 3 through 8 cited by Petitioner are not "school laws" and thus the Commissioner of Education has no jurisdiction to issue declaratory rulings regarding them or hear cases arising under them. Therefore, I **CONCLUDE** that Petitioner's claims 3 through 8 should be dismissed.

B. Claims subject to dismissal for timeliness:

N.J.A.C. 6A:3-1.3(i) address time limitations on petitions to the Commissioner of Education:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.
>
> [Id.]

N.J.A.C. 6A:3-2.1(b) makes the timeliness standard from petitions to appeal found at N.J.A.C. 6A:3-1.3(i) applicable to petitions for declaratory rulings:

> [T]he rules pertaining to filing, service and answer of petitions as set forth in this chapter shall apply to petitions for declaratory ruling.
>
> [N.J.A.C. 6A:3-2.1(b).]

Of the statutes Petitioner lists that are within the jurisdiction of the Commissioner of Education, the Petition references events taking place between the years of 2008 and 2012. In light of I.W.'s transfer to West Orange in 2012, I **FIND** that any claims Petitioner might have against West Orange that are subject to the jurisdiction of the Commissioner of Education are plainly time-barred by N.J.A.C. 6A:3-1.3(i) and I **CONCLUDE** therefore that they should be dismissed.

Moreover, Newark and West Orange both state that I.W. transferred from Newark to West Orange on March 6, 2012. Newark Memo 4; West Orange Brief 2. The Petitioner's submission also appears to reference March 6, 2012, more specifically as the date I.W. was subjected to "a dishonorable order," as well as "corporal punishment." Pet. 3, 5. Therefore, I **CONCLUDE** that all of Petitioner's claims against Newark are time-barred as well and should be dismissed.

CONCLUSION

The petition warrants dismissal for a multitude of reasons, not the least of which is the fact that it appears that all of the behavior her "claims" address took place in 2008 at the earliest, and in 2012 at the latest. These incidents are well past the 90 day time limitation on such claims.

Of even greater significance is the fact that the Petitioner's submission is incoherent and incomprehensible. Even if the petition did reference actions by Newark or West Orange that were alleged to have occurred within the past 90 days, it remains impossible to decipher what exactly those actions were.

Finally, **I FIND** that the majority of the statutes cited by Petitioner are not school laws, and thus are not within the jurisdiction of the Commissioner of Education. Therefore, I **CONCLUDE** that all of Petitioner's claims should be dismissed.

ORDER

Based upon all of the foregoing, it is hereby **ORDERED** that the petition in this matter be and hereby is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 9, 2017
DATE

LESLIE Z. CELENTANO, ALJ

May 9, 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Received at Agency:

Date Mailed to Parties: MAY 10 2017

dr

171-17

OAL DKT. NO. EDU 6162-17
AGENCY DKT. NO. 77-4/17

DHARMESH TRIVEDI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. In this case, the petitioner is challenging the Morris County Vocational School District's (District) admission policy. The petitioner seeks an Order requiring the District to immediately reconsider all of its admission decisions and apply an objective assessment to all applications.[1] The ALJ denied the petitioner's request for emergent relief.[2]

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The party seeking such relief

[1] It should be noted that the petitioner did not file the petition of appeal on behalf of his minor child, who was not accepted to the District's Mathematics, Science and Engineering program for the 2017-2018 school year. Instead, the petitioner named himself in the petition as a parent and taxpayer in the District and sought immediate reconsideration of all admission decisions for every applicant.

[2]The recommended Order does not state any facts or provide any indication whatsoever as to why the petitioner did not satisfy the requirements for emergent relief. Based upon a review of the audio recording from the hearing at the OAL, it appears the ALJ found that the petitioner did not show that he would personally suffer irreparable harm if the relief was not granted because he was not an applicant. Additionally, the ALJ suggests that the petitioner did not establish a likelihood of success on the merits because he did not provide any evidence that the current admission process was unlawful. Although the ALJ's determinations on these *Crowe* factors can be gleaned from the ALJ's exchange with the parties at the hearing, the ALJ did not issue a verbal Order on the record outlining his reasons for denying petitioner's motion for emergent relief.

must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

Upon a review of the record in this matter, the Commissioner finds that the petitioner has failed to meet the standard required for emergent relief. Most notably, the petitioner has failed to demonstrate a likelihood of success on the merits of the underlying appeal. Specifically, the petitioner has not made a preliminary showing that the District's current admission policy is arbitrary, capricious or unreasonable.

In response to the petition of appeal and request for emergent relief, the District submitted an affidavit of the superintendent wherein he states that the District has developed a multiple-measure admissions rubric that is designed to be as fair and equitable as possible to all applicants. Among other factors, the admissions rubric involves the use of an applicant's final 7th grade averages for English, Mathematics, Science and Social Studies, without distinction between honors, traditional or special education courses and without assigning a factor for weighing different school districts. In his petition, the petitioner challenges the District's practice of interviewing the applicants and he maintains that the criteria for admission that is used by the District is unfair to students who take honors courses. The petitioner, however, has failed to present the requisite evidence necessary to show on a motion for emergent relief that the District's multi-discipline approach to the application process is arbitrary, capricious or unreasonable, or is in violation of any school law. *See, Ann Kopera v. Board of Education of West Orange, Essex County, et al.*, 60 *N.J. Super.* 288, 294-296 (App Div 1960). Therefore, in light of the fact

that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the remaining factors.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed herein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley S. Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/20/17
Date of Mailing: 6/20/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 06162-17
AGENCY DKT. NO. 77-4/17

DHARMESH TRIVEDI,

Petitioner,

v.

BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT, MORRIS COUNTY,

Respondent.

Dharmesh Trivedi, petitioner, pro se

John M. Mills, III, Esq., for respondent (Mills & Mills, attorneys)

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

THIS MATTER having been brought before this tribunal by petitioner, Dharmesh Trivedi, upon application for emergency relief; and having considered the papers both in support of and in opposition to the application; and having heard oral argument; and having concluded that petitioner failed to demonstrate that he will suffer irreparable harm if the relief is not granted, that the legal rights underlying his claims are settled, that petitioner has a likelihood of prevailing on the merits of the underlying claims, and that

petitioner will suffer greater harm than respondent will suffer if the requested relief is not granted; and for good cause having been shown;

It is on this 12th day of May 2017,

ORDERED that petitioner's application for emergency relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

BARRY E. MOSCOWITZ, ALJ

/bem

OAL DKT. NO. EDU 6162-17
AGENCY DKT. NO. 77-4/17

DHARMESH TRIVEDI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. In this case, the petitioner is challenging the Morris County Vocational School District's (District) admission policy. The petitioner seeks an Order requiring the District to immediately reconsider all of its admission decisions and apply an objective assessment to all applications.[1] The ALJ denied the petitioner's request for emergent relief.[2]

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The party seeking such relief

[1] It should be noted that the petitioner did not file the petition of appeal on behalf of his minor child, who was not accepted to the District's Mathematics, Science and Engineering program for the 2017-2018 school year. Instead, the petitioner named himself in the petition as a parent and taxpayer in the District and sought immediate reconsideration of all admission decisions for every applicant.

[2]The recommended Order does not state any facts or provide any indication whatsoever as to why the petitioner did not satisfy the requirements for emergent relief. Based upon a review of the audio recording from the hearing at the OAL, it appears the ALJ found that the petitioner did not show that he would personally suffer irreparable harm if the relief was not granted because he was not an applicant. Additionally, the ALJ suggests that the petitioner did not establish a likelihood of success on the merits because he did not provide any evidence that the current admission process was unlawful. Although the ALJ's determinations on these *Crowe* factors can be gleaned from the ALJ's exchange with the parties at the hearing, the ALJ did not issue a verbal Order on the record outlining his reasons for denying petitioner's motion for emergent relief.

must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

Upon a review of the record in this matter, the Commissioner finds that the petitioner has failed to meet the standard required for emergent relief. Most notably, the petitioner has failed to demonstrate a likelihood of success on the merits of the underlying appeal. Specifically, the petitioner has not made a preliminary showing that the District's current admission policy is arbitrary, capricious or unreasonable.

In response to the petition of appeal and request for emergent relief, the District submitted an affidavit of the superintendent wherein he states that the District has developed a multiple-measure admissions rubric that is designed to be as fair and equitable as possible to all applicants. Among other factors, the admissions rubric involves the use of an applicant's final 7th grade averages for English, Mathematics, Science and Social Studies, without distinction between honors, traditional or special education courses and without assigning a factor for weighing different school districts. In his petition, the petitioner challenges the District's practice of interviewing the applicants and he maintains that the criteria for admission that is used by the District is unfair to students who take honors courses. The petitioner, however, has failed to present the requisite evidence necessary to show on a motion for emergent relief that the District's multi-discipline approach to the application process is arbitrary, capricious or unreasonable, or is in violation of any school law. *See, Ann Kopera v. Board of Education of West Orange, Essex County, et al.*, 60 *N.J. Super.* 288, 294-296 (App Div 1960). Therefore, in light of the fact

that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the remaining factors.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed herein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: _____

Date of Mailing: _____

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
C. ANN VOLK, EXECUTIVE COUNTY SUPERINTENDENT, NEW JERSEY STATE DEPARTMENT OF EDUCATION, AND E.H., ON BEHALF OF MINOR CHILD, K.M.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

In December 2014, the State-Operated School District of Camden (Camden) filed a petition contending that E.H. and minor child K.M. are residents of the City of Camden – despite previously being homeless after losing their home in Voorhees Township – and now live in a Camden home that is "fixed, regular and adequate," thus precluding a determination that they are homeless. Petitioner urged that K.M. is entitled to a free public education in Camden schools, not in Voorhees Township schools. The Executive County Superintendent (ECS) had rejected petitioner's position, concluding that E.H. and K.M. were homeless and, as such, K.M. is entitled to attend school in Voorhees Township at Camden's expense. After E.H. failed to file an answer to the petition, petitioner filed a motion for summary decision. An Initial Decision was issued in February 2016, wherein the ALJ found, *inter alia*, that E.H. and K.M. were no longer homeless as they had lived at a home in Camden that was fixed, regular and adequate for more than four years. Accordingly, summary decision was granted to petitioner. Subsequently, the Commissioner issued a final decision in the matter, which found, *inter alia*, that the ALJ failed to address all of the issues raised in the petition and the record was devoid of evidence regarding K.M.'s present living conditions; accordingly, the Commissioner remanded the matter to the OAL for further proceedings.

On remand, following a hearing which included testimony from E.H. and others, the ALJ found, *inter alia*, that: the Camden home that E.H. shares with family members meets the definition of "fixed, regular and adequate", and therefore K.M. is not homeless; Camden is the district in which K.M. is entitled to receive a free and appropriate education; there is no warrant in the record or circumstances presented to the Commissioner to issue injunctions against a county office; Camden has not presented a basis for any remedy of reimbursement against NJDOE; and the homelessness determination made by the ECS did not fully consider and analyze the entire scenario present in the instant case. The ALJ concluded that the ECS's determination regarding K.M.'s homelessness must be reversed, and Camden's applications for injunctive relief and financial reimbursement must be denied.

Upon comprehensive review, the Commissioner adopted the Initial Decision as the final decision, with modification. Specifically, the Commissioner found, *inter alia*, that: the appropriate standard of review for ECS decisions regarding homelessness is *de novo*; the ALJ properly found the K.M. is no longer homeless, however the ECS's 2014 decision that K.M. was homeless and deemed domiciled in Camden was also proper; the District has no basis for seeking reimbursement from the NJDOE for K.M.'s tuition and transportation costs; petitioner is not entitled to any of the injunctive or declaratory reliefs sought herein; the ECS's process for determining disputes regarding homelessness and financial responsibility for a homeless child's education comports with the requirements of *N.J.A.C.* 6A:17 *et seq.* and the McKinney-Vento Homeless Education Assistance Act, 42 *U.S.C.A.* § 11431 *et seq*; and the ECS's decision in this matter has neither created a new definition of domicile nor a "voucher" system for Camden.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 6/20/17

OAL DKT. NO. EDU 4521-16
(EDU 6081-15 ON REMAND)
AGENCY DKT. NO. 371-12/14

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
C. ANN VOLK, EXECUTIVE COUNTY SUPERINTENDENT, NEW JERSEY STATE DEPARTMENT OF EDUCATION, AND E.H., ON BEHALF OF MINOR CHILD, K.M.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law ("OAL") have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the parties, and the replies thereto. In this matter, petitioner[1] challenges the homeless determination of the Executive County Superintendent ("ECS") for Camden County, C. Ann Volk, in reference to minor child, K.M. Petitioner seeks reversal of Volk's determination from September 2014 and October 2014 that K.M. was homeless, and that the District was financially responsible for her education.[2] Furthermore, petitioner requests various declaratory and injunctive reliefs from the Commissioner. Finally, petitioner seeks reimbursement for the cost of K.M.'s education, as well as attorney's fees, from the New Jersey Department of Education ("NJDOE"). Respondent[3] contends that her determination was proper and that K.M. remains homeless; thereby, Camden is required to

[1] Petitioner shall also be referred to as "Camden" and "District."

[2] K.M. was enrolled in Eastern Regional High School in Voorhees, New Jersey, where she remained enrolled for the time period relevant to this case.

[3] Respondent shall refer to "Volk" for the purposes of this decision.

continue providing tuition and transportation costs for K.M. Respondent further contends that petitioner's requests for declaratory and injunctive relief are improper and must be denied. Additionally, respondent submits that petitioner is not entitled to reimbursement or attorney's fee from the NJDOE.

Following transmittal of this matter to the OAL, the parties filed a motion and cross-motion for summary decision before the Administrative Law Judge ("ALJ"). The ALJ granted summary decision to petitioner on Count One of the petition – finding that K.M. is not homeless because she presently resides in a fixed, adequate, and regular dwelling – but did not address Counts Two through Five of the petition or Camden's request for reimbursement. In a decision dated March 18, 2016, the Commissioner remanded the matter to the OAL, finding that the ALJ failed to address all of the issues raised within the petition and erred in granting summary decision. The Commissioner explained that, given the lack of information contained in the record, a plenary hearing centered upon a comprehensive, fact-specific examination of the family's circumstances was necessary to determine K.M.'s status.

On remand, the ALJ concluded that K.M. lives in a "fixed, regular and adequate residence" and therefore, she is not homeless.[4] The ALJ further concluded that there is no basis for the Commissioner to issue any injunctions in this matter, and that Camden is not entitled to reimbursement from the NJDOE.

Petitioner's exceptions substantially recast and reiterate the arguments made below. Specifically, petitioner argues: 1) Camden is entitled to reimbursement of tuition and transportation costs from the 2012-2013 through the 2016-2017 schools years since K.M. is not homeless, and the NJDOE is responsible for such reimbursement; 2) Camden is entitled to injunctive relief permanently enjoining and requiring Volk to apply the law in making homelessness determinations; 3) Volk's decision has created a new definition for domicile, which permits a general education student from

[4] The ALJ also reversed Volk's decision.

the District to attend an out-of-district school at Camden's expense; 4) Volk has created a "voucher" system by directing Camden to pay for the cost of K.M.'s education in another school district; and 5) as such, the NJDOE must declare that it will not penalize Camden for incurring the cost of tuition and transportation to send its general education students to another school district.

In her reply, respondent expresses her disagreements with petitioner's specific exceptions, and also argues that the ALJ's decision leaves open the question of when K.M.'s homeless status changed. Respondent submits that petitioner cannot assume that K.M. was no longer homeless beginning in the 2012-2013 school year merely because that is the point at which Camden became financially responsible for K.M.'s education. Respondent further argues that the ALJ did not find Volk's decision incorrect; rather, the ALJ reached a different determination based on *de novo* review of the record and the additional information gathered subsequent to Volk's decision. Respondent also uses this opportunity to reassert her position that a "more-appropriate" standard of review is "arbitrary, capricious, or unreasonable, or whether subsequently-received information requires the decision be reversed."

Respondent's exceptions similarly advance her arguments below. Specifically, respondent argues that the ALJ erred in determining that K.M. is no longer homeless. Respondent submits that K.M. lacks a fixed, regular and adequate residence as demonstrated by the family's particular living situation and E.H.'s financial difficulties. Additionally, Respondent argues that the inability of a homeless person to realistically obtain their own residence in the foreseeable future due to economic hardship, together with their long-term residence in a family member's home, does not change their homeless status. Respondent also seeks modification of the ALJ's decision to clarify that there is no temporal limit to homelessness, and a homeless student has the right to attend school in their district of origin even after they are deemed domiciled in another district, so long as they remain homeless. Lastly, respondent further reiterates arguments in support of the ALJ's

determination that petitioner is not entitled to the injunctive relief or declaratory relief sought in its petition.

Petitioner argues in its reply that the District is entitled to injunctive relief because "if the Commissioner felt that [s]he was not authorized to issue injunctive relief, then [s]he would not have remanded that portion of the case to the [ALJ]." Petitioner also argues that the Initial Decision creates a new definition of domicile because Camden is "required to pay for tuition and transportation to an out of district school for a general education student who lives in and is domiciled in the City of Camden." Lastly, petitioner reasserts that the ALJ's finding that K.M. is not homeless is proper because K.M. and her family live in a home that has "running water, a kitchen, a bathroom, living areas and bedrooms." Petitioner further notes in its reply,

> Respondents would have the Commissioner issue a decision that permits a family to declare itself "homeless" for the entire length of a child's education, spanning 12 years, simply because the family is living in a home that is either not the family's own home or is not where they would prefer to live . . . Respondents are redefining homelessness by creating a situation where [K.M.]'s family, who lives in a stable house for years and years, with the usual amenities found in a regular home, and that specifically fits the definition of "fixed, adequate and regular" is still considered homeless, simply because some people in the home share a bedroom and because this is not where [K.M.]'s mother would prefer to live.

Upon a comprehensive review of the record, the Commissioner is in accord with the ALJ's decision, as modified herein. Specifically, the Commissioner finds that the appropriate standard of review for ECS decisions regarding homelessness is *de novo* (without deference to the decision below). Additionally, the ALJ properly found that K.M. is no longer homeless; however, Volk's decision in 2014 that K.M. was homeless and deemed domiciled in Camden – and, therefore, the District was responsible for the cost of K.M.'s education – was also proper. Furthermore, the District has no basis for seeking reimbursement from the NJDOE for K.M.'s tuition and transportation costs. The Commissioner also finds that petitioner is not entitled to any of the

injunctive and declaratory reliefs sought in this matter.[5] Indubitably, Volk's process for determining disputes regarding homelessness and the financial responsibility for a homeless child's education comports with the requirements of *N.J.A.C.* 6A:17 *et seq.* and the McKinney-Vento Homeless Education Assistance Act, 42 *U.S.C.A.* § 11431 *et seq.* (McKinney-Vento Act), and the decision has neither created a new definition for domicile nor a "voucher" system for Camden.[6]

Under *N.J.A.C.* 6A:17-2.7, "[i]f an appeal of a determination of district of residence also includes an appeal of the determination of homelessness and/or school district of enrollment, the appeal shall be submitted to the Commissioner pursuant to *N.J.A.C.* 6A:3, Controversies and Disputes." The regulations do not specify the standard of review for appeals from ECS decisions in matters of homelessness; however, both parties seek review of this case under the "arbitrary, capricious or unreasonable" standard. This limited scope of review is the standard used by appellate courts in considering final agency decisions. *See Campbell v. Dept. of Civil Service*, 39 *N.J.* 556 (1963). The decisions below are not disturbed "in the absence of a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence." *Id.* at 562. Similarly, in matters where the Commissioner serves as the appellate entity, the "arbitrary, capricious, or unreasonable" standard is applied to determine whether a previous ruling was improper on the basis that it was made on unreasonable grounds or without appropriate consideration of circumstances. In

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[5] Petitioner's request for injunctive and declaratory relief do not merit extensive discussion, as petitioner has no basis in law for same. The Commissioner notes the following, however: 1) Even if petitioner had a right to seek such relief in this matter, Camden cannot establish irreparable harm. More importantly, the Commissioner's decision to remand the matter to the OAL had nothing to with the merits of Camden's claims; rather, it was a procedural action – the matter had already been transmitted to the OAL for a hearing so the ALJ's failure to complete fact-finding and consider *all* the issues raised in the case rendered the matter incomplete, and 2) Petitioner's request for a declaration from the Commissioner that Camden will not be penalized for paying for the educational costs of "general education students" to attend school in another school district is, simply put, far-fetched. Petitioner has conflated the rights of a "homeless" child – which will be discussed below – with that of "non-homeless" children domiciled/residing in the District.

[6] Petitioner has again misconstrued the law as it applies to homelessness. The Commissioner does not deem it necessary to address Camden's arguments relating to "a new definition of domicile" and "establish[ment] of a voucher system," in detail, as the law is sufficiently clear, and petitioner's arguments are devoid of any legal support. Instead, the Commissioner directs the petitioner's attention to *N.J.S.A.* 18A:38-1, *N.J.S.A.* 18A:7B-12, *N.J.A.C.* 6A:17-2.3 and *N.J.A.C.* 6A:17-2.5, and corresponding decisional law – which will be discussed below – as they clearly set forth the education of homeless children and the school districts' responsibilities.

making such determinations, deference is given to the decision below. *See T.R v. Bd. of Educ. of the Bridgewater-Raritan Reg'l Sch. Dist.*, Commissioner Decision No. 144-15 (May 6, 2015) (citing *Thomas v. Bd. of Ed. of Morris Twp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966)) ("[i]t is well established that when a local school board acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable").

Moreover, when the Department has decided to limit the Commissioner's scope of review of specific subordinate divisions or offices, it has expressed that limitation by regulation. *E.g.*, *N.J.A.C.* 6A:4-4.1 (decisions of the State Board of Examiners), *N.J.A.C.* 6A:3-7.5 (decisions of the New Jersey State Interscholastic Athletic Association); *see also In the Matter of the Certificates of Gail Wunsch*, Commissioner Appeal No. 421-16A (December 14, 2016) ("the Commissioner may not substitute her judgment for that of the Board [of Examiners] so long as . . . the Board's decision is supported by sufficient credible evidence in the record . . . the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious or unreasonable"), *Bd. of Educ. of North Bergen Twp. v. NJSIAA*, Commissioner Decision No. 476-12 (December 14, 2012) ("[t]he Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious or unreasonable manner"). As noted above, no such regulation similarly restricts the scope of review from an ECS determination of homelessness. Significantly, "the agency head is not legally required to give any deference to the staff of the agency, but as the head of an administrative agency is instead required to decide the matter as the agency head deems legally appropriate." *Bd. of Trustees of the Passaic Cnty. Elks Cerebral Palsy Center v. NJ Dept. of Educ.*, OAL Docket. No. EDU 16074-12, Commissioner Decision No. 334-14 (Aug. 14, 2014) (citing *Liberty House Nursing Home v. Dep't of Health and Senior Servs.*, OAL Dkt. No. HLT 7275-09, *adopted*, Commissioner (Sept. 23, 2010), *aff'd*, A-1069-10 (App. Div. Mar. 5, 2012) (slip op.), *cert. denied*, 210 N.J. 478 (2012)).

Accordingly, "arbitrary, capricious or unreasonable" is not the appropriate standard of review as this matter is not an appeal from a final agency decision, and petitioner has requested the Commissioner's review of a subordinate office within the Department where the Commissioner's scope of review is not limited.

It bears noting that appeals from a determination of homelessness are not solely a request to review and reverse an ECS's decision: the Commissioner must also decide – based on the facts available to her at the conclusion of the hearing at the OAL – whether the child is homeless. Such adjudications are fact-sensitive, and individual circumstances must be thoroughly considered. *See M. O'K. v. Bd. of Educ. of the Boro of Cresskill, et al*, Commissioner Decision No. 325-14 (August 12, 2014), *aff'd*, A-0828-14T4 (App. Div. Sept. 8, 2016) (slip op.) (Finding "[t]he reasons for a child's homelessness, the child's living conditions, and the resources and intentions of the parents or custodians" are relevant considerations in the evaluation of homelessness). During the time between an ECS's decision (which is ordinarily made within a short period of time and without the convenience of fact-finding or an extensive record) and the Commissioner's review of the appeal, the child's living conditions, and/or the resources and intentions of the family may change. Consequently, the Commissioner's review of the appeal is based on "the facts as they may exist at the conclusion of the hearing held in the OAL and the proper application [of] those facts [to] the existing law." Initial Decision at 13. As such, the Commissioner's independent determination of a student's homeless status is *de novo*.

In New Jersey, it is well-settled that homelessness determinations are dictated by Federal and State law. Under the McKinney-Vento Act, homeless children are defined as "individuals who lack a fixed, regular and adequate nighttime residence," which includes "children sharing housing with other persons due to loss of their own housing, economic hardship, or a similar reason." 42 *U.S.C.A.* § 11434a. Similarly, under state law, homeless children are defined as "child[ren] or youth who lack[] a fixed, regular and adequate residence pursuant to *N.J.S.A.* 18A:7B-

12 and *N.J.A.C.* 6A:17-2.2," which includes children living in the "residence of relatives or friends where the homeless child resides **out of necessity** because his or her family lacks a regular or permanent residence of its own." *N.J.A.C.* 6A:17-1.2 and 2.2 (emphasis added). As discussed above, determination of homelessness is not temporal, *i.e.*, there is no maximum duration of homelessness, and therefore, the determination must be made on the specific facts and circumstances of the case. The facts in this case support a finding that K.M. is *not* homeless pursuant to *N.J.A.C.* 6A:17 *et seq.*, and the McKinney-Vento Act because she does not lack a "fixed, regular, and adequate nighttime residence" and her family's continued residence at her grandmother's home can no longer be considered "resid[ing] out of necessity" due to "economic hardship." *See N.J.A.C.* 6A:17-1.2 and 2.2; 42 *U.S.C.A.* § 11433 and 11434a. *See also M. O'K*, *supra*; *Bd. of Educ. of the Boro. Of Englewood Cliffs v. E.S. and W.S., o/b/o A.S. and E.S., et al*, Commissioner Decision No. 196-10 (June 30, 2010); *L.C. o/b/o B.C. v. Bd.of Educ. of the Twp. of Branchburg*, 96 *N.J.A.R.* 2d (EDU 1003).

A review of the record indicates that K.M.'s family moved from Voorhees to Camden in 2011 due to loss of residence and economic hardship. The record also reveals that E.H. has been gainfully employed since September 2012 and receives a salary of $65,000, and her two adult children are employed in part-time positions.[7] E.H. testified that she is unable to receive approval for a mortgage or a rental apartment due to debt and poor credit. E.H. also testified that there are default judgments entered against her for which she makes monthly payments.[8] Finally, E.H. testified that she does not pay rent to live in the Camden residence, but she contributes towards the household expenses by paying for the bills when her mother asks her to pay for a particular bill, which varies

[7] It is observed from the transcript of the hearing that E.H. was hesitant to disclose the exact amount of her annual income and questioned the relevance of such information.

[8] There is no record of how much E.H. is paying on a monthly basis, and in response to the ALJ's request for an approximate amount, E.H. claimed that it is a substantial portion of her income without providing a specific amount.

from month to month.[9] Respondent has argued that the family's economic hardship has prevented E.H. from being able to find a residence of her own, and the shared residence cannot be considered "fixed, regular, and adequate" because of the sleeping arrangements,[10] and the family's previous short-term relocations to hotels due to conflict between E.H. and her mother on several occasions.[11]

In *M. O'K.*, *supra*, the Commissioner found, and the Appellate Division affirmed, that the O'K family – two parents and three children – become homeless due to the foreclosure of their home in Cresskill, and although they had been deemed domiciled in Little Ferry as a result of their residence in the district for over one year, the O'K family continued to remain homeless due to their shared living conditions and the parents' economic hardship.[12] The O'K family initially moved into S. O'K's parents' house in Little Ferry, but after a year of living in that home, they were temporarily displaced from the residence due to flooding caused by Hurricane Sandy. At that point, they were forced to relocate to a relative's home in New York. After a few months, the O'K family returned to Little Ferry and resumed living in S. O'K's parents' house. At the Little Ferry residence, the O'K family occupied the bottom floor of the house, which consisted of one small bedroom and a common area. There was no bathroom or kitchen on that floor. The parents and two of the children – a teenage daughter and the ten year old son – shared the bedroom, while the older son slept in the

[9] E.H. also testified that she pays for food but it is not clear from the transcript whether she pays for all of the food for the household or just her family, or contributes towards the total cost of food for the household.

[10] E.H. testified that she sleeps in the living room, the two daughters share one bedroom, while her son has his own room, and her mother has her own room. E.H.'s brother sleeps in the unfinished basement. E.H. also testified that her brother, who lived in the home prior to their move in 2011, voluntarily relocated to the basement.

[11] It is not clear from E.H.'s testimony the exact number of times the family left the Camden residence and stayed at a hotel, but E.H. testified that it was between five and ten times over the last six years. E.H. also testified that in some years, the brief relocation occurred more frequently than in others. It is also not clear whether such incidents have occurred in recent years, but the ALJ did not find this to detract from his conclusion because of the number of years that the family has occupied the Camden residence and the fact that they have moved back to the Camden residence after every hotel stay. The Commissioner agrees – to the extent that the family returned to the Camden residence and has continued their occupancy of the home – that such relocations do not impact the family's present status as there is no indication that the family is in imminent or foreseeable risk of losing their place in the home.

[12] Neither parent was employed at the time of the litigation, and the family's sole income consisted of Social Security Disability benefits.

common area. The O'K family lived in those conditions *out of necessity*, especially considering the family's financial challenges. Prior to their displacement, the O'K family had always lived in Cresskill and they expressed a desire to return to Cresskill and continue to raise their children in that community. During the pendency of the litigation, the O'K family represented that they were actively searching for a house in Cresskill. In fact, at the time of the Appellate Division proceedings, the O'K family still had not acquired housing of their own and moved into a two-bedroom apartment in Little Ferry being rented by the adult, emancipated son, while continuing to seek permanent housing.

In the instant matter, the living conditions of K.M. and her family, as well as E.H.'s financial situation, are distinguishable from those of the O'K family. First, K.M. and her family enjoy occupancy and use of the entire Camden residence, as they are not relegated to a portion of the home that would otherwise be considered inadequate. Moreover, although the sleeping arrangements may be less than ideal, it is not uncommon for siblings to share the same room.[13] Second, E.H. is presently employed; notably, she has been employed for over four and a half years. Additionally, her two adult children are also employed in part-time positions. While E.H. has testified that she has outstanding debt and judgments against her – which she claims has resulted in economic hardship – she has not been forthcoming about the amounts of such judgments and debts, and the extent to which they have prevented her from finding alternate housing for her family. Without such proofs, the Commissioner is not persuaded that E.H., who is gainfully employed and earns an annual salary of $65,000, is unable to find an apartment that is suitable for her family in Voorhees, while making payments for the alleged judgments and debt.[14] Third, E.H.'s testimony reveals that she stopped

[13] The Voorhees apartment also had three bedrooms, and at least five occupants at one point. As such, it is probable that the two sisters were also sharing a room in the Voorhees apartment.

[14] E.H. has not indicated where she has been looking for an apartment; however, based on her desire to have K.M. remain enrolled in Eastern Regional, it would be reasonable to expect that E.H. has been looking for an apartment in Voorhees for the last four and a half years. There is also nothing barring E.H. from looking for adequate housing in

looking for apartments in June 2016.[15] While the Commissioner is certainly sympathetic to E.H.'s predicament, the Commissioner is not persuaded – based on the facts in this case – that K.M. and her family continue to remain in the Camden residence out of necessity and economic hardship. Furthermore, since the Camden residence qualifies as a "fixed, regular, and adequate" nighttime dwelling-place, K.M. is deemed not homeless.[16]

Homelessness, particularly in cases like the present matter, is best viewed in a continuum. For instance, a family may move into a relative's home out of necessity and hardship, but over time, that home may become a regular, *albeit* temporary, dwelling-place where the members of the household seamlessly co-habit and share the expenses and amenities of the home. *See L.C., supra* (finding "while [petitioner's] living arrangements with her brother may not be permanent in the sense that she may wish to eventually return to Branchburg, the evidence shows them to have become sufficiently fixed, regular and adequate so as to preclude a finding of homelessness"). In *L.C., supra*, the C. family was evicted from their home in Branchburg, causing them to move into L.C.'s brother's apartment. The apartment was small and did not have room for the C. family's belongings, which were placed in storage. At the time of the hearing, L.C. testified that the C. family had continued to remain in the brother's apartment and that L.C. was paying half of the rent for the apartment. L.C. also indicated her desire to move back to Branchburg.

Here, E.H. similarly contributes to household expenses at the Camden residence, but – unlike in *L.C., supra* – her circumstances appear less temporary, as there is no indication that any

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Camden or in its vicinity, as the S. Family did in Teaneck when they could not find a home in Englewood Cliffs. *See E.S., supra.*

[15] It is also unclear whether E.H. has attempted to find housing where she is not required to submit a rental application or undergo a credit check: E.H. testified that she would not be approved for an apartment due to her credit as she has been rejected in the past.

[16] It is noted that E.H. sleeps in the living room and her brother – whose living condition should not be factored in deciding K.M.'s status as a homeless child – sleeps in the basement. Unless E.H. opts to share one of the three bedrooms – which is certainly not ideal – her continued living situation is a result of her decision to remain in the Camden residence despite having the potential means to move into an adequate home of her own.

of the family's possessions had to be placed in storage until such time as the family moves to a different home. E.H. may consider the Camden residence temporary, and her intention may be to eventually move back to Voorhees (or to a different home in Camden) in the future. However, while intention is a factor to be considered in determining homelessness, the totality of the facts and circumstances in this case renders a finding that K.M. is no longer homeless. Significantly, E.H. stopped looking for another home in June 2016; her financial situation is not typical of the economic hardships usually related to homelessness; and the Camden residence is fixed, regular, and adequate. *See E.S., supra*, where the ALJ found, and the Commissioner concurred, that the S. family – who had been evicted from their rental home of two years in Englewood Cliffs, which precipitated their move to Teaneck in November 2008 – was not homeless despite their representation that the small home in Teaneck was temporary, and that they were forced to remain there because of issues with their credit.[17] The ALJ noted that the parents were steadily employed for many years, and the S. family did not suffer from the typical financial hardships that are often related to homelessness.

It is important to distinguish between a family's decision to remain in a relative's home or temporarily settle elsewhere *out of necessity – i.e.*, they do not have the resources or the ability to find alternate housing – and a situation in which a family remains in the relative's home *out of choice*, *e.g.*, they have not found the home that they desire, even when other suitable housing is available to the family, or one where a family – like *E.S., supra* – claims homelessness just because they do not live in the community of their preference. As such, when a homeless family moves into a relative's home that is adequate – and the adults in the family are sufficiently employed with the financial means to find alternate housing, and the family continues to live in the home for an extended period of time without any imminent or foreseeable risk of losing their place in that home, and they share the space as a cohesive unit – a finding of homelessness would be improper.

[17] The ALJ also found that the home was in need of repairs but habitable.

As conceivable as it may be that a child could be homeless for the duration of their education (in limited circumstances), such determination must not be based on broad application of the governing statutes and regulations, as respondent has proposed. The purpose of the law is to ensure that a homeless child is not denied a free public education; it is not meant to enable a child to receive an education in a school district of preference by circumventing residency requirements. For that reason, the notion that homelessness has no maximum duration must be applied with caution, taking into consideration the totality of the circumstances. Consequently, when a child's circumstances change such that the child is no longer homeless, the finder of fact must also determine the point at which the child's homelessness ceased. A child's homeless status may change well before the case concludes, and it would be inequitable to hold a school district responsible for a child's education until a final decision is rendered if that district is not in fact responsible for the cost of the child's education. In this case, the Commissioner finds that K.M. stopped being homeless in June 2016, because that is when E.H. stopped looking for another place to live, despite having the resources and claiming that her intent was to move. The Commissioner finds that implicit in E.H.'s actions is the intent to remain in her mother's home for the foreseeable future – a home that is fixed, regular and adequate, and where she no longer resides out of necessity. Therefore, K.M. was homeless when she moved to Camden in 2011; she was properly found homeless in 2014 by ECS Volk; she is presently not homeless (as of June 2016); and therefore, K.M. was not entitled to a free public education in Voorhees for the 2016-2017 school year.

With regard to Camden's demand for reimbursement from the NJDOE for the cost of K.M.'s education,[18] and its request for attorney's fees, the Commissioner finds that there is no legal basis for same. Notwithstanding petitioner's failure to cite to any legal authority and convincingly

[18] In the limited instances where the district of residence cannot be determined or in situations where the child has resided in a domestic violence center or transitional living facility located outside of the district residence for more than one year, the State will assume financial responsibility for the tuition of the child. See *N.J.S.A.* 18A:7B-12(d). Such circumstances are not present in this matter.

argue why the District is entitled to such relief, it appears that Camden also seeks to change how the district of residence and the responsibility for the cost of a homeless child's education is determined. As such, the Commissioner will clarify the ALJ's finding in this matter. It is undisputed that a homeless child's district of residence – when the parent or guardian temporarily moves out of one district to another – is the district where the parent or guardian last resided prior to becoming homeless. *See N.J.S.A.* 18A:7B-12. In this case, K.M.'s district of residence was Voorhees when she moved from Voorhees to Camden in 2011. The district of residence is responsible for the educational costs of the child, which includes determining where the child shall be enrolled, paying the cost of tuition if the child is enrolled in another school district, and providing transportation as necessary. *See N.J.A.C.* 6A:17-2.3. Therefore, during the 2011-2012 school year, Voorhees was responsible for K.M.'s education and the associated costs. *N.J.A.C.* 6A:17-2.3(c) further provides, "[f]inancial responsibility will remain with the homeless child's school district of residence until the family is deemed domiciled in another jurisdiction, pursuant to *N.J.S.A.* 18A:38-1.d." In other words, if a homeless child moves to another school district and is deemed domiciled in that district, then for the purposes of the homeless child's education, the new school district is the child's district of residence, and the last school district is no longer financially responsible for the child's education.

Entitlement to a free, public education can be established once "[a]ny person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place within the district for one year or longer shall be deemed domiciled within the district . . ." *N.J.S.A.* 18A:38-1(d). It follows that the child is then entitled to a free, public education in that district. It is important to reiterate that when a child is "deemed domiciled in another jurisdiction" it does not mean that the child is no longer homeless, because the conditions of homelessness may still persist. Additionally, throughout the duration of a child's homelessness, they have a conditional right to continue education in the last

school district.[19] In this case, when K.M. and her family lived in Camden for a year, she was deemed domiciled in the District, and the District then became financially responsible for her education. Since K.M. was deemed homeless at the time, Camden had the option of continuing her enrollment in Voorhees, which the District decided was in K.M.'s best interest during the school years between 2012 and 2016. To now seek reimbursement for the 2012-2013, 2013-2014, 2014-2015, and 2015-2016 schools years from the NJDOE or any other similar entity for Camden's calculated decision to enroll K.M. in Voorhees, is improper.

With regard to the 2016-2017 school year, however, K.M. was not entitled to attend school in Voorhees as she was no longer homeless. Neither Voorhees nor the NJDOE is legally responsible for K.M.'s education as her present domicile is Camden. As K.M. was not homeless during the 2016-2017 school year, Camden may seek reimbursement from E.H. for: 1) the cost of K.M.'s transportation to Voorhees (deducting any cost of transportation Camden may have incurred had K.M. attended school in the District); and 2) the difference between the cost of K.M.'s tuition at Voorhees for the 2016-2017 school year and Camden's per pupil cost for the 2016-2017 school year (should Camden's cost of tuition be higher than Voorhees, the difference shall be credited towards the cost of transportation from Camden to Voorhees).

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is hereby adopted – as modified herein – as the final decision in this matter. Volk's determination in September 2014 and October 2014 that K.M. was homeless was proper given the totality of the family's circumstances at that time. K.M.'s status changed in June 2016 when E.H. – who has been satisfactorily employed for four and a half years – stopped looking for another place to live and

[19] The right to an education in the last school district is defined as "conditional" by the Commissioner because the determination of which school district the child will attend is made by the present school district based on the "best interest of the child," which includes consideration of factors such as the parents' wishes, continuity of the educational program, eligibility for special instructional programs, and the "distance, travel time, and safety factors in coordinating transportation services from the residence to the school." *N.J.A.C.* 6A:17-2.5. Therefore, unlike respondent's assertions, an absolute right to enroll in the last school district does not exist as such attendance may not be in the best interest of the child.

decided to continue her residence in a fixed, regular and adequate home in Camden despite having the resources and ability to move. Petitioner's request for reimbursement for tuition from the 2012-2013 school year through to the 2016-2017 school year, attorney's fees, injunctive relief and declaratory relief are denied on the basis that Camden has no legal right to same. Petitioner may, however, seek reimbursement of K.M.'s educational costs for the 2016-2017 school year from E.H., as outlined above.

IT IS SO ORDERED.[20]

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/20/17

Date of Mailing: 6/20/17

[20] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1) and applicable Appellate Division rules.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4521-16
AGENCY DKT. NO. 371-12/14
(ON REMAND OAL DKT. NO. EDU 6081-15)

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,
Petitioner,
v.
C. ANN VOLK, EXECUTIVE COUNTY SUPERINTENDENT, NEW JERSEY STATE DEPARTMENT OF EDUCATION, AND E.H., ON BEHALF OF MINOR CHILD, K.M.,
Respondents.

Derlys Gutierrez, Esq., for petitioner (Adams, Stern, Gutierrez & Lattiboudere, attorneys)

Geoffrey Stark, Deputy Attorney General, for respondents C. Ann Volk and New Jersey State Department of Education (Christopher S. Porrino, Attorney General of New Jersey, attorney)

E.H., respondent, pro se, on behalf of K.M.

Record Closed: February 15, 2017 Decided: March 22, 2017

BEFORE **JEFF S. MASIN,** ALJ t/a:

This initial decision is the result of a remand of a prior decision issued concerning a dispute between the petitioner, State-Operated School District of Camden City (Board or SOSD Camden), and respondents, the State Department of Education, C. Ann Volk, formerly the Executive County Superintendent ("ECS") for Camden County, and E.H., the mother of a student, K.M. The dispute concerned a decision made by Volk regarding the alleged homelessness of K.M., and of her family. Volk had determined that the family was homeless and that as such, K.M. was entitled to attend school in Voorhees Township, New Jersey—the district of origin—at the expense of the SOSD Camden. The Board filed a Petition of Appeal with the Commissioner, which was referred for hearing to the Office of Administrative Law. The Initial Decision, issued on February 5, 2016, found that E.H., who, despite clear warnings concerning the possible consequences, had never responded to the original Petition or to the ongoing proceedings concerning a motion for summary decision filed by the Board, had defaulted. On the merits, the decision granted summary decision to the Board, concluding that E.H. and K.M. were not homeless, and thus Camden was both responsible for providing the student with a free and appropriate education and for determining the location where such education would be provided, with due consultation with the parent as to the latter issue.

On March 18, 2016, the Commissioner of Education issued a Decision, remanding the contested case to the Office of Administrative Law (OAL) for further proceedings. The Commissioner found the Initial Decision had not addressed all of the issues raised by Camden in its Petition of Appeal, specifically Counts Two through Five, as well as petitioner's request for reimbursement from the State.[1] Additionally, the Commissioner found that the record had not provided sufficient evidence to support the determination that K.M. "presently resides in a fixed, adequate, and regular residence and is, therefore, not homeless." Thus, the remand Order sought additional information to assist in assessing this issue. The Commissioner's Decision did not address the issue of whether E.H. had defaulted, or what, if anything, a default on her part meant

[1] The Petition of Appeal does not contain any claim for reimbursement. However, the Commissioner has noted this as an issue to be considered on this remand.

regarding the search for additional evidence. Camden asserts that the default has consequences for the record, but as will be explained, given the Commissioner's mandate, it is likely that he did not view the lack of response by E.H. as consequential, and she did testify in the remand hearing.

It is important to note that at the hearing on remand, SOSD Camden expressly stated that it did not seek to require that K.M., now a high school senior still attending Eastern Regional High School, which serves students from Voorhees Township, actually attend school in Camden, regardless of whether the District prevailed on its claim that she is not homeless. Therefore, the dispute is now focused on the Board's request to correct what it views as an incorrect decision as to the student's homelessness made by the then Executive County Superintendent, and on the financial consequences of the student's actual status, as well as the Board's claims for injunctive relief.

As the previous Initial Decision related, and the current testimonial record confirms, before 2010, E.H. and her family, consisting of her children and until 2009, her then husband, lived in a rental property in Voorhees Township, New Jersey. The parents separated and ultimately divorced, and according to E.H., when she could no longer meet the income requirements for the lease, the family was forced to relocate. They moved into E.H.'s mother's home in Camden in 2011. Since that time, they have not lived in any other rented or purchased location, either in or outside of Camden. K.M. continued to attend school in Voorhees and at Eastern Regional High School.

The Board has for some time contended that E.H. and her family, including K.M., are residents of the City of Camden, and that while in the past the family may have been homeless, they have for some time and are now not homeless. As a result, the student's right to a free education entitles her to attend school in Camden, not in Voorhees Township. The Executive County Superintendent twice rejected this position and concluded that E.H. and K.M. were homeless, and as such, the child was entitled to attend school in Voorhees Township at the expense of Camden, which was responsible for both the educational tuition and the costs of transportation. See letter decision dated September 23, 2014, and second decision letter dated October 15,

2014. In her first written decision, Executive Superintendent Volk made the following determinations:

1. The family was displaced from their home.
2. The family is living in a "doubled up" situation with a relative," and
3. The family is experiencing financial hardship.

Based upon these determinations, and without other written analysis, Superintendent Volk found that the family was homeless and therefore, under N.J.A.C. 6A:17 and the Federal "McKinney-Vento" legislation, 42 U.S.C. 11434, the Camden Board was responsible for tuition and transportation costs. The Superintendent's second decision letter of October 15, 2014, simply iterated the determination of eligibility for Camden to bear these costs. In neither decision did the Executive Superintendent discuss the evidence upon which she relied to make her decision.

N.J.S.A. 18A:38-1 provides

> Public schools shall be free to the following persons under 20 years of age:
>
> > d. Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for the purposes of this section;

During the remand hearing, Sandra Cintron, who performs services as a homeless liaison for the Camden School District, testified that she was familiar with K.M., and her family, having first been advised that they were being displaced from the Eastern Regional School District and wanted the children to stay in school in that district. Ms. Cintron was unsure whether this occurred in 2012 or 2013, but documentation from 2012 indicates that the reason for the displacement was the "nonrenewal of lease." In April 2012, the family requested that the District provide transportation to Eastern Regional. Ms. Cintron would provide information to the Camden District's business office about such requests. The address provided for the family after its displacement was on Bradley Avenue in Camden, where the family was

residing with K.M.'s grandmother.[2] The witness reviewed other documentation previously discussed in the prior initial decision, including intake packets, school residency forms and McKinney-Vento forms. All information gathered would be provided to the District's legal counsel. In August 2014, a letter was sent to E.H., advising that as the family had resided within the City of Camden since April 2012, a period of over twelve months from the date of the letter, "New Jersey law deems your child domiciled in the Camden City school district. Your child is entitled to a free public education within the Camden City school district." In response to this letter, E.H. e-mailed, advising that having received the letter, she appreciated, "[H]aving the option to enroll K. in the Camden City Public School District." However, she added, "it is my opinion that her interest is best served at Eastern Regional High School(school of origin)."

Ms. Cintron testified that she had never been in the home at Bradley Avenue, but had reviewed tax records which showed the number of bedrooms in the home and which showed that M.H., the mother of E.H. and the grandmother of K.M., was the owner of the property. She had also looked at the Zillow website, which showed the square footage of the property and described a single family home. After considering the information available, the District decided that the family was not homeless. According to the information available to her, the family still resided at the time of the hearing at the Bradley Street address. The District has paid bills for educational services provided the family since its displacement, but has not done so during the 2016-17 school year. During the time that the District has been considering the family's situation, there have been several meetings with E.H., attended first by Ms. Cintron's predecessor, Mr. Smith, and at least twice by Miss Cintron herself.

Richard Farr, a licensed private investigator, testified that he performs investigative services for the SCSD Camden concerning residency issues. He described observations of E.H. exiting from the Bradley Avenue address on several occasions and of a teenage female getting on a school bus early in the morning. As there is no real dispute regarding the fact that the family does live at Bradley Avenue address, this testimony was of limited significance. Although Mr. Farr never entered the

[2] The exact address has been purposely not provided in this decision.

home, he described it as a brick row house, with an open front porch, apparently built in the 1930s. He also confirmed that E.H. worked at an insurance firm in Evesham Township, again a matter which is not in dispute as E.H. herself testified to this employment.

E.H. testified that she and her family live on Bradley Avenue in Camden. Currently living in the house are her mother, her three children and her brother. Her mother owns the home. Her brother is sixty years old. The house has two stories and an unfinished basement. The first floor consists of a living room, dining area and kitchen. On the second floor are three bedrooms and a bathroom. E.H.'s two daughters share a bedroom on the second floor. Her son has a bedroom by himself on the second floor, and her mother has her own bedroom on second floor. E.H. sleeps on a sofa bed in the living room on the first floor. Her brother lives in the basement.

When the family resided in Voorhees Township they had a three-bedroom apartment. Although a bit shaky on dates, E.H. recalled that she had become unemployed in 2009. She received severance pay and/or unemployment benefits until 2011. When the lease renewal came due in 2011, her husband had already left the home. Even before his departure from the home he had not provided financial support and this situation has continued after the separation and subsequent divorce, with E.H. receiving neither spousal nor child support. In 2011, E.H. no longer met the income requirements for the Voorhees rental and her lease was not renewed. Having no other options at the time, her family went to Camden to live in her mother's home. E.H. is currently employed as a compliance analyst for a firm in Marlton, New Jersey, earning approximately $65,000 a year. She is supporting her two adult children, who have part-time jobs. A significant portion of her income goes to pay civil judgments that accumulated over the years and other debts.

According to E.H., her family has resided in her mother's home on Bradley Avenue ever since arriving in 2011. The children have always been there with her. However, there have been times when due to the stress of living with her mother, who is ill, and with whom she has not always had the best relationship, it has been requested that the family leave the house. On these several occasions, perhaps five to

ten times, they have relocated to hotels or motels for at least three to four days, at most for seven to ten days, all of these being relatively short stays away from Bradley Avenue. On each occasion, the family has then returned to that home. E.H. spoke of her attempts to find more permanent housing, indeed, noting that she does not consider her present living arrangement as "permanent." She has tried without any success to find apartments to rent or to obtain mortgages, but has been unable to make other living arrangements for her family. She described looking for other living arrangements once or twice a year, having last attempted to do so in June 2016. She described herself as "always looking mentally for another situation." At the same time, she is "not trying to beat the system." It is necessary for her to rebuild her credit. It has been very hard for her to dig out of the significant debt that she accumulated over time, including several civil judgments. While living with her mother she has contributed toward the household, but has not paid any fixed amount over any period of time. The payments she makes depend upon the bills she is asked to cover and she also pays for her family's food. Utilities are in her mother's name. E.H. has no credit cards. She pays a cell phone bill. Her driver's license lists her address as Bradley Avenue, She receives her mail at that location. She acknowledged that her mother could ask her to leave the home at any time. She does not know if her brother contributes anything to the home's expenses.

Arenda Fleming, a planning associate with the Camden County Board of Education, testified that one of her responsibilities is to perform evaluations concerning families that may be homeless. She collects and reviews information and discusses the material collected with the Executive County Superintendent. On September 11, 2014, the County Superintendent received a letter from the General Counsel for the Camden City School District concerning a dispute "regarding the determination of homelessness," concerning the family of E.H. and K.M. In order to review the matter, Ms. Fleming contacted Ms. Cintron, reviewed documents that had been developed over time by the Eastern Regional School District, and she "may have reached out to mom." Among the documents reviewed was an "Affidavit as to Homeless Status," prepared in April 2012 and signed by E.H., which noted that the family had left its Voorhees home due to "nonrenewal of the lease." She also saw a "Student Residency Form," prepared in April 2011 for student E.M., another of the family's children. Additionally, she

reviewed a McKinney-Vento education program form prepared by the Gloucester County Special Services School District in April 2011 for E.M., and an "Affidavit as to Homeless Status," prepared in August 2013 and signed by E.H., which noted that the departure from the Voorhees home was due to "annual lease not renewed, separation from spouse" and reported the Bradley Avenue address as the place where the family was residing. According to Ms. Fleming's certification, provided as part of the documentation regarding the motion for summary decision, she did speak to E.H. Ms. Fleming recalled that E.H. had advised her that they had lived for a number of years at the Bradley Avenue address, but that they had lived in one hotel or motel during that same period of time. In addition to all this, Ms. Fleming spoke to the State monitor for homelessness and reported the information received from this source, along with the other material she gathered with the Executive County Superintendent, Ms. Volk, who was to make the decision regarding the homeless status of the family.

On cross-examination, Ms. Fleming advised that other than gathering information and speaking to the persons noted, no independent investigation was conducted concerning the status of the family. She could not recall the details of her conversation with E.H., did not know how long the family had stayed in a hotel and was not sure whether she had asked E.H. what her intentions were regarding her living arrangements. As for the letter issued on September 23, 2014, by Ms. Volk to the Superintendent of the Camden School District, in which Ms. Volk provided her decision that the family remained homeless, Ms. Fleming described the form of the letter as a "template," in which the necessary information is filled in. In respect to the determination of homelessness, Ms. Fleming mentioned a "guidance document" from the Department of Education, which referred to living with a friend or relative as a factor to be considered. With regard to Ms. Volk's having noted in her decision, as one of the factors upon which the determination was based, that the "family is experiencing financial hardship," Ms. Fleming was unable to recall "offhand" what documents might have been available, if any, from which this conclusion was drawn.

C. Ann Volk, now serving as the County School Business Administrator for the Camden County Superintendent's Office, services as the Interim Executive County Superintendent from June 2013 until April 2014, and again from June 2014 to August

2015. Ms. Volk testified that prior to making her decision regarding the family's status, she spoke with Ms. Fleming on more than one occasion. She described the information regarding the family's financial hardship as "limited." This was the only decision regarding a family's homelessness that she had to make during her time as the Interim ECS. She considered that the family was living in a "doubled-up" situation.

Ms. Volk commented that there is no process for fact-finding hearings at the County level in regard to these determinations of homelessness. The County Superintendent depends largely upon information provided by the school district, including affidavits. Questions regarding what the family's intent was with respect to its living arrangements were not discussed with Ms. Fleming and there was no independent verification of intent or even a question about intent, as according to Ms. Volk, such was "not within our purview." Ms. Volk further commented that "[T]he question that we do ask, 'is this temporary,' that we can ask and we depend on the school district that they're in and the other affidavits that we get from other sources." Asked to define what "temporary" meant to her, Ms. Volk said that "Whatever temporary means to the person that's there. They don't intend to stay there." Asked whether her interpretation of temporary, "Is determined by each individual . . . temporary for K.M. is different for somebody else maybe," Ms. Volk explained that "each situation is different and would have a different intent." Asked if "five years" was temporary, Ms. Volk explained that it could be. Given that answer she was asked if, "Based on that logic, a student could become homeless in kindergarten and the parents move in with another family—with a relative for the next twelve years and that's temporary," Volk responded, "I have seen that happen. I didn't say it was right. I just said that I have observed that that has happened in other counties, that even has occurred over several years." As for the determination of financial hardship, Ms. Volk had no conversations with E.H. about her finances. Her determination regarding homelessness was based solely on the conversations Ms. Fleming had with E.H., with the State monitor Ms. Thomas, and the documents identified in the record.

Discussion

In a recent decision, the Commissioner of Education discussed factors relevant to determining if a child is "homeless."

> A "homeless child" is one who lacks a fixed, regular and adequate residence. N.J.A.C. 6A:17-2.2. Not every child residing temporarily with a relative is "homeless." Rather, pursuant to N.J.A.C. 6A:17-2.3(a)3, such a child is homeless when he or she resides in "[t]he residence of relatives or friends with whom the homeless child is temporarily residing out of necessity because the family lacks a regular or permanent residence of its own." An examination of the conditions that precipitated the family's relocation is critical to ascertaining whether the living arrangement arose "out of necessity," and whether the family is without access to a "regular or permanent residence of its own."
>
> [Bd. of Educ. of the Borough of Hawthorne, Passaic Cnty., v. Bd. of Educ. The Borough of Prospect Park, Passaic Cnty., and N.J. Dep't of Educ., EDU16270-13, (Final Dec. May 12, 2014)]

As the Commissioner noted, regulations adopted by the Department of Education define "homeless" children. N.J.A.C. 6A:17-2.2.

> (a) A district board of education shall determine that a child is homeless for purposes of this subchapter when he or she resides in any of the following:
>
> 1. A publicly or privately operated shelter designed to provide temporary living accommodations, including:
>
> i. Hotels or motels;
>
> ii. Congregate shelters, including domestic violence and runaway shelters;
>
> iii. Transitional housing; and
>
> iv. Homes for adolescent mothers;
>
> 2. A public or private place not designated for or ordinarily used as a regular sleeping accommodation, including:
>
> i. Cars or other vehicles including mobile homes;
>
> ii. Tents or other temporary shelters;
>
> iii. Parks;
>
> iv. Abandoned buildings;
>
> v. Bus or train stations; or
>
> vi. Temporary shelters provided to migrant workers and their children on farm sites;

3. The residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own;
4. Substandard housing; or
5. Any temporary location wherein children and youth are awaiting foster care placement.

The Federal Government has adopted a similar set of definitions as part of what is known as the McKinney-Vento legislation.

For purposes of this subtitle [42 USCS §§ 11431 et seq.]:

(1) The terms "enroll" and "enrollment" include attending classes and participating fully in school activities.
(2) The term "homeless children and youths"--
(A) means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of section 103(a)(1)) [42 USCS § 11302(a)(1)]; and
(B) includes--
(i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;
(ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings (within the meaning of section 103(a)(2)(C)) [42 USCS § 11302(a)(2)(C)];
(iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and
(iv) migratory children (as such term is defined in section 1309 of the Elementary and Secondary Education Act of 1965 [20 USCS § 6399]) who qualify as homeless for the purposes of this subtitle [42 USCS §§ 11431 et seq.] because the children are living in circumstances described in clauses (i) through (iii).

In her September 23, 2014, decision finding that the student K.M. was homeless, County Superintendent Volk cited three factors upon which her determination was based. The first of these was that a student's family "was displaced from their home." As to this, the evidence clearly demonstrates that E.H. and her family were in fact displaced from their residence in Voorhees Township, New Jersey, due to their inability to obtain a new lease for the rental property in which they resided. This situation appears to have arisen from a combination of factors, including E.H.'s loss of employment, the departure of her husband from the family residence and his lack of any financial support for his family after his departure, and the termination of severance pay and unemployment benefits that E.H. had been receiving. Superintendent Volk's determination regarding this first factor, regarding as it does the originating cause for the family's presence in Camden and not in Voorhees, was thus fully supported by the information available to her. Nothing presented during this hearing has changed the appropriateness of that conclusion. That said, and before considering the other factors relied upon by the Superintendent, as well as the factors identified in statute and case law, it is necessary to consider the standard of review to be applied regarding the issue currently before this forum and the Commissioner.

In their briefs both parties appear to consider the appropriate standard of review to be whether the determination made by the ECS was "arbitrary, capricious, or unreasonable." The language, "arbitrary, capricious or unreasonable" is typically the formula used by appellate courts when reviewing determinations made by administrative agencies. In limited circumstances, the same standard is utilized by agency heads when reviewing certain actions of local administrative bodies, such as reviews by the Commissioner of Education of the determinations by local school boards in disciplinary proceedings against students. However, the use of the "arbitrary, capricious or unreasonable" standard when an agency head is reviewing determinations made by constituent elements of that same agency would be quite unusual. Here, the Commissioner of Education is asked to consider whether K.M. is homeless. It may well be that the decision of the ECS, who holds a position within the structure of the very Department that the Commissioner heads, made based on the information available to her at the time, was a reasonable one based upon the application of the existing law to the facts as they were known to her. If nothing

produced during this hearing has materially changed that factual setting such as to require a change in determination after applying the applicable legal standards for determining homelessness, then it can be fairly said the ECS's decision was not arbitrary or unreasonable. However, reference to cases in which it has been noted that a decision by the ECS concerning homelessness was reasonable must note that that characterization was used where nothing produced at the hearing on appeal necessitated a change in the decision, again given the applicable law. Indeed, in his brief, the Deputy Attorney General, while first suggesting that review should be under the arbitrary, capricious and unreasonable standard, notes that, "[T]he only way that the ECS's decision should be reversed now, is if subsequently-received information requires its reversal." This recognition that subsequently-received information is to be used in deciding the question of homelessness proves the point. If the only thing we were concerned with was whether the ECS's decision was reasonable, based on what Ms. Volk had before her at the time, there would be no reason to receive "subsequent information." The true test is not whether the ECS was "arbitrary, capricious, or unreasonable," but whether, given all the facts produced at the hearing, the student is or is not homeless based on the application of the applicable law to those facts. In the end, if the facts existing in the record at the time of the decision made by the administrative law judge, and subsequently by the Commissioner, do not require that the ECS's decision be changed, that decision may be seen as neither arbitrary nor capricious and certainly as reasonable. But the appellate review standard is not the proper standard for considering the issue. Instead, the review on what is termed an "appeal" is effectively a de novo consideration, first by the judge and then by the Commissioner, of the facts as they may exist at the conclusion of the hearing held in the OAL, and the proper application to those facts of the existing law.

Returning to the merits, again, in addition to noting the family's displacement from their home as a basis for the finding of homelessness, Ms. Volk identified two other bases. These were that the family was living in "a 'doubled-up' situation with a relative" and that it was "experiencing financial hardship." The Board contends that these stated grounds are not proper criteria for determining if a family/student is homeless.

N.J.A.C. 6A:17-2.2 defines a "homeless child" as one who lacks a "fixed, regular and adequate" residence. This regulation further identifies several circumstances in which children may live that the statute deems to be indicative of "homeless" status. Many are obvious, children living in cars, shelters, motels, parks, etc. None of these apply to the current case. But the statute, and the Federal enactment known as the McKinney-Vento legislation, also identify a circumstance in which a child lives in what is likely a more traditional living setting, but where the child lives in "[T]he residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own." The federal provision also includes "children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, . . ." In this case, it is undeniable that E.H. and her family first came to her mother's home in Camden due to economic necessity and that K.M. shares the housing of "other persons," i. e., the home owned by her grandmother, and came to that home "due to loss of housing" and "economic hardship." The Board has not suggested otherwise. It has not challenged the description provided by E.H. of the reasons for her having to vacate the Voorhees Township residence; it has not suggested that at the time the family had any viable way to maintain that residence. It does not dispute that she lives in a home with other family members besides her children, a home that she does not have any ownership in or lease for. What it does argue, though, is that after so many years residing in the Bradley Avenue home, the family is no longer "homeless." And it appears to suggest, at least implicitly, that E.H. no longer has to live there due to ongoing financial hardship, pointing out her now over four years of steady employment at a salary which she herself described as between $55,000-70,000 a year, currently at $65,000. Thus, what the Board really seems to contend is that while Ms. Volk may have cited as bases for her determination factors that properly relate to the total picture of the family and student's circumstances, she did not properly assess the significance of these factors in the ultimate, statutorily-grounded consideration of whether K.M. lives in a "fixed, regular, and adequate residence."

If the home in which the family resides is not "adequate," then a child living in that home is, by definition, "homeless." Is the home in which student K.M. living on Bradley Avenue in Camden "adequate?" The evidence reveals that this structure is a

row home, typical in Camden and many other localities, in which there are living a grandmother, a mother and her three children, and the mother's brother. The home has kitchen facilities, a living room, a dining area, three bedrooms on the second floor, and a bathroom. There is a basement. The home is serviced by standard utilities. The grandmother has her own bedroom on the second floor, the two female children share a bedroom and their brother has a separate bedroom, these two latter bedrooms also being located on the second floor. E.H. sleeps in the living room on a pull-out sofa. Her sixty-year-old brother sleeps in the basement. The evidence does not indicate that the student and her siblings, as well as E.H.'s mother, are limited in regard to use of the kitchen and bathroom facilities. E.H. testified that she paid for her family's food, and there is no indication that there is any deprivation with respect to cooking facilities. While the home may only have one bathroom, there is no evidence that this presents any significant difficulties for the student or her family.

In M.O'K & C.O'K, o/b/o minor children K.O'K, A.O'K, & C.O'K v. Bd. of Educ. of the Borough of Cresskill, Bergen Cnty., and Bd. of Educ. of the Borough of Little Ferry, Bergen Cnty., EDU 14830-13N (Final Dec. August 12, 2014)(adopting in part, rev'g in part initial dec. of June 13, 2014), the Commissioner considered a situation in which

> petitioners returned to S.O'K.'s parents' home in Little Ferry, where the two parents and three children occupy the bottom floor of the house, which floor has no shower, sink or kitchen. Because there is only one small bedroom on that floor, the 13-year old daughter and ten-year old son share a bunk-bed in the parents' bedroom and the oldest son, 18, sleeps in the common area.

The Commissioner determined that these conditions did not constitute an adequate residence. While the case involved other factors as well which led the Commissioner to conclude that the children were homeless, clearly the living conditions described in the quoted section of the decision differed in some marked degree from the conditions in which the children in this case, most particularly K.M., live. In Cresskill, two children, a boy and a girl, shared a bunk bed in the same bedroom as their parents. Another child slept in a common area. Here, two girls share one bedroom, not at all an uncommon situation for children of the same sex. The male child resides in a separate bedroom. Their grandmother has her own bedroom; their uncle sleeps in a totally separate part of

the home. There is no indication that these children have any difficulty accessing the bathroom facilities. The children sleep in separate bedrooms from their mother. The fact that she sleeps on a pull-out sofa in the living room hardly suggests that the home is not adequate. The statutory provision certainly does not aim at perfection. Based upon the evidence here, I **CONCLUDE** that there is no basis for concluding other than the Bradley Avenue residence is "adequate."

That said, is the residence "fixed" and "regular?" The Commissioner reviewed applicable legal provisions in Cresskill.

> The regulation N.J.A.C. 6A:17-2.3(a)(3), for example, provides that children are homeless when they stay in the home of relatives or friends, with whom they are temporarily residing because the family lacks a regular or permanent residence of its own. Similarly, 42 U.S.C. sec. 11434a(2)(A) and (B)(i) describe homeless children as those "who lack a fixed, regular, and adequate nighttime residence . . .," including, inter alia, "children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason . . . ." Thus, an evaluation of "homelessness" cannot rest upon a simple calculation of the amount of time that children have spent in a particular location or municipality. The reasons for the children's homelessness, their living conditions, and the resources and intentions of the parents or custodians are relevant.

Here, E.H.'s family, having been forced to vacate their Voorhees Township residence due to financial hardship, reside with relatives. The home in which they reside is owned by E.H.'s mother. Thus, I **FIND** that this is a family that are living, at least initially due to economic hardship, in housing they share, that is not their own, but, in the case of the children, in their grandmother's home.[3] As Cresskill notes, the fact that, as here, the family has spent a number of years at Bradley Avenue is not in and of itself determinative of the lack of homeless status. In addition to the time factor, the Commissioner notes the significance of living conditions, resources and parent intentions. Again, here, the residence, that is, the "living conditions," is "adequate." As for the "resources" of the parent, E.H. testified, credibly, that although she has had a steady job for over four years, which now pays a salary of about $65,000 a year, given

[3] Thus, the living situation does involve a "doubling-up" of family, the grandmother and brother with E.H. and her children.

her financial history, accumulation of debt, including court judgments, and her support of her adult children who continue to live with her in the home while working part-time, she has been unable to obtain either appropriate leased premises or to obtain a mortgage for her family of four. It is not clear exactly how aggressive she has been in seeking some alternative housing arrangement. Nevertheless, the record indicates that her finances are limited, and given the need for at least a three-bedroom home so long as the mother and her children all stay together, her difficulty in locating adequate housing is not suspicious. As for her "intentions," she clearly stated did she did not consider the present residence at Bradley Avenue to be permanent. She certainly has in mind the idea of moving to some other housing. Nevertheless, at least based on the experience she testified about and her financial limitations, it is entirely unclear how realistic such a change of residence may be, at least in any foreseeable timeframe.

Thus, the case presents a picture of a child living in adequate housing, but in a shared home that she was taken to by her mother out of economic necessity that continues to limit the mother's ability to relocate to her own home, whether rented or purchased, and in a home her mother, not unreasonably, does not consider to be a "permanent" home, but "temporary" in the sense that she has the intention to relocate.

This case then appears to present a classic situation where the law may define something in a way that might not be obvious to the casual observer, or make sense to the average taxpayer. As the home in which this child is residing, now for a period of about six years, where she lives with her family, which is her grandmother's home, is adequate housing, and is not remotely akin to living in cars, shelters, parks, motels, buses, or any of the other places identified in the federal and state legislation, it certainly does not seem as if E.H. and K.M. are "homeless." Yet they came there due to economic hardship, they remain economically challenged, at least as far as obtaining "adequate" alternative housing of their own, and the place they live in is, legally, someone else's which they "share." And the law defines a child whose housing situation is defined by these conditions as "homeless." But does the existence of these facts dictate that the "homeless" label must remain fixed regardless of the full circumstances existent at any given time?

If the key to determining whether a child living in an otherwise adequate home ("living conditions") is still to be considered homeless is, as the Commissioner notes in Cresskill, a consideration of "resources and intentions," then the question is whether once a family is forced by economic hardship to live in such a shared circumstance in another's home that status of "homelessness" is fixed and ongoing, even if the understandable intention of the parent is that she "intends" to move and does not consider the current residence as "permanent" but instead as "temporary." As the Board's question to Ms. Volk as to her understanding of the definition of who is "homeless," and her response thereto pointed out, it is conceivable to her that a child could be considered "homeless" for an entire educational "career," if the family was forced to relocate to a shared housing situation when the child was in kindergarten and economic realities worked to foil the parental "intent" to obtain housing of the family's own for so many years. Yet it is hard to imagine that anyone would see that child as homeless, at least in the sense that children living in all of the other conditions listed in the state and federal definitions exist.

Possibly then this case presents the question of when the realities of long-term economic hardship, or at least of long-term economic limitations, shared by so many families, and the reality that hoped-for intentions are not realistic, at least for any foreseeable time, again a circumstance no doubt common, work to convert a state of "homelessness" to one where the child is no longer "homeless." The definitions do not assist in understanding the limits that may apply in such circumstances. But to the extent that homeless status is identified as one without a "fixed, regular and adequate" living place, here, given the very lengthy period of residence, the adequacy of the living place and the regularity of occupation, I **FIND** that she does live in a "fixed, regular, and adequate residence" and **CONCLUDE** that K.M. is not homeless. See L.C. on behalf of her Minor Child B.C. v. Bd of Educ. of the Twp. of Branchburg, Somerset County, 96 N.J.A.R. 2d(EDU)1003 (Commissioner found that "while her living arrangements with her brother [in his apartment] may not be permanent in the sense that she may wish to eventually return to Branchburg, the evidence shows them to have become sufficiently fixed, regular, and adequate so as to preclude a finding of homelessness.")[4] As such,

[4] The short periods where the family had to stay in a motel due to conflict between E.H. and her mother do not detract from this conclusion, as they do not appear to have been of substantial length and each time,

Camden is the district wherein the student is entitled to receive a free and appropriate education, and in the normal course, it is Camden that would be responsible for selecting the school in which that education would be provided. That said, it is again noted that in regard to this student, the Board, quite wisely, does not seek to have her finish her senior year of high school in the Camden schools and does not seek to have her leave Eastern Regional High School. As Camden is the district responsible for educating K.M., it must of course pay for that education. This outcome, however, is limited to the circumstances of this student and this case, and is not meant to suggest that in other cases, the Board would not be authorized to seek to have students found to be domiciled in Camden and not homeless placed in schools within the Camden District.

The Board's Petition of Appeal seeks several remedies besides a declaration that K.M. is not homeless. Primarily, the Board asks for injunctive relief, more specifically defined as a permanent injunction to require that the Executive County Superintendent's Office "must use proper and legal criteria for determinations of homelessness." More specifically, the Petition requested injunctive relief to compel the use of "only proper legal citations for informing potential litigants of their appeal rights"; "to refrain from asserting the wrong legal citations in homeless determinations"; to analyze legally relevant criteria in making homeless determinations . . . to state its findings of fact and conclusions in its homeless determination letters based on legally relevant criteria . . . to refrain from making homeless determinations that do not include an analysis of legally relevant criteria . . . to refrain from making homeless determinations based on legally irrelevant criteria . . . to cease and desist from directing the CCSD to violate the law in directing CCSD to fund out-of-district placements of non-classified students domiciled with the City of Camden who are not the subject of sending-receiving relationships or the Inter-district Public School Choice program . . . from placing the CCSD in an untenable, Catch 22 situation, whereby it must decide whether to violate the law or a NJDOE directive that is contrary to the law . . ." and "to not fine, sanction, penalize, or reduce the State aid of CCSD" if it follows "ECS Volk's directive and funds" such placements. Finally, the District requests that if

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the family has returned to the home and remained. Given the many years of that occupancy, these familial difficulties are insufficient proof that E.H. and her children have not established a regular, fixed and adequate residence.

the Department affirms Ms. Volk's decision, it "declares" that the NJDOE has "effectively changed the historical consequences, effects of domicile . . . " "no longer recognizes that entitlement to a free public education within the district is a consequence/effect of domicile . . . no longer recognizes that the district of domicile has educational decision-making responsibility over students domiciled within district . . . " and "has recognized CCSD's ability and authority to fund the out-of-district placements of non-classified . . . non-sending-receiving relationships."

The Board concedes that the K.M. case is the only example of a homelessness decision made by the ECS Office in this record.

Initially, it is important to note exactly what the Board proposes. The ECS is an official of the State's Department of Education. The Commissioner is the head of that agency. Despite common references to it as a "court," the OAL is not a court, and unlike a judicial-branch forum, it has absolutely no independent judicial, or quasi-judicial authority. The OAL cannot on its own issue injunctions, even where the test for injunctive relief might otherwise be met. Thus, the only source for the issuance of an injunction is the agency head, to the extent that the agency has the authority to issue such relief. But here, the request, or demand, is that the Commissioner issue an injunction against a member, as it were, of her own staff. It is, to say the least, unusual to seek what is in effect an internal injunction. Should the Commissioner be persuaded that the ECS is not using appropriate standards or is relying on incorrect factors to assess homelessness, she can issue new regulations, internal guidance, provide legal assistance to the Office, and provide additional training. In individual cases, she can reverse a decision if persuaded that the proper standards were not utilized, or, even where they were utilized, where the outcome is at variance with a reasoned assessment of the facts and the applicable law. The Board has not provided any authority or reasoning as to why, given all this, the Commissioner should enjoin her subordinate. And, besides this concern, it would be highly unusual to issue such an injunction based upon the example of one case. There is no record here upon which to conclude that there is any real danger that the Camden County ECS, who it must be noted is no longer Ms. Volk, will continue to utilize improper procedures or standards in future assessments of homelessness. And to the extent the Board is concerned about cases

similar to this one, where long-term presence in Camden by students claiming homelessness may be presenting the District with similar funding concerns as with K.M., the Commissioner has the power to provide guidance to her staff through the mechanisms just listed, including even in her final decision in this case. Assessments of homelessness must of necessity be made on a case-by-case basis. If the Board does believe that a case can be made concerning a systemic failure of the County Executive Superintendent's Office, then it may wish to initiate a more global proceeding in order to present the necessary record to sustain more general relief against the DOE and its subordinate Office. But it has not done so here. I **CONCLUDE** that there is no warrant in this record, or in the circumstances presented, for the Commissioner to issue any injunctions.

In regard to a request for reimbursement, it is noted that the Board has not presented any authority for the proposition that the DOE, or its constituent office, has any responsibility to it to pay for the educational and/or transportation costs it has expended in funding K.M.'s education at Eastern Regional. Perhaps there may be a claim against that district for reimbursement, but the Board never initiated a Petition before the Commissioner against Eastern, which is not a party to these proceedings and cannot be impleaded under the Uniform Administrative Procedure Rules. Again, it is noted that the request for reimbursement was not made in the Petition of Appeal here, but added as a remedy sought by the Board later in the proceedings. I **CONCLUDE** that the Board has not presented a basis for any remedy of reimbursement against the DOE or the ECS.

For the reasons stated, I **CONCLUDE** that K.M. is not homeless. I **CONCLUDE** that the determination made by Ms. Volk, while identifying certain factors properly considered in determining whether homelessness exists, did not fully consider and properly analyze the entire picture in assessing that issue. Her decision is therefore **REVERSED**. The Board's applications for injunctive relief and reimbursement are **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 22, 2017
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency: 3/22/17

Date Mailed to Parties: 3/22/17

mph

WITNESSES:

For petitioner:

Sandra Cintron
Richard Farr

For respondents:

Arenda Fleming
C. Ann Volk
E.H.

EXHIBITS:

For petitioner:

P-1 Curriculum Vita of Richard Farr
P-2 Farr's Report
P-3 Farr's Report
P-4 Letter from District to ECS
P-5 Letter, dated September 23, 2014
P-6 Not in evidence
P-7 Zillow and Google map information
P-8 Westlaw search
P-9 Affidavit of homelessness
P-10 Eastern Regional's Student Residency Form
P-11 McKinney-Vento Form
P-12 Homeless registration, August 30, 2013
P-13 Not in evidence
P-14 Letter to K.M. re: status August 14, 2014
P-15 E.H.'s Linked-in pag3
P-16 City of Camden Tax Records
P-17 Assessment of home
P-18 Camden City tax website listing

For respondent C. Ann Volk and New Jersey State Department of Education:

R-1 E-mail to Fleming from Volk
R-2 Fleming's Certification

For respondent E.H.:

None

178-17

OAL DKT. NO. EDU 17849-16
AGENCY DKT. NO. 270-10/16

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
S.P., M.P., AND V.P., ON BEHALF OF MINOR CHILD, Y.P,	:	
RESPONDENTS.	:	

The record of this matter, the stipulation of settlement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, it is noted that the settlement makes reference to a payment schedule, beginning immediately upon entry of an order by the Administrative Law Judge. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

Subject to the foregoing, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed – subject to compliance with the terms of the settlement – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/26/17

Date of Mailing: 6/27/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 17849-16

AGENCY REF. NO. 270-10/16

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,

Petitioner,

v.

S.P., M.P. AND V.P. ON BEHALF OF MINOR CHILD Y.P.,

Respondents.

David B. Rubin, Esq., for Petitioner

Vinay Mavinkurve, Esq., for Respondents

Record Closed: May 2, 2017 Decided: May 4, 2017

BEFORE: **JOHN P. SCOLLO**, ALJ

Petitioner, the Piscataway Township Board of Education, seeks payment of tuition from Respondent's for Y.P.'s ineligible attendance in the school district from the 2010-2011 school year through September 28, 2016.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on November 28, 2016.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached Stipulation of Settlement and Board Resolution.

I have reviewed the terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

Therefore, I **CONCLUDE** that this Stipulation of Settlement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

May 4, 2017
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

5-10-2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:

MAY 5 2017

db

DAVID B. RUBIN, P.C.
Attorney at Law
44 Bridge Street
P. O. Box 4579
Metuchen, New Jersey 08840
(732) 767-0440
Attorney for Petitioner Piscataway Township Board of Education

PISCATAWAY TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY, Petitioner, vs. S.P., M.P. and V.P., Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Agency Docket No. 270-10/16 OAL Dkt. No. EDU 178492016 **STIPULATION OF SETTLEMENT**

The parties having amicably resolved their differences, the within matter is hereby settled on the following terms:

1. Respondents Sanjay Patel, Manisha Patel and Virangi Patel shall pay to Petitioner Piscataway Township Board of Education the sum of $15,000.00, in two equal installments: the first, immediately upon entry of an order by Administrative Law Judge John Scollo approving the settlement, and the second, within 30 days thereafter.

2. Payment shall be made by check payable to "Piscataway Township Board of Education," and delivered to Petitioner's counsel.

3. In the event that either installment payment is not made when due, Respondents shall immediately become jointly and severally liable for $63,302.84 less any payments previously made, plus any reasonable attorney fees and costs incurred in pursuit of collection.

4. This Stipulation of Settlement is entered into solely to avoid the expense and inconvenience of continued litigation, and does not represent an admission by any party of the correctness of any other party's factual or legal position in this matter.

5. Respondents represent that they have been represented by Vinay Mavinkurve, Esq., in this matter, that they have consulted with their counsel regarding the meaning and effect of this Stipulation of Settlement, and that they enter into it voluntarily and without coercion.

6. This Stipulation of Settlement resolves all claims for back tuition with respect to the time periods referenced in the Petition of Appeal. Respondents acknowledge their ongoing obligation to maintain residency sufficient to continue lawful enrollment of Y.P. in the Piscataway Township Public School District, and Petitioner's right to pursue any lawful remedy should they fail to do so.

DAVID B. RUBIN, P.C.
Attorney for Petitioner

Dated: 5/2/17 By: _____
DAVID B. RUBIN

Dated: 04/26/2017 _____
SANJAY PATEL

Dated: 04/26/17 _____
MANISHA PATEL

Dated: 04-26-17 _____
VIRANGI PATEL

PISCATAWAY
TOWNSHIP SCHOOLS

1515 Stelton Road
Piscataway, NJ 08854
732 572-2289
Fax 732 572-7889
www.piscatawayschools.org

Teresa M. Rafferty
Superintendent of Schools

David Oliveira
Business Administrator/Board Secretary

BE IT RESOLVED that a settlement be approved in the matter of Piscataway Township Board of Education v. S.P., et als, OAL Dkt. No. EDU 17849-16, pursuant to the terms of a written agreement in a form satisfactory to General Counsel.

Moved by: Ms. Cherry Seconded by: Mr. Stern

Roll Call Vote: Yeas 8 Nays 0 Abstain 0

****

I certify that the foregoing is a true and correct abstract of a resolution passed at a meeting of the Piscataway Township Board of Education held on April 27, 2017 and in that respect is a true and correct copy of its minutes.

School Business Administrator/
Board Secretary

179-17

OAL DKT. NO. EDU 18002-16
AGENCY DKT. NO. 299-11/16

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF VINCENT J. VITIELLO, SCHOOL DISTRICT OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY	COMMISSIONER OF EDUCATION DECISION

This matter was opened before the Commissioner of Education by petitioner (Edison Board of Education or Board), seeking suspension of respondent's (Vincent J. Vitiello) teaching certificate pursuant to *N.J.S.A.* 18A:26-10. The Board alleged that respondent resigned from his teaching position without providing the requisite notice to petitioner. Following transmittal of the matter to the Office of Administrative Law (OAL), the parties proposed a Settlement Agreement and Release (Agreement), which the Administrative Law Judge sent to the Commissioner with a recommendation for approval.

Upon review of the terms of the proposed Agreement, the Commissioner rejects same because the parties wish to apply a six-month suspension retroactively – from October 5, 2016 to April 7, 2017 – and the record below is devoid of affirmation from the parties that the respondent was not employed as a teacher elsewhere during the proposed suspension period above. Under *N.J.S.A.* 18A:26-10, the Commissioner may suspend a teacher's certificate for up to one year for wrongful cessation of performance of her duties. The central purpose of the statute is to ensure proper notice to the school to deter the disruption of services and adverse impact on the students when teachers abruptly resign. *See Penns Grove-Carney's Point Board of Education v. Leinen, 94 N.J.A.R. (EDU) 405, 407.* As the parties in this matter have agreed to retroactive suspension of respondent's certificate, the Commissioner may – at her discretion – consider the proposed suspension, provided that respondent remained unemployed as a teacher for the duration of the

suspension, and has attested to same by way of an affidavit. In the absence of any affirmation from the respondent in this regard, the Commissioner cannot approve the within settlement.

Accordingly, this matter is remanded to the OAL for revision of the Agreement or for further proceedings consistent with the concerns set forth above.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/26/17

Date of Mailing: 6/27/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 18002-16

AGENCY DKT. NO. 299-11/16

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE(S) OF VINCENT J. VITIELLO, SCHOOL DISTRICT OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY.

Amanda N. Castrogiovanni, Esq., for petitioner Edison Township Board of Education (Busch Law Group, attorneys)

Vincent J. Vitiello, respondent, pro se

Record Closed: May 1, 2017 Decided: May 2, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

Petitioner, the Edison Township Board of Education (the Board), seeks the suspension of the teaching certificate of respondent Vincent J. Vitiello. The Department of Education transmitted this matter to the Office of Administrative Law, where it was filed on November 29, 2016, for hearing as a contested case. A telephone prehearing conference was held on January 6, 2017, during which a hearing date was

discussed and scheduled for May 19, 2017. Prior to the scheduled hearing, under letter dated April 28, 2017, counsel for the Board submitted the attached Agreement and Release indicating the terms of agreement between the parties.

I have reviewed the record and the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

5/2/17

DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency:

5-3-17

Date Mailed to Parties:

MAY 3 2017

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AGREEMENT AND RELEASE

This AGREEMENT AND RELEASE (the "Agreement") is made this 27 day of February, 2017 by and between the Edison Township Board of Education, including members, officers, agents, attorneys, administrators, employees, representatives, agents, affiliates, subsidiaries, successors, or assigns (the "Board") and Vincent Vitiello, including his agents, representatives, assigns, heirs and successors ("Mr. Vitiello") (collectively referred to as the "Parties").

WHEREAS, Vincent Vitiello ("Mr. Vitiello") was a tenured teacher employed by the Edison Township Board of Education (the "Board"); and

WHEREAS, On or about May 4, 2016, the Board passed a resolution confirming Mr. Vitiello's reappointment to the teaching position for the 2016-2017 school year; and

WHEREAS, Mr. Vitiello notified the Board on September 13, 2016 via electronic correspondence that he intended to retire effective October 5, 2016; and

WHEREAS, Peter Pittuco, Director of Personnel ("Mr. Pittuco"), informed Mr. Vitiello on September 14, 2016, via electronic correspondence, of Mr. Vitiello's contractual and statutory obligations to provide 60 days' notice; and

WHEREAS, Mr. Vitiello relinquished his position on October 5, 2016; and

WHEREAS, on or about October 21, 2016 the Board filed with the Acting Commissioner of the New Jersey Department of Education an Order to Show Cause compelling Mr. Vitiello to explain why the Commissioner should not suspend his teaching certificate for unprofessional conduct (retirement without sufficient notice), pursuant to N.J.S.A. 18A:26-10 and N.J.A.C. 6A:9-17.9; and

WHEREAS, in order to avoid the costs, expenses, delays, and uncertainties of the hearing process and/or civil litigation, the Parties hereto wish to fully and finally settle and resolve any and all claims which have been and/or could have been asserted by the Board;

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties incorporate the above recitals and agree as follows:

1. **Suspension**. Mr. Vitiello's teaching certificate shall be suspended for a period of six (6) months. The six (6) month suspension shall have a retroactive initiation date of October 5, 2016 and continue through April 5, 2017.

2. **Withdraw Pending Action.** The Board agrees to send a letter to the Honorable Michael Antoniewicz within five (5) days from receipt of a fully executed copy of the herein

Agreement, withdrawing OAL Docket number EDU 18002-2016 N, Agency Reference number 299-11-16, In The Matter of the Suspension of the Teaching Certificate(s) of Vincent J. Vitiello / School District of the Township of Edison, Middlesex County within.

3. **Compromise/No Admission of Liability**. The Parties understand, represent, and warrant that this Agreement is not an admission of wrongdoing or liability by or on the part of any Party.

4. **Release.** Mr. Vitiello hereby irrevocably and unconditionally waives, releases and forever discharges any and all claims or rights, whether known or unknown, which he has or may have against the Board, in any venue, as well as any of its members, officers, agents, attorneys, administrators, employees or representatives, related in any way to his employment with the Board or retirement therefrom, and in respect of, any and all charges, promises, actions, causes of action, covenants, contracts, controversies, agreements, complaints, claims, counterclaims, liabilities, obligations, suits, demands, grievances, arbitrations, costs, losses, sums of money, accounts, bills, judgment, executions, damages, debts and expenses, including attorneys' fees and costs, of any nature or description whatsoever, in law or in equity, asserted or unasserted, express or implied, foreseen or unforeseen, real or imaginary, suspected or unsuspected, known or unknown, liquidated or non-liquidated, of any kind or nature or description whatsoever, arising from the beginning of the world to the effective date of this Agreement, including but not limited to any claim under State or Federal law for discrimination based on age, race, gender, disability or any other actual or perceived characteristic. To the extent that Mr. Vitiello is authorized by law to file a claim or complaint with the U.S. Equal Employment Opportunity Commission or any other such institution, Mr. Vitiello additionally and specifically waives any right to receive monetary damages as a result of such claim or complaint. With respect to his waiver of any and all potential age discrimination or similar claims hereunder, Mr. Vitiello understands that he has twenty-one (21) days to consider this Agreement and shall have seven (7) days after signing the agreement to reconsider and revoke his signature, though such revocation shall relieve the Board of any duty to abide by its obligations herein.

5. **Enforceability and Severability**. The Parties agree and acknowledge that each of the provisions of this Agreement are reasonable and should be fully enforceable, and the Parties waive any right to argue, assert or allege any claim to the contrary. However, if any provision of this Agreement is determined by a Court of competent jurisdiction to be unenforceable because it is overbroad or unreasonable, the Parties agree that such provision(s) shall be modified and enforced to the maximum extent permissible. If any provision of this Agreement is held to be invalid and cannot be modified so as to make it enforceable, then such provision shall be deemed to be severed from the Agreement and the remaining provisions shall remain in full force and effect.

6. **Mutual Non-Disclosure and Non-Disparagement Agreement.** The Parties agree that the terms and existence of this Agreement shall not be disclosed to any third party,

unless required by law. Further, the Parties agree that they shall not make any disparaging remarks (verbally or in writing) to any third party (or via social media) about and/or concerning each other.

7. **Entire Agreement**. This Agreement constitutes the sole and complete agreement among the Parties with respect to the subject matters hereof.

8. **Drafting and Negotiation by Counsel**. The drafting and negotiating of this Agreement have been participated in by each of the Parties and their respective counsel and/or representatives and, for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the Parties. The Parties hereby acknowledge that they have been represented by counsel, or any other representative of their choice, throughout the Action, throughout the negotiation of this Agreement, and at the execution of this Agreement, and have read and consulted with counsel, or their chosen representative, regarding this Agreement. To the extent any party chose not to consult with counsel and/or a representative, such a decision was made knowingly and voluntarily and said party expressly agrees that they were given ample opportunity to confer with counsel and/or a representative, but chose not to, and therefore waives their right to argue, at a later date, that they did not understand the terms of this Agreement because they did not confer with counsel and/or a representative.

9. **Governing Law**. This Agreement shall be construed under, subject to, and governed by the laws of the State of New Jersey.

10. **Costs of Additional Litigation**. If the Board is forced to incur any fees to enforce the terms of this Agreement, or to recover damages pursuant to this Agreement, or to defend any actions brought by Mr. Vitiello, or by the Edison Township Education Association with the assistance of and/or participation in by Mr. Vitiello, contrary to the terms of the Agreement, the Board shall be entitled to recover, from Mr. Vitiello, all attorneys' fees and costs expended.

Vincent Vitiello

Dated: 2/10/2017

Frank Heelan
Board President
Dated: 2-27-17

Attested to by:

_____

Dated:

Attested to by:

Daniel Michaud
Business Administrator
Dated: 2/27/17

WHEREAS, the New Jersey Constitution authorizes the Governor to call the Legislature into special session to address specific issues when it is in the public interest to do so; and

WHEREAS, in light of the need for immediate and decisive action to reform the system of school funding in New Jersey, a special session of the Legislature is obviously in the public interest;

NOW, THEREFORE,
BE IT RESOLVED: that the Edison Board of Education hereby calls upon Governor Chris Christie to call the Legislature into a special session for the purpose of enacting comprehensive school funding reform legislation; and

BE IT FURTHER
RESOLVED: that a copy of this Resolution be sent to Governor Christie, Senate President Sweeney, Assembly Speaker Prieto, the Board's local representatives in the State Legislature and the New Jersey School Boards Association Delegate Assembly, as well as be posted on the Board's website.

4. Settlement Agreement – S.A.

BE IT
RESOLVED: that upon the recommendation of the Superintendent of Schools, the Edison Board of Education hereby (1) approves the settlement agreement in the matter of J.A. and C.A. o/b/o S.A. v. Edison Twp. Bd. Of Educ., EDS 04101-2016; and (2) authorizes the Board President and the Board's administration to take all necessary and appropriate steps to carry out this action of the Board.

5. Settlement Agreement – S.H.

BE IT
RESOLVED: that upon the recommendation of the Superintendent of Schools, the Edison Board of Education hereby (1) approves the settlement agreement in the matter of J.H. and J.H.. o/b/o S.H. v. Edison Twp. Bd. Of Educ., EDS 13864-2016; and (2) authorizes the Board President and the Board's administration to take all necessary and appropriate steps to carry out this action of the Board.

6. Settlement Agreement – V.V.

BE IT
RESOLVED: that upon the recommendation of the Superintendent of Schools, the Edison Board of Education hereby (1) approves the settlement agreement I/M/O the Suspension of the Teaching Certificate(s) of V.V./School District of the Township of Edison, Middlesex County, EDU 18002-2016; and (2) authorizes the Board President and the Board's administration to take all necessary and appropriate steps to carry out this action of the Board.

181-17

181-17L

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

June 29, 2017

A[redacted] B[redacted]
[redacted]
Tinton Falls, New Jersey 07724

A[redacted] B[redacted]
[redacted]
Red Bank, New Jersey 07701

Anthony P. Sciarrillo, Esq.
Sciarrillo, Cornell, Merlino, McKeever,
& Osborne, LLC
238 St. Paul Street
Westfield, New Jersey 07090

Re: *Board of Education of the Red Bank Regional High School District, Monmouth County v. A.B., on behalf of minor child, T.B., Agency Dkt. No. 59-3/17*

Dear Parties:

Upon review of the Petition of Appeal filed in connection with this matter and based upon the respondent's failure to submit an Answer to the Petition that complies with *N.J.A.C.* 6A:3-1.5, I have determined to grant summary decision in favor of the petitioner.

On March 28, 2017 the Board filed its Petition of Appeal pursuant to *N.J.A.C.* 6A:3-8.1 seeking an order assessing tuition and claiming that minor child, T.B., was not entitled to attend school in the district for 92 days – between September 6, 2016 and January 31, 2017 – during the 2016-2017 school year, pursuant to *N.J.S.A.* 18A:38-1 *et seq.* A copy of the petition was served upon respondent on March 28, 2017 via certified mail, regular mail, and hand delivery, to both known addresses for respondent. An acknowledgment of filing and notice – dated March 28, 2017 – that an Answer to the Petition was due within 20 days was also sent to the respondent. *N.J.A.C.* 6A:3-1.5.

When A.B. failed to respond to the initial notice, a second notice was sent on April 19, 2017, via certified and regular mail, clearly indicating that – absent receipt of an Answer to the Petition within 10 days -- each count in the Petition would be deemed admitted

and the matter may be decided on a summary basis pursuant to *N.J.A.C.* 6A:3-1.5(c). According to information obtained from the U.S. Postal Service, the copy sent via certified mail was not claimed, but the copy sent via regular mail was never returned to this office. A.B., nevertheless, failed to respond to the second notice. A third and final notice was sent to A.B. via certified and regular mail on May 23, 2017, reiterating the information contained within the prior notice. Again, the certified mail was returned as "unclaimed", but the regular mail was never returned to this office.

To date, no Answer has been filed on behalf of respondent. Accordingly, petitioner's claim that T.B. was not entitled to attend school in the district pursuant to *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted. It is hereby ordered that respondent reimburse the petitioner $7,099.64[1] in tuition costs for T.B.'s ineligible attendance in the district for 92 days – from September 6, 2016 through to January 31, 2017 – during the 2016-2017 school year.

IT IS SO ORDERED.[2]

Sincerely,

Kimberly Harrington

Kimberly Harrington
Acting Commissioner of Education

c: County Superintendent
State Law Library

KH/MKD/ATA

VIA REGULAR MAIL & CERTIFIED MAIL

[1] The tuition is assessed based on the number of days T.B. attended school as an ineligible student. The Board has certified that the annual cost of tuition is $14,200 and there are a total of 184 school days, which makes the per day cost $77.17. Therefore, $7,099.64 is the total tuition owed for 92 days.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

182-17

182-17LM

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

June 29, 2017

J[redacted], *pro se*
[redacted]
Monroe Township, New Jersey 08831

Mary H. Smith, Esq.
Office of General Counsel
Monroe Township Schools
423 Buckelew Avenue
Monroe Township, New Jersey 08831

Re: *J.S., on behalf of minor child, A.S. v. Board of Education of the Township of Monroe, Middlesex County, Agency Dkt. No. 92-4/15, Commissioner Decision No. 127-16.*

Dear Parties:

I have reviewed the materials filed in connection with petitioner J.S.'s Motion for Reconsideration of the Acting Commissioner's April 5, 2016 decision ordering the petitioner to reimburse the Monroe Township Board of Education $18,706.47 in tuition costs for her minor child A.S.'s period of ineligible attendance in the district.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)(2), a motion for reconsideration shall be considered based upon the following:

i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

Upon review and consideration of the submissions, I find that petitioner's request for reconsideration of the Commissioner's decision was filed significantly out of time, which alone serves as sufficient basis for denying petitioner's request.[1]

Notwithstanding, petitioner has also failed to satisfy any of the requisites for granting such relief specified in *N.J.A.C.* 6A:3-1.15(b)(2). The petitioner does not argue that she has satisfied any of the requirements for reconsideration, nor has she provided new evidence to refute the finding that she was not domiciled in Monroe Township during the period in question – the 2014-2015 and 2015-2016 school years.

Accordingly, the Motion for Reconsideration is hereby DENIED.[2]

Sincerely,

Kimberly Harrington

Kimberly Harrington
Acting Commissioner

c: County Superintendent
State Law Library

KH/MKD/ATA

Via Regular Mail

[1] *N.J.A.C.* 6A:3-1.15(b) provides that a motion for reconsideration must be filed within 10 days of the filing of the Commissioner's Decision.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

183-17LM

183-1

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

June 29, 2017

Sabino Valdes, *pro se*
P.O. Box 463
Paramus, New Jersey 07653

Susan Lavelle, Esq.,
1814 Kennedy Blvd.
Union City, New Jersey 07087

Re: *In the Matter of the Tenure Hearing of Sabino Valdes, Board of Education of the City of Union, Hudson County, Agency Dkt. No.328-9/00.*

Dear Parties:

I have reviewed the materials filed in connection with Sabino Valdes' motion to reopen the above referenced matter. The Commissioner notes that this is Mr. Valdes' third motion to reopen the tenure charges that were filed against him by the Union City Board of Education in September 2000.[1] Mr. Valdes filed his first motion to reopen in April 2014, which was denied by the Commissioner in a decision dated June 14, 2014. Mr. Valdes then filed his second motion to reopen in August 2016, which was denied by the Commissioner in a decision dated November 3, 2016. The Commissioner's November 3, 2016 decision is pending appeal before the Superior Court of New Jersey, Appellate Division.

Pursuant to New Jersey Court Rule 2:9-1(a), "the supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of petition for certification is filed." As Mr. Valdes has filed a Notice of Appeal with the Appellate Division relating to his second request to reopen the tenure matter, the Commissioner does not have jurisdiction to consider Mr. Valdes' duplicate motion to reopen.

[1] The third motion to reopen contains substantially the same facts and issues raised in Mr. Valdes' previous motions.

Even if the Commissioner was deemed to have jurisdiction in this matter, upon review and consideration of the parties' submissions, I find that Mr. Valdes has failed to establish good cause to reopen the tenure charges filed against him by the Board, and he did not make such request with reasonable time or diligence. It is well-established that administrative agencies have an inherent authority to reconsider, reopen or revise a prior decision made by the agency. A motion to reopen, however, will only be granted when good cause is shown and the motion is made with reasonable time or diligence. *See Duvin v. State of New Jersey, Dep't of the Treasury, Public Employees' Retirement System*, 76 *N.J.* 203, 207 (1978); see also *Skulski v. Nolan*, 68 *N.J.* 179 (1975) and *Ruvoldt v. Nolan*, 63 *N.J.* 171 (1973).

As a preliminary matter, Mr. Valdes' first motion to reopen was filed 12 years after the State Board of Education's August 4, 2004 decision was issued, affirming the decision to remove Mr. Valdes from his tenured employment with the District for insubordination and unbecoming conduct. Significantly, his subsequent submissions asserted the same arguments and unsubstantiated claims of fraud, collusion, and conspiracy.[2] In his present motion, Mr. Valdes has not provided any new evidence nor has he alleged the existence of any new information that was not previously argued throughout the protracted litigation of this matter. Mr. Valdes has, however, raised a "new" issue relating to an old document – the Administrative Law Judge's (ALJ) Interlocutory Order of August 9, 2001. Mr. Valdes argues that the Order is "void" because the Commissioner and the State Board affirmed the ALJ's Initial Decision without reviewing and affirming the Order.[3]

When the Commissioner reviews an initial decision from the OAL, the entire record below is also reviewed. The Commissioner, therefore, reviews any orders or rulings entered by an ALJ – such as a denial of a motion to dismiss – after an initial decision has been rendered. This, however, does not mean that the Commissioner is required to independently or separately "affirm" such orders or rulings. Significantly, review and affirmation (or rejection) of any orders or rulings made by the ALJ during the pendency of the litigation is subsumed in the Commissioner's final decision in the matter. Implicit in the Commissioner's adoption of the ALJ's Initial Decision in this matter – based on the review of the record below, as indicated in the Commissioner's June 24, 2003 decision – is the fact that the Commissioner was in accord with the ALJ's August 9, 2001 ruling on Mr. Valdes' motion to dismiss. Notwithstanding, the August 9, 2001 Order had no bearing on the ultimate outcome of the case; therefore, the arguments raised by Mr. Valdes in his current motion do not amount to new evidence or information that would suggest a need to revisit the tenure charges filed against him in 2000. Accordingly, it is evident that no good cause has been shown to compel the reopening of this case after more than a decade.

---

[2] Over the course of the last 17 years, the various allegations and issues raised by Mr. Valdes – including his persistent reliance on the 45-day argument – have been exhaustively addressed and rejected by different tribunals.

[3] The August 9, 2001 Order and decision of the ALJ denied Mr. Valdes' motion to dismiss the tenure charges filed against him. No review was sought with the Commissioner – pursuant to *N.J.A.C.* 1:1-14.10 – of the ALJ's August 9, 2001 Order. Consequently, the matter proceeded to hearing and an initial decision was issued by the ALJ at the conclusion of the case before the Office of Administrative Law (OAL).

For all of the foregoing reasons, the third motion to reopen the tenure charges filed against Mr. Valdes by the Union City Board of Education is hereby DENIED.[4]

Sincerely,

Kimberley Harrington
Acting Commissioner

c: County Superintendent
State Law Library

KH/MKD/ATA

Via Regular Mail

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

184-17

C.E., on behalf of minor child, K.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* petition appealing the determination of the respondent Board that his daughter, K.E., was not domiciled in West Orange, and therefore not entitled to a free public education in the West Orange school district. Petitioner contended that he had leased a property in West Orange where he and his daughter were domiciled; further, the petitioner testified that he had purchased a home in West Orange on May 10, 2017, six days before the hearing in this matter. The Board alleged that a residency investigation had shown that C.E. and K.E. live at an address in East Orange. The Board sought tuition reimbursement for the period of K.E.'s ineligible attendance.

The ALJ found, *inter alia*, that: the testimony provided by the Board's witnesses was credible, while that of petitioner was not; pursuant to *N.J.A.C.* 6A:22-3.1(a)(1), a student is a resident of a school district if his parent or guardian has a permanent home in the district; the domicile of an unemancipated child is that of her parent or guardian; in the instant case, C.E. contested the Board's decision that K.E. was not properly domiciled in West Orange; the testimony of the Board's residency inspector and the results of the investigation were credible and indicated that K.E. and her father were domiciled out-of-district in East Orange, but continued to attend school in West Orange during the 2016-2017 school year; and the cost of tuition for K.E. in West Orange schools for the 2016-2017 school year was $17,069. The ALJ concluded that the petitioner was not a domiciliary of West Orange for the 2016-2017 school year and was therefore ineligible to attend West Orange public schools; accordingly, the respondent Board is entitled to reimbursement of tuition in the amount of $17,069.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 6/29/17

OAL DKT. NO. EDU 494-16
AGENCY DKT. NO. 324-12/16

C.E., on behalf of minor child, K.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed.[1] The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner adopts the Initial Decision as the final decision for the reasons set forth therein. Accordingly, the petitioner shall pay the Board $17,069.00 in tuition costs for K.E.'s ineligible enrollment in the District for the 2016-2017 school year.

IT IS SO ORDERED.[2]

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/29/17
Date of Mailing: 6/30/17

[1] The record did not include a transcript of the hearing held at the Office of Administrative Law on May 16, 2017.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00494-17
AGENCY REF. NO. 324-12/16

C.E. ON BEHALF OF MINOR CHILD, K.E.,
Petitioner,
v.
BOARD OF EDUCATION OF WEST ORANGE,
Respondent.

C.E., pro se

Frances Febres, Esq., for respondent (Cleary Giacobbe Alfieri Jacobs, attorneys)

Record Closed: May 16, 2017 Decided: May 18, 2017

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE

Petitioner, C.E. filed an appeal on behalf of his daughter K.E. from the determination of the respondent, West Orange, Board of Education (West Orange) that she is not domiciled in its district. West Orange counterclaims for tuition reimbursement.

Petitioner filed an appeal with the New Jersey Department of Education (DOE) on December 20, 2016. West Orange filed an Answer on January 13, 2017.

PROCEDURAL HISTORY

The contested case was transmitted to the Office of Administrative Law (OAL), where it was filed on January 12, 2017. Respondent filed a motion to amend its answer to include a counterclaim for tuition reimbursement on February 23, 2017. The motion was granted without opposition on March 6, 2017. The hearing was held on May 16, 2017 at which time I closed the record.

FACTUAL DISCUSSION

The following facts are not in dispute. Based upon the documentary and testimonial evidence presented, I **FIND** the following **FACTS**:

Gerard Drappi is a residency investigator for West Orange. He was previously a police officer for thirty years. He began an investigation on whether K.E. was a resident of West Orange because a letter was received by West Orange questioning K.E.'s residency. K.E.'s address was listed as 2 Seaman Road, West Orange, NJ on her student registration. A letter signed by D.E. the brother of C.E. dated August 19, 2015 stated that K.E. and C.E. lived with him at 2 Seaman Road, West Orange. The certificate of residency included the letter from D.E., a PSE&G bill and a pay stub.

Drappi began his investigation on October 7, 2016. He went to the Seaman Road address on that day and did not see K.E. leave the house. From October 7, 2016 to December 1, 2016, Drappi did not see K.E. enter or exit the Seaman Road address. During this time, he saw petitioners exiting the address on Norwood Street in East Orange before school.

A postal Freedom of Information request for C.E. showed his address as --- Norwood Road, East Orange, NJ. A record search of C.E.'s email address and the address connected to his phone number revealed C.E.'s address as --- Norwood Street, East Orange, NJ. A motor vehicle search on a vehicle with a license plate number of --- 5-5 which Drappi had seen C.E. primarily use revealed that the vehicle was registered to A.G. of Clifton, NJ. A subsequent motor vehicle search of license plate number P— E-X showed the vehicle to be owned by C.E. and registered at the same Norwood Street in East Orange.

Drappi went to the Seaman Road address on December 1, 2016 to deliver a letter regarding a residency hearing. At that time the house was vacant. Drappi contacted the sheriff's foreclosure unit and determined that the 2 Seaman Road address had been foreclosed on by the bank on September 1, 2015, which made the bank the owner of the property as of September 1, 2016. C.E. admitted that he left the Seaman Avenue address in September 2016 due to his brother being forced out of the house because of the foreclosure.

The notice of the meeting was given to K.E. at school with C.E.' s consent. At the December 6, 2016 Board meeting regarding K.E.'s residency, C.E. told Drappi that they had moved to East Orange. He also stated that he leased an apartment in West Orange at -- Washington Street, Unit One and provided a copy of a lease.

West Orange removed K.E. contingent on proof that petitioners were residing in West Orange. The removal letter stated, among other things, that if in his appeal C.E. could not sustain the burden of demonstrating entitlement of K.E. to attend school in West Orange, he would be required to pay tuition. K.E. was in the seventh grade during the 2016-2017 school year. The tuition rate for a student in the seventh grade during the 2016-2017 school year is $17,069.

The lease provided by C.E. stated that the owner of the property was Reggie Scott/ Transcon Bay Group. Drappi contacted the property manager at -- Washington

Street and was informed that the property was in foreclosure. The bank appointed Blue Asset Management to manage the property. James Boyle a representative of Blue Asset Management was the actual property manager. Drappi spoke to Boyle who informed him the Reggie Scott was a tenant who leased a garage and a storefront. Scott did not have the authority to sublet. In addition, Unit One was a commercial unit, and was in disrepair and uninhabitable in and around December 2016.

Blue Asset Management did not lease any unit to C.E. Blue Asset Management did not draft the lease agreement that C.E. gave Drappi on December 6, 2016. Boyle never saw C.E. at the Washington Street address in West Orange. Petitioner never moved into the Washington Street address because he was informed by West Orange that Reggie Smith/ Transcon Bay Group did not own the property.

Drappi did a search with the New Jersey Department of the Treasury Division of Revenue Enterprise Services because C.E. stated that he had several businesses. The search showed that C.E. had approximately six businesses, all of which listed his address as the Norwood Avenue in East Orange, NJ.

C.E. testified that he had purchased a house at 12 Wildwood Avenue in West Orange, NJ on May 10, 2017. He stated that the seller was Wildwood Associates with the agent being Oscar Meurma. He stated that he knew Meurma through Reggie Scott and through real estate deals. He did not do a title search or a home inspection. No attorney assisted him with the purchase. C.E. further testified that he changed his driver's license to list his address as 12 Wildwood Avenue in West Orange. C.E. provided West Orange with documents regarding 12 Wildwood Avenue. He stated that the Notice to Buyer and Seller was prepared by the title company whose name he does not know. Page thirteen of the contract has a signature of C.E. as the buyer but no signature of the seller. C.E. acquired the tax record from the city, which lists Steve Tischler as the owner of the property. C.E. stated that Steve Tischler sold the property to Meurma, but there is no record of that.

The Actual owner of 12 Wildwood Avenue per the tax assessor's office is Steve Tischler, who purchased the property on April 12, 2010. A MLS listings for 12 Wildwood Avenue, West Orange, NJ showed that the property was listed for sale and the agent was James Boyle. Drappi spoke to James Boyle who was the listing agent for the property. James Boyle told Drappi that the property was under contract but not to C.E. Boyle had never heard of C.E.

Considering the contradictory testimony presented by respondent's witness and petitioner, the resolution of this matter requires that I make credibility determinations regarding the critical facts. The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses it is my view that Drappi and Boyle were credible. Their testimony was truthful and accurate. They did not have anything to gain by their testimony. Their testimony was consistent with the documents that were presented. C.E. was not credible. He testified that he knew Meurma from real estate business but testified that he did not know the name of the title company he contracted to purchase a house from just five days before the

hearing. He did not do a title search on the property that he was about to purchase although he has a real estate background. At the December 6, 2016 residency hearing and at the present hearing C.E. provided what he stated were leases to premises he was going to rent or own in West Orange. Both documents were dated a few days before the hearing dates and neither of the documents were accurate. The owners of both premises had never heard of C.E. and did not lease or sell the properties to C.E.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J 238, 250 (1955). The domicile of an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001). Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

In support of its claim for tuition, respondent produced residency inspector Drappi, who testified in its behalf. The results of the investigation supported the finding that K.E. and her father, C.E. are domiciled out-of-district, but continued to attend public schools in the district for the 2016-2017 school year. The cost of tuition for K.E. for the 2016-2017 school year is $17,069.

West Orange asserts that it is entitled to be reimbursed for tuition for the period of K.E.'s ineligible enrollment the 2016-2017 school year. Whereas here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

> If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

N.J.S.A. 18A: 38-1(b) likewise requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioners were not a domiciliary in the West Orange School District for the 2016-2017 school year and that respondent is entitled to reimbursement for the costs of audited tuition in the amount of $17,069.

ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that petitioner and his daughter were not residents and domiciliary in West Orange, New

Jersey, and were not domiciled within its school district during the 2016-2017 school year is hereby **AFFIRMED**. It is further **ORDERED** that respondent be reimbursed tuition from petitioner in the amount of $17,069.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5-18-17

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

MAY 19 2017

Date Mailed to Parties:

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner:

None

For Respondent:

Gerard Drappi

James Boyle

Exhibits

For Petitioner:

None

For Respondent:

R-1 Student Registration Record of K.E. Dated September 8, 2015

R-2 Attendance Follow-Up Form of West Orange School District, dated December 6, 2016

R-3 Investigative Report of Gerard Drappi

R-4 Postal Freedom of Information Request for 530 Norwood Street East Orange, NJ dated November 28, 2016

R-5 Postal Freedom of Information Request for 534 Norwood Street East Orange, NJ dated November 28, 2016

R-6 Public Record Phone Number and Email Searches

R-7 Motor Vehicle Search Request for KGK-52S, dated October 10, 2016

R-8 Motor Vehicle Search Request for P---E--
dated October 21, 2016

R-9 Lease between C.E. and Transcon Bay Group/Reggie Smith,
dated November 29, 2016

R-10 Photos of 25 Washington Street, West Orange, Unit One

R-11 New Jersey Department of the Treasury Division of Revenue
and Enterprise Services Searches

R-12 Letter from West Orange Superintendent, Jeffrey S. Rutzky,
dated November 29, 2016

R-13 Letter from West Orange Superintendent, Jeffrey S. Rutzky,
dated December 7, 2016

R-14 Motor Vehicle Search Request for C.E. Dated March 27, 2017

R-15 Documents submitted by C.E. regarding Proposed New Address,
dated May 15, 2017

R-16 Tax Assessor Search and MLS listing of 12 Wildwood Avenue, West Orange, NJ

186-17

AGENCY DKT. NO. 23-2/16

G.P. AND I.R.-P., ON BEHALF OF MINOR CHILD, A.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	ORDER
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
RESPONDENT.	:	

On December 15, 2016, a final agency decision was rendered in this matter, wherein the Commissioner found G.P. and I.R.-P. liable for tuition in the amount of Five Thousand Eight Hundred Ninety One Dollars and Seventy Cents ($5,891.70), representing tuition for a period of ineligible attendance by their child, A.P., in the Board's school district between October 26, 2015 and March 16, 2016. The Board subsequently notified the Commissioner that G.P. and I.R.-P. had failed to comply with the decision, and requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. G.P. and I.R.-P. offered no reasons why the judgment against them should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Gaetano Pensavalle and Irma Rivera-Pensavalle are now subject to entry of a judgment by the court in the amount of $5,891.70, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/05/17

Date of Mailing: 7/05/17

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

July 5, 2017

Michelle M. Smith, Clerk
Superior Court of New Jersey
Hughes Justice Complex
25 Market Street, 6th Floor
P.O. Box 971
Trenton, NJ 08625

Re: Request for Docketing of Judgment

Dear Ms. Smith:

In accordance with *N.J.S.A.* 2A:58-10, I am enclosing the July 5, 2017 Order of the Commissioner of Education finding that Gaetano Pensavalle and Irma Rivera-Pensavalle are subject to entry of a judgment on the docket of the court due to their failure to pay the tuition assessment ordered in the matter of *G.P. and I.R.-P., on behalf of minor child, A.P. v. Board of Education of the Township of Hamilton, Mercer County.*[1] By copy of this letter, I am advising Mr. Pensavalle and Ms. Rivera-Pensavalle, as well as counsel for the Hamilton Township Board of Education, of the Commissioner's issuance of the enclosed Order.

If you require anything more, please contact this office at (609) 292-5706.

Very truly yours,

Kathleen Duncan /SKH

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

Enclosure
c: Gaetano Pensavalle (with copy of Order)
Irma Rivera-Pensavalle (with copy of Order)
Daniel Roberts, Esq. (with copy of Order)
State Law Library (with copy of Order)

[1] Please note that, although the case caption reflects only Mr. Pensavalle's and Ms. Rivera-Pensavalle's initials, their full names are included within the body of the Commissioner's Order.

185-17

IN THE MATTER OF THE SUSPENSION :

OF THE TEACHING CERTIFICATE OF : COMMISSIONER OF EDUCATION

CARLOS BAEZA, SCHOOL DISTRICT OF THE : DECISION

TOWNSHIP OF IRVINGTON, ESSEX COUNTY. :

SYNOPSIS

In October 2016, the Commissioner of Education issued an Order to Show Cause requiring respondent to show cause why an order should not be entered suspending his teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10, for resigning his position without giving the required 60 day notice. The respondent – a non-tenured teacher – contended that he did not have a contract for the 2016-2017 school year, and was therefore not obligated to provide a 60 day notice. The Board contended that – while no formal contract for the 2016-2017 school year was offered to Mr. Baeza – a June 20, 2016 letter rescinding respondent's non-renewal created an implied contract.

The ALJ found, *inter alia*, that: *N.J.S.A.* 18A:26-10 provides, in pertinent part, that any teaching staff member "who shall, without the consent of the board...cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year"; in this case, respondent was initially employed by the petitioning Board as a middle school science teacher in March 2016, under a "Contingency Employment Contract" which expired on June 30, 2016; in May 2016, respondent received a letter from the Board informing him that his employment would not be renewed for reasons of economy; in June 2016, respondent received a second letter from the Board stating that his non-renewal was rescinded, but he received no formal contract for his review and signature; respondent received two letters in August of 2016 regarding the beginning of the school year and classroom setup, but again did not receive a written contract; the second of these letters clearly indicated that respondent's employment was contingent upon Board approval at a scheduled meeting on August 17; since respondent had still not received a formal contract for the 2016-2017 school year by late August, he accepted an offer of employment in the Paterson School District. The ALJ concluded that the respondent had no formal offer of employment for the 2016-2017 school year, but rather received a flurry of mixed messages, including: a non-renewal letter, a rescission of that letter, and a letter advising that his reemployment remained contingent on board approval. Respondent's conduct in accepting a formal contract offered by another school district was reasonable and did not violate *N.J.S.A.* 18A:26-10. Accordingly, the petitioning Board's request that the Commissioner suspend the respondent's teaching certificate was denied.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 6/29/17

OAL DKT. NO. EDU 18362-16
AGENCY DKT. NO. 282-10/16

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
CARLOS BAEZA, SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF IRVINGTON, ESSEX COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) – for the reasons thoroughly set forth in the Initial Decision – that respondent did not enter into an employment contract with the Board for the 2016-2017 school year, and therefore acted reasonably in accepting new employment. As such, the Commissioner is in accord with the ALJ that respondent's certificate should not be suspended pursuant to *N.J.S.A.* 18A:26-10 because he is not guilty of unprofessional conduct.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/29/17
Date of Mailing: 6/30/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 18362-16
AGENCY DKT. NO. 282-10/16

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF CARLOS BAEZA, SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY.

Yadira Duran, Esq., for petitioner (Hunt Hamlin and Ridley, attorneys)

Carlos Baeza, respondent, pro se

Record Closed: May 25, 2017 Decided: May 25, 2017

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Irvington School District (Irvington), seeks an order suspending respondent's teaching certificate for a period of one year, contending that he resigned from his teaching position with inadequate notice. Respondent, Carlos Baeza, replies that he had not been given a contract of employment for the 2016-2017 school year, and thus accepted alternative employment. Baeza asserts that his actions in no way violated N.J.S.A. 18A:26-10.

On or about October 3, 2016, at the request of Irvington, the Commissioner of Education (the Commissioner) entered an Order directing Baeza to show cause why his teaching certificate should not be suspended for unprofessional conduct, pursuant to N.J.S.A. 18A:26-10. Baeza filed an answer on December 2, 2016. On December 5, 2016, the Commissioner transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case. A hearing was conducted on May 25, 2017, at which time the record closed.

FACTUAL DISCUSSION AND FINDINGS OF FACT

The facts are not in dispute and I **FIND**:

Baeza holds certification issued by the Department of Education as a teacher of elementary and middle school science. He was initially employed by Irvington in March 2016 to serve as science teacher in the seventh and eighth grades at University Middle School. He was employed pursuant to a "Contingency Employment Contract" dated February 17, 2016; his contract expired on June 30, 2016.

On May 11, 2016, Baeza and every other non-tenured staff member received an email from the Superintendent of Schools advising that their employment would not be renewed. The email cited budgetary constraints, and urged that the non-renewal was not performance related. Superintendent Neely Hackett explained that a proposed move to a new health plan could potentially ease these budgetary restrictions; that the legality of the proposed change was under review; and that she hoped to be able to rescind the non-renewals in the coming weeks.

Baeza again heard from the district via a letter from the Human Resources Department dated June 20, 2016, advising that his non-renewal had been "rescinded as of the date of this letter." But Baeza received no formal contract for his review and signature. By letter dated August 12, 2016, the principal of University Middle School shared information about the coming year; indicated that staff were required to report on September 6, 2016; and would be able to set up their classrooms during the week of August 29, 2016. Baeza received this letter, but again, received no contract of

employment. By letter dated August 17, 2016, the Irvington Schools Office of Government Programs advised that there would be a two-day orientation on August 31 and September 1, 2016. Baeza received this letter, but again, no contract of employment. And this latter letter states, quite unequivocally, "that [his] employment is contingent on Board approval at the scheduled Board of Education meeting on August 17, 2016."

Counsel for the school district confirmed that no formal contract was ever offered to Baeza, urging that the June 20, 2016, letter rescinding his non-renewal created an implied contract. As for whether Baeza's employment was approved by the Board on August 17, 2016, as noted in the letter of the same date, counsel had no knowledge whether his employment was approved by the Board that night, or any night before or after.

As a science teacher, Baeza's services are in demand. Late in August 2016, he was approached with an offer of employment by the Paterson Schools. Having not yet received a contract, or any indication that the Board had approved his employment for the 2016-2017 school year, he accepted the position in Paterson. Via email sent on August 30, 2016, Baeza advised that, "as I had received no formal notice of my continuance at University Middle School, please be advised that I will not be returning to teach this academic year, as I had to make other arrangements for employment." Hackett replied that he "most certainly did receive notice and...will be held to [his] 60-day requirement." She asked for a letter of resignation. By reply email sent September 6, 2016, Baeza stated he had no intention of resigning as there was no employment from which to resign. He pointed out that his contract expired June 30, 2016, and he had not received a successor contract.

The district called Baeza himself as its only witness, and offered no evidence that Baeza's conduct caused any inconvenience or disruption to the public schools.

CONCLUSIONS OF LAW

N.J.S.A. 18A:26-10 provides that "[a]ny teaching staff member employed by a board of education . . . who shall, without the consent of the board . . . , cease to perform

his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year." See also N.J.A.C. 6A:9-17.9. The Commissioner has held that the central purpose of N.J.S.A. 18A:26-10 is "to provide notice to the school so that a suitable replacement can be hired without adversely impacting students." Penns Grove-Carneys Point Bd. of Educ. v. Leinen, 94 N.J.A.R.2d (EDU) 405, 407. The decision to suspend a teaching certificate pursuant to N.J.S.A. 18A:26-10 is discretionary and the Commissioner has historically evaluated all circumstances specific to an individual case. Black Horse Pike Reg'l Sch. Dist. v. Mooney, 1984 S.L.D. 821; In re Capshaw, EDU 12318-06, Initial Decision (April 30, 2007), modified, Comm'r (June 12, 2007), <http://njlaw.rutgers.edu/collections/oal/>; East Amwell Twp. Bd. of Educ. v. Acken, 1986 S.L.D. 2803.

For a non-tenured staff member like Baeza, the inquiry regarding whether there has been a violation of N.J.S.A. 18A:26-10 must commence with an understanding of the "the term of his employment." The contractual understanding between the parties thus becomes the critical reference point. A binding contract is formed between two parties when there is a meeting of the minds evidenced by a written offer and an unconditional written acceptance. Morton v. 4 Orchard Land Trust, 180 N.J. 118, 129–30 (2004) (citing Johnson and Johnson v. Charmley Drug Co., 11 N.J. 526, 538–39 (1953)). Here, Baeza did not terminate his employment before the expiration of the term of his employment, because he had no contract, and thus, no term of employment. Irvington's argument that an implied contract was created by the rescission of its non-renewal notice is devoid of merit.

Indeed, N.J.S.A. 18A:27-5 makes it clear that a contract of employment must be in writing. And N.J.S.A. 18A:27-6 requires that such contracts specify a start date; the kind of certificate required; the salary; and "such other matters as may be necessary to a full and complete understanding of the contract." These statutory provisions echo the well accepted view that a contract must evidence the mutual understanding by the parties of its essential terms. A letter simply stating that an employee's non-renewal has been rescinded meets none of these requirements, and cannot be held to form a binding contract, as Irvington suggests.

Moreover, N.J.S.A. 18A: 27-10 required the school district to non-renew Baeza on or before May 15, or give him a contract by that date. And Irvington did timely non-renew him. Only if it had not, would Baeza have had any absolute expectation of continued employment, as N.J.S.A. 18A: 27-11 provides that in the absence of timely notice of non-renewal the school district "shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as required by law or policies of the board of education."

I thus agree with Baeza that he had no formal offer of employment for the 2016-2017 school year and instead, a flurry of mixed messages, to include, a non-renewal letter; a recession of that letter; and a letter advising that his reemployment remained contingent on board approval. Like most Americans, Baeza needed a job, so he did what anyone under the circumstances would have done, he accepted a formal contract offered by another school district. I **CONCLUDE** that his conduct was eminently reasonable, and did not violate N.J.S.A. 18A: 26-10.

I fully recognize that teaching is a unique occupation where a change in personnel can affect many young lives.[1] N.J.S.A. 18A:26-10 confirms that a dedicated teacher must always put his students first, and resigning teachers must afford as much notice as administration feels is needed to ensure that education will continue uninterrupted. But the statute makes it plain that the non-tenured employee's professional obligations are those established by the "term of employment" agreed upon by the parties, and not by any intrinsic notion of professionalism. An employing school is thus obliged to offer a non-tenured staff member an actual contract, and not an implied one, if it expects that staff member to feel obliged to report to work at the start of a new school year.

[1] While I am willing to take judicial notice of the fact that a change in teacher creates added work for administration, the school district is cautioned for the future that it is obliged to offer evidence of actual disruption to the district and its students in a proceeding of this kind. Each circumstance is unique. Here, Baeza left before he met his students, and it is surely possible that the district immediately found a replacement, thus causing little or no disruption to the classroom. Or conversely, it might have taken the district months to replace him. The burden is on the school district to prove disruption. And the penalty imposed may vary, based on the disruption created by the teacher's conduct.

Finally, I am compelled to point out that both the administrative law judge and the Commissioner roundly rejected the identical arguments when they were previously raised by Irvington in In Re Canela, Irvington School District, EDU 17209-16, Initial Decision (January 12, 2017), aff'd Commissioner (February 23, 2017), <http://njlaw.rutgers.edu/collections/oal/>. It is noteworthy that there too, the district cited N.J.S.A. 18:28-8 in it petition, which was inapplicable there, and is likewise inapplicable here, as that statute governs the obligations of tenured staff members.

ORDER

Based on the foregoing, it is **ORDERED** that the request by the Irvington Public Schools that the Commissioner suspend the teaching certificate of Carlos Baeza pursuant to N.J.S.A. 18A: 26-10 is **DENIED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 25, 2017

DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

May 25, 2017

Date Mailed to Parties:

MAY 26 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Petitioner:

Carlos Baeza

For Respondent:

Carlos Baeza

EXHIBITS

For Petitioners:

P-1 Email dated May 11, 2016

P-2 Email sent August 30, 2016

P-3 Email sent September 6, 2016, with email trail

P-4 Letter dated June 20, 2016, with acknowledgement of receipt

For Respondent:

R-1 Contract

R-2 Letter dated August 17, 2016

R-3 Letter dated August 12, 2016

187-17

OAL DKT. NO. EDU 216-16
AGENCY DKT. NO. 222-8/15

T.G., on behalf of minor children, T.S. and T.S.,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	
	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
	:	
RESPONDENT	:	

On June 10, 2016, a final agency decision was rendered in this matter, wherein, the Commissioner dismissed the petition of appeal with prejudice, finding that dismissal of the petition was proper due to T.G.'s failure to appear and prosecute on the rescheduled hearing date of April 14, 2016.[1] The Commissioner assessed petitioner, Tracy Green, $46,998.62 in tuition costs for T.S. and T.S. for the period of ineligible attendance, plus each day beyond April 14, 2016 that T.S. and T.S. remained enrolled in the District's schools. The Board subsequently notified the Commissioner that petitioner had failed to reimburse respondent as directed in the final decision, and has requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Petitioner offered no reasons why the judgment against her should not be so docketed, although given an opportunity to do so by this agency.

[1] Petitioner had previously failed to appear for the original hearing date of January 4, 2016, and subsequently requested that the hearing be rescheduled. However, petitioner again did not appear at the April 14, 2016 hearing, and also failed to provide an explanation for her non-appearance and lack of prosecution.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Tracy Green is now subject to entry of a judgment by the court in the amount of $46.998.62,[2] which represents the total payment ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/06/17

Date of Mailing: 7/06/17

[2] The additional tuition per day was not assessed, as the Board has notified the Commissioner that T.S. and T.S. were withdrawn from the District.

- 187-17

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

KIMBERLEY HARRINGTON
Acting Commissioner

July 6, 2017

Michelle M. Smith, Clerk
Superior Court of New Jersey
Hughes Justice Complex
25 Market Street, 6th Floor
P.O. Box 971
Trenton, NJ 08625

Re: Request for Docketing of Judgment

Dear Ms. Smith:

In accordance with *N.J.S.A.* 2A:58-10, I am enclosing the Order of the Commissioner of Education finding that Tracy Green is subject to entry of a judgment on the docket of the court due to her failure to pay the tuition assessment ordered in the matter of *T.G., on behalf of minor children, T.S. and T.S. v. Board of Education of the Township of Hamilton, Mercer County.*[1] By copy of this letter, I am advising Ms. Green as well as counsel for the Hamilton Board of Education, of the Commissioner's issuance of the enclosed Order.

If you require anything more, please contact this office at (609) 292-5706.

Very truly yours,

Kathleen Duncan /JKH

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

Enclosure
c: Tracy Green, *pro se* (with copy of Order)
Daniel R. Roberts, Esq. (with copy of Order)
State Law Library (with copy of Order)

[1] Please note that, although the case caption reflects only Ms. Green's initials, her full name is included within the body of the Commissioner's Order.

190-17EL

196-17

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Acting Commissioner

July 12, 2017

Mark G. Toscano, Esq.
Comegno Law Group, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057

Edward C. Bertucio, Esq.
Hobbie, Corrigan & Bertucio, P.C.
125 Wyckoff Road
Eatontown, New Jersey 07724

Re: *West Windsor-Plainsboro Regional School District, Mercer County v. New Jersey State Interscholastic Athletic Association*, Agency Dkt. No. 113-6/17

Dear Counsel:

I have reviewed the materials filed in connection with the petition of appeal and motion for emergent relief filed by the petitioner, West Windsor-Plainsboro Regional School District (District), in the above-captioned matter. The District is appealing the decision of the Executive Committee of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying its request for a hearing before the Executive Committee in connection with the May 23, 2017 Board Resolution, permitting West Windsor-Plainsboro students to participate in co-curricular and/or athletic programs at the other District high school when such programs are not offered at their school of residence.

The District contends that it began having concerns that it may not be able to maintain separate football programs at the West Windsor-Plainsboro High School North (HSN), which is classified as Group III school, and West Windsor-Plainfield High School South (HSS), which is classified as Group IV school. As a result, the District sought to establish a cooperative agreement for football whereby there would be one football team for the 2017-2018 school year that would be comprised of students from both HSN and HSS.[1] However, Article III, Section 10 of NJSIAA's Constitution, Bylaws, Rules and Regulations prohibits cooperative football agreements by a Group III football program. Therefore, the District applied to the West Jersey Football League (WJFL) to request a waiver of the Cooperative Sports Program Regulation and the approval of a cooperative football agreement between HSN and HSS for the 2017-2018 school year.[2] The WJFL denied the District's request, citing various reasons why the waiver would not only impact other schools in the WJFL conference but also all schools in the state.

---

[1] The District contends that it was seeking a waiver of the Cooperative Sports Program Regulation based upon several factors, including: the lack of a robust feeder program; decreasing enrollment; decreasing student interest; fear of sports injury and concussions; and the District's inability to run sub-varsity programs.

[2] The District also appeared before the NJSIAA Executive Committee to present its request to advance proposed legislation regarding a formal change to the NJSIAA's Constitution and Bylaws to allow Groups III, IV, and V to enter into a cooperative agreement for football under specific provisions.

The District appealed the WJFL's decision to the NJSIAA League and Conference Committee. Following a hearing on May 23, 2017, the League and Conference Committee denied the District's request for a waiver of the Cooperative Sports Program Regulation. The District could have appealed that decision to the Executive Committee in accordance with Article XII, Section 5 of the Bylaws.[3] Instead, later that day, the District passed a Board Resolution that permitted District students to participate in co-curricular and/or athletic programs at the other District high school when such programs are not offered at their school of residence. The Board Resolution effectively allowed the cooperative agreement for football that is expressly prohibited by the NJSIAA's Constitution and Bylaws and was the subject of the waiver request that was denied by the League and Controversies Committees.

On May 24, 2017, the Board informed the NJSIAA's Executive Committee of the Board Resolution and requested a hearing before the Executive Committee on the Resolution's immediate enactment. The District sought to have an immediate decision from the Executive Committee under Article XII, Section 6 of the Bylaws, which permits the Executive Committee to hear a controversy and render a decision in "emergent circumstances where time will not permit a controversy to be heard by the Controversies Committee." The NJSIAA denied the District's request for another hearing, stating that the substance of the Board Resolution was already the subject of a hearing before the League and Conference Committee.[4] The NJSIAA also noted that the District's desire to have the Executive Committee act on the Board Resolution does not amount to a "complaint, protest or dispute" that would entitle the District to review by the Executive Committee under Article XII, Section 4 of the NJSIAA's Bylaws.

The Commissioner's scope of review in matters involving NJSIAA decisions is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a)(2); *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Nor may the Commissioner substitute his own judgment for that of the NJSIAA, where due process has been provided and where there is sufficient credible evidence in the record as a whole to serve as a basis for the decision reached by the NJSIAA. *N.J.A.C.* 6A:3-7.5(a)(1).

Additionally, pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. The party seeking such relief must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

Upon review of the parties' submissions, I find that the District has failed to meet the standard required for emergent relief because the District has not demonstrated a likelihood of success on

[3] Pursuant to Article XII, Section 5 of the Bylaws, "[a]ny party [that] is aggrieved by any decision of the Controversies Committee ... may appeal to the Executive Committee ... [whereby] the Executive Committee shall serve as an appellate body, and the appeal shall be limited to the record developed before the Controversies Committee."

[4] The League and Conference Committee is a sub-committee within the Controversies Committee.

the merits.[5] More specifically, the District has not made a preliminary showing that the NJSIAA applied its rules in an arbitrary or unreasonable manner when it denied the District's request for a hearing and immediate action on the Board Resolution based on the fact that the substance of the resolution was already decided by the League and Conference Committee after an extensive hearing.

The District contends that the NJSIAA has failed and/or refused to take action with respect to the Board Resolution that would establish one football team comprised of students from both HSN and HSS for the 2017-2018 school year. Although the District has attempted to characterize the Board Resolution as a separate action from its request for a waiver of the Cooperative Sports Programs Regulation, it is evident that the application of the Board Resolution to football has already been decided and denied by the League and Conference Committee.[6] Certainly without the NJSIAA granting a waiver of the Cooperative Sports Programs Regulation, the adoption of the Board Resolution is meaningless with respect to football.[7] A board of education cannot simply pass a resolution as a mechanism to circumvent the NJSIAA's Constitution and Bylaws; and it is undisputed that the NJSIAA Bylaws prohibit Group III schools from entering into a cooperative agreement for football. There is also nothing in the record to suggest on emergent relief that the NJSIAA's determination that the District's desire to have the Executive Committee act on the Board Resolution does not amount to a "complaint, protest or dispute" under Article XII, Section 4 of the NJSIAA's Bylaws.

In light of the fact that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the three remaining factors. Accordingly, the District's request for emergent relief and an Order granting the immediate enactment of the Board's Resolution is hereby denied.

Sincerely,

Peter Shulman
Deputy Commissioner[8]

c: County Superintendent
State Law Library

VIA FAX AND REGULAR MAIL

[5] This is not a decision on the merits of the NJSIAA's denial of the District's request for a waiver of the Cooperative Sports Program Regulation, but rather a decision on the NJSIAA's denial of the District's request for a hearing before the Executive Committee and the immediate enactment of the Board Resolution.

[6] The District was afforded the requisite due process in connection with the waiver request. Not only did the WJFL review the waiver request, but the League and Conference Committee also held a hearing during which the District had an opportunity to present testimony and thoroughly present its arguments in favor of the waiver.

[7] Not all sports are treated the same in the Cooperative Sports Programs Regulation.

[8] This matter has been delegated to the Deputy Commissioner pursuant to *N.J.S.A.* 18A:4-33.

191-17

OAL DKT. NOS. EDU 04548-16, EDU 04551-16, EDU 04549-16, and EDU 04550-16 (consolidated)
AGENCY DKT. NOS. 65-2/16, 66-2/16, 67-2/16, and 68-2/16

J.M. AND T.M., ON BEHALF OF MINOR CHILD, J.M.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

RESPONDENT,

AND

T.D. AND S.D., ON BEHALF OF MINOR CHILD, T.D.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

RESPONDENT,

AND

A.H. AND S.H., ON BEHALF OF MINOR CHILD, Z.H.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

RESPONDENT,

AND

COMMISSIONER OF EDUCATION

DECISION

M.C. AND C.C., ON BEHALF OF MINOR CHILD, M.C.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

RESPONDENT.

The record of this matter, the proposed settlement agreement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/11/17

Date of Mailing: 7/13/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04548-16

AGENCY REF. NO. 65-2/16

J.M. AND T.M. ON BEHALF OF MINOR CHILD J.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

Respondents.

T.D. AND S.D. ON BEHALF OF MINOR CHILD T.D.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

Respondents.

OAL DKT. NO. EDU 04551-16

AGENCY REF. NO. 66-2/16

A.H. AND S.H., ON BEHALF OF MINOR CHILD Z.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

Respondents.

OAL DKT. NO. EDU 04549-16
AGENCY REF NO. 67-2/16

M.C. AND C.C. ON BEHALF OF MINOR CHILD M.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

Respondents.

OAL DKT. NO. EDU 04550-16
AGENCY REF. NO. 68-2/16

CONSOLIDATED

David Khawam, Esq., for Petitioners

Athina Lekas Cornell, Esq., for Respondents (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys)

Record Closed: May 15, 2017

Decided: May 25, 2017

BEFORE: **JOHN P. SCOLLO**, ALJ

Petitioners challenge the Board's Harassment Intimidation and Bullying (HIB) determination of October 26, 2015.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on March 24, 2016.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached Stipulation of Settlement and Board Resolution.

I have reviewed the terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

Therefore, I **CONCLUDE** that this Stipulation of Settlement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

May 25, 2017
DATE

John P. Scollo
JOHN P. SCOLLO, ALJ

Date Received at Agency: 5-30-17

Date Mailed to Parties: MAY 30 2017

Lina Andres
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

CONFIDENTIAL SETTLEMENT AGREEMENT WITH MUTUAL GENERAL RELEASES

WHEREAS, on or about September 28, 2015, a Complaint alleging actions of harassment, intimidation, and bullying ("HIB") was filed with New Providence High School, one of the schools under the governance of the New Providence Board of Education (hereinafter referred to as "Board" or "Respondent"); and

WHEREAS, the New Providence School District (hereinafter referred to as the "District") conducted an investigation of the allegations and determined that harassment, intimidation and bullying was substantiated; and

WHEREAS, the Superintendent of Schools agreed with the investigation's findings; and

WHEREAS, the Board affirmed the recommendation of the Superintendent to substantiate the investigation's findings; and

WHEREAS, the investigation's findings pertain to Petitioners in this matter; and

WHEREAS, there is a dispute between Petitioners and the Board (hereinafter Petitioners and the Board shall be collectively referred to as the "Parties"); and

WHEREAS, on or about October 29, 2015, the Petitioners requested a hearing before the Board and a copy of the investigation file; and

WHEREAS, on December 1, 2015, the Respondent provided a redacted version of the Investigator's report and the HIB complaint; and

WHEREAS, on or about December 2, 2015, a hearing was held before Board with respect to Petitioners; and

WHEREAS, on or about March 3, 2016 a Complaint was filed with the Commissioner of Education on behalf of Petitioner J.M.; and

WHEREAS, on or about March 4, 2016, three (3) separate Complaints were filed with the Commissioner of Education on behalf of Petitioner T.D., Z.H., and M.C., respectively; and

WHEREAS, on or about March 16, 2016, Respondent filed four (4) separate Answers with the Commissioner in response to the Complaints filed on behalf of J.M., T.D., Z.H., and M.C.; and

WHEREAS, the Parties thereafter participated in the exchange of discovery documents and a series of telephone conferences with the Office of Administrative law; and

WHEREAS, on or about November 10, 2016, the Honorable John Scollo, A.L.J., signed an Order to consolidate the four (4) separate Complaints filed by Petitioners and four (4) separate answers filed by Respondent into a single matter; and

WHEREAS, the Parties agree that the conduct of J.M., T.D., Z.H., and M.C. leading to the filing of the September 28, 2015 Complaint with the New Providence High School was inappropriate and had a negative impact on the student who was the subject of the September 28, 2015 Complaint; and

WHEREAS, the Parties acknowledge that Petitioners have not challenged the discipline previously imposed on J.M., T.D., Z.H., and M.C., respectively, and all discipline has been served;

NOW THEREFORE, the Parties having a desire to settle the above matter in an amicable way, hereby agree as follows:

1. The Board shall modify the investigation finding of harassment, intimidation, and bullying and re-categorize same as Disruptive Behavior pursuant to Board Regulation 5600, Student Discipline/Code of Conduct.

2. The Parties agree that the New Providence School District records associated with this matter shall be revised to reflect a re-categorization of the initial harassment, intimidation, and bullying finding as set forth in paragraph 1 of this Agreement. All

reference to the initial harassment, intimidation and bullying findings shall be expunged from all student records, including but not limited to, Powerschool and District files. No information related to a previous HIB finding shall be disclosed and/or reported to any third parties.

3. The Parties agree that Petitioners, including but not limited to J.M., T.D., Z.H., and M.C. and their parents/guardians, expressly agree not to engage in any and all negative or inappropriate discussion of the District student who was the subject of the September 28, 2015 Complaint filed in this matter. The parties agree that Petitioners, including but not limited to J.M., T.D., Z.H., and M.C. and their parents/guardians, also expressly agree not to engage in any negative or inappropriate discussion of the District student's family.

4. The Parties have reached this compromise to avoid the expense, inconvenience, and potential acrimony of an administrative law hearing under the school laws. The Parties specifically disclaim any liability to each other. The Parties' entry into this Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the Parties' part. Any such obligation or liability on either Party's part is expressly denied. The Parties have all entered into this Agreement solely to compromise disputed claims.

5. In consideration of the settlement of the captioned matter, the Parties forever waive their right to take any action against each other regarding this matter.

6. In consideration of the settlement of the captioned matter, the Parties shall forever release each other from any and all claims, rights and liability, including but not limited to any and all claims for attorney's fees, money damages, civil liability, or any other equitable or legal relief.

7. This Agreement contains the entire Agreement and understanding between all Parties and constitutes a full and final Agreement on any and all issues.

8. Any dispute arising out of the breach of this Agreement shall be governed by the laws of the State of New Jersey.

9. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

10. The Parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. The Parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they reviewed the Agreement in detail with their counsel or representative and fully understand its requirements and limitations.

11. This Agreement shall remain confidential to the maximum extent permitted by law and the Parties shall not disclose its form or contents to any third parties.

12. The Parties expressly agree that they shall act in good faith to ensure implementation of this Agreement. The Parties mutually agree to refrain from making any derogatory comments, written or oral; retaliation or disparagement, in any manner, against the other Party or their families, family members, agents, officials, administrators, representatives and employees.

13. This Agreement shall be construed as if it were drafted by both Parties contemporaneously.

14. This Agreement is subject to ratification by the New Providence Board of Education.

J.M., Petitioner
Date: 4/19/17

T.M., Petitioner
Date: 4/19/17

J.M. o/b/o minor child J.M., Petitioner
Date: 4/19/17

T.M. o/b/o minor child J.M., Petitioner
Date: 4/19/17

T.D., Petitioner
Date:

S.D., Petitioner
Date:

T.D. o/b/o minor child T.D., Petitioner
Date:

S.D. o/b/o minor child T.D., Petitioner
Date:

11. This Agreement shall remain confidential to the maximum extent permitted by law and the Parties shall not disclose its form or contents to any third parties.

12. The Parties expressly agree that they shall act in good faith to ensure implementation of this Agreement. The Parties mutually agree to refrain from making any derogatory comments, written or oral; retaliation or disparagement, in any manner, against the other Party or their families, family members, agents, officials, administrators, representatives and employees.

13. This Agreement shall be construed as if it were drafted by both Parties contemporaneously.

14. This Agreement is subject to ratification by the New Providence Board of Education.

J.M., Petitioner
Date:

T.M., Petitioner
Date:

J.M. o/b/o minor child J.M., Petitioner
Date:

T.M. o/b/o minor child J.M., Petitioner
Date:

Thomas P Dolan
T.D., Petitioner
Date:

Sally Dolan
S.D., Petitioner
Date:

Thomas P Dolan
T.D. o/b/o minor child T.D., Petitioner
Date:

Sally Dolan
S.D. o/b/o minor child T.D., Petitioner
Date:

A.H., Petitioner
Date: 4/9/17

S.H., Petitioner
Date 4/9/17

A.H. o/b/o minor child Z.H., Petitioner
Date: 4/9/17

S.H. o/b/o minor child Z.H., Petitioner
Date 4/9/17

M.C., Petitioner
Date:

C.C., Petitioner
Date:

M.C. o/b/o minor child M.C., Petitioner
Date:

C.C. o/b/o minor child M.C., Petitioner
Date:

ON BEHALF OF THE NEW PROVIDENCE BOARD OF EDUCATION

Adam Smith, Board President
Date:

A.H., Petitioner
Date:

S.H., Petitioner
Date

A.H. o/b/o minor child Z.H., Petitioner
Date:

S.H. o/b/o minor child Z.H., Petitioner
Date

M.C., Petitioner
Date:

C.C., Petitioner
Date:

M.C. o/b/o minor child M.C., Petitioner
Date:

C.C. o/b/o minor child M.C., Petitioner
Date:

ON BEHALF OF THE NEW PROVIDENCE BOARD OF EDUCATION

Adam Smith, Board President
Date:

NEW PROVIDENCE SCHOOL DISTRICT

356 ELKWOOD AVENUE, NEW PROVIDENCE, NJ 07974

Fax (908) 464-9041 • www.npsd.k12.nj.us

DAVID M. MICELI, Ed.D.
Superintendent of Schools
908-464-9050 (ext. 225)

SCOTT D. HOUGH
Assistant Superintendent
of Educational Services
908-464-9050 (ext. 222)

JAMES E. TESTA
School Business Administrator/
Board Secretary
908-464-9050 (ext. 223)

ANN MARIE INZANO
Interim Director of Curriculum
Instruction, and Supervision
908-464-9050 (ext. 221)

April 28, 2017

ACTION ITEMS

Education Action

Mrs. Cuccaro, Committee Chairperson, moved to approve Item 4 as listed below:

4. Approve the settlement agreement for all parties, Students #1240148, #1240119, #1240515, and #1240110, copies in the hands of each Board member.

The motion was seconded by Mr. Dinerman and carried on the following roll call vote:

Mrs. Cuccaro	Yes
Mr. Dibble	Yes
Mr. Dinerman	Yes
Mr. Krauss	Yea
Mrs. Misiukiewicz	Absent
Mr. Smith	Yes
Mr. Walsh	Yea

This is a true copy of the minutes of April 27, 2017.

James E. Testa
School Business Administrator/Board Secretary

J/JT/CertMin/ResolutionSettlementAgreement4-27-17

192-17

OAL DKT. NO. EDU 08155-17
AGENCY DKT. NO. 114-6/17

S.R., ON BEHALF OF MINOR CHILD, J.G.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST ORANGE ESSEX COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. In this case, the petitioner is appealing the decision of the East Orange Board of Education (Board) not to allow J.G. to participate in her 8th grade promotional ceremony. The ALJ denied the petitioner's request for emergent relief.*

Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe*. *Ibid.* The party seeking such relief must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the

* The recommended Order states that the petitioner's motion for emergent relief is denied under *N.J.A.C.* 6A:3-1.6, but it does not explain the relevant facts, nor does it specifically state why one or more of the *Crowe* prongs were not established.

equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

In this case, the petitioner has failed to demonstrate a likelihood of success on the merits that the Board acted in an arbitrary, capricious or unreasonable manner in determining that J.G. is ineligible to participate in the 8th grade promotional exercises. The Board advised petitioner on May 31, 2017 that J.G. would be ineligible to participate in the promotional exercises due to chronic absenteeism, excessive tardiness, multiple infractions against the code of conduct and multiple violations of the 8th grade contract. (Exhibit R14) Pursuant to *N.J.A.C.* 6A:16-7.1(d)(1), "[a] district board of education may deny participation in extracurricular activities, school functions, sports, graduation exercises or other privileges as disciplinary sanctions when designed to maintain the order and integrity of the school environment."

Judging from the testimony at the emergent hearing in this matter, it is clear that the Board took the position that J.G. was ineligible to participate in the promotional exercises because she continued to violate school policy. Specifically, J.G. was absent 18 times, was tardy 51 times, and had numerous disciplinary infractions, including cell phone violations, entries into unauthorized areas of the school, and a physical altercation with other students. The Board informed J.G. via a "redemption contract agreement" that she was ineligible to attend the class field trip to Dorney Park due to a January 18, 2017 cell phone violation, but that she could earn her privileges back through maintaining positive relationships, completing all class assignments, and refraining from receiving any discipline referrals. (Exhibit R6) Thereafter, following an unauthorized area violation on March 2 and a group fight on March 23, 2007, J.G. received two more redemption contracts indicating that she lost her privileges to attend not only the Dorney Park trip, but also the 8th grade social and the promotional exercises. (Exhibits R7 and R8)

Following those incidents, J.G. received another unauthorized area violation on April 28, threw student binders on the floor on May 3, and had a verbal altercation with another student on May 11, 2017. (Exhibits R4, R9, and R10) Considering J.G.'s behavior, especially after she was informed that she would be ineligible to attend the promotional exercises absent displaying positive behavior and avoiding any disciplinary referrals, it is clear that the school did not act in an arbitrary, capricious, or unreasonable manner in refusing to allow J.G. to participate in the 8th grade promotional exercises. Therefore, in light of the fact that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the three remaining factors.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted as modified. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/11/17
Date of Mailing: 7/13/17

Email 6-15-17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 08155-17
AGENCY DKT. NO. 114-6/17

S.R., on behalf of minor child, J.G.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY
Respondent.

BEFORE **JEFFREY A. GERSON**, ALJ:

THIS MATTER HAVING COME BEFORE THE COURT, on Petitioner's Motion for Emergency Relief, Petitioner appearing Pro se, with Leonard V. Jones, Esq. appearing for Respondent and the Court having read the papers submitted by Petitioner, heard the arguments of the parties and having considered the respective positions of the Parties and the applicable laws;

NOW, FOR GOOD CAUSE SHOWN, IT IS ON THIS 15th day of June, 2017 ORDERED that based on the testimony and decision on the attached CD, petitioner's Motion for Emergency Relief is hereby **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 15, 2017

Date

JEFFREY A. GERSON, ALJ

sej

cc: Robert Giordano, Clerk

193-17

OAL DKT. NO. EDU 2364-16
AGENCY DKT. NO. 8-1/16

S.L. and J.L., on behalf of minor child, J.L., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY, : DECISION

RESPONDENT. :

The record of this matter, the parties' proposed Settlement & Release Agreement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In so doing, however, the Commissioner notes with respect to paragraph 16 of the Agreement that the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.* in regard to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential. Additionally, with respect to paragraphs 8 and 9, as set forth in *N.J.A.C.* 6A:3-3.1(b), parties seeking enforcement of agency judgments must bring action in the Superior Court as provided in New Jersey Court Rules at R.4:67-6. Therefore, the parties may not seek enforcement of the Agreement with the Commissioner of Education.

Accordingly, this matter is hereby dismissed, subject to compliance with the terms of the settlement consistent with applicable public records law and *N.J.A.C.* 6A:3-3.1(b).

IT IS SO ORDERED.

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 7/13/17
Date of Mailing: 7/13/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 02364-16
AGENCY DKT. NO. 8-1/16

S.L. AND J.L., ON BEHALF OF THEIR MINIOR CHILD, J.L.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

Respondent.

Richard J. Kaplow, Esq., for petitioners

Athina L. Cornell, Esq., for respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys)

Record Closed: May 30, 2017 Decided: June 6, 2017

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

On October 19, 2015, respondent determined that J.L. had committed an act of harassment, intimidation, and bullying in violation of the New Jersey Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq. On January 11, 2016, petitioners appealed the determination to the Department of Education. On February 8, 2016, the Bureau of

Controversies and Disputes transmitted the case to the Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On February 22, 2016, the case was assigned to me for hearing. After steadfast negotiations, the parties entered into a settlement agreement, which is attached to this decision. On May 22, 2017, Board of Education approved the settlement agreement.

Having reviewed the terms of the settlement agreement, I **FIND** that the parties have entered into the settlement agreement voluntarily, as evidenced by their signatures, or the signatures of their representatives, on the settlement agreement.

I **CONCLUDE** that the settlement agreement disposes all of the issues in controversy between the parties and that the settlement agreement is consistent with law.

Given my finding of fact and conclusion of law, I **ORDER** that the parties comply with the terms of the settlement agreement.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this case. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days, and unless such time limit is otherwise extended, this recommended decision shall become a final decision under N.J.S.A. 52:14B-10.

6/6/17
DATE

BARRY E. MOSCOWITZ, ALJ

6-8-17

Date Received at Agency:

Date Mailed to Parties: JUN 8 2017

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Attorney ID #012111977
RICHARD J. KAPLOW
53 Elm Street
Westfield, New Jersey 07090
(908) 232-8787
Attorney for Petitioners

S.L. and J.L. o/b/o J.L.	:	
	:	
Petitioners,	:	BEFORE THE STATE OF NEW JERSEY
	:	DEPARTMENT OF EDUCATION AND
vs.	:	OFFICE OF ADMINISTRATIVE LAW
	:	
BOARD OF EDUCATION OF THE	:	OAL DKT. NO. EDU-2364-2016 N
BOROUGH OF NEW PROVIDENCE,	:	AGENCY REF. NO. 8-1/16
NEW PROVIDENCE, UNION COUNTY,	:	
	:	
Respondent.	:	SETTLEMENT AGREEMENT
	:	

WHEREAS, J.L. is a student enrolled within the School District of the Borough of New Providence, Union County, New Jersey; and

WHEREAS, the Board of Education OF the Borough of New Providence ("Board") is the local educational authority with the responsibility of providing a free, appropriate, public education to J.L.; and

WHEREAS, Petitioners S.L. and J.L. are the parents of J.L., referred to as "Petitioners"; and

WHEREAS, a dispute existed with regard to a reported incident of alleged harassment, intimidation and bullying ("HIB") involving J.L. which was investigated by the District (the New Providence Board of Education, its Board Members, Administrators, employees, agents and representatives, herein collectively referred to as "the

District) pursuant to its statutory obligations and its HIB Policy; and

WHEREAS, following the District's investigation and an affirmation by the Board of the recommendation of the Superintendent of Schools, J.L. was determined to have engaged in an act of HIB against another student, which J.L. denied and disputed, resulting in the filing of a Petition of Appeal with the Commissioner of Education ("Commissioner"), which was assigned Agency Reference Numbers 8-1/16 and OAL Docket Number EDU-02364-2016-N for J.L.; and

WHEREAS, the parties each having a desire to amicably settle any and all claims in all jurisdictions, asserted and unasserted, now hereby agree as follows:

1. The Board hereby agrees that it shall modify the HIB documentation relating to J.L., including the Investigative Findings, Conclusions and Recommendations, and all other documentation relating thereto, in a manner that will reflect that J.L has solely been found to have engaged in an act that has resulted in "Disruptive Behavior" in violation of the District's Code of Conduct for students;

2. The Parties hereto agree that the New Providence School District records associated with this matter within the District's possession and control shall be modified and revised as set forth herein. All references to the HIB findings, conclusions and recommendations shall be expunged from all student records, including but not limited to Powerschool and District files.

3. The parties agree that the District as collectively defined herein shall not release or authorize the release of any document or student record, or any information, written or oral, contained therein, relating to the HIB incident involving J.L. unless specifically directed by court order upon application on notice to all named parties and their counsel. All such documents and information shall be deemed privileged and confidential.

4. The parties further agree that all documents relating to the HIB incident and the District's investigation shall not be included in J.L.'s cumulative record nor shall the alleged HIB incident and the District's investigation be considered a disciplinary action reportable to any third parties without a specifically directed court order upon application on notice to all named parties and their counsel. In the event any District representative is asked about J.L.'s disciplinary history, all District representatives must state that J.L. has not been disciplined at any time in the District up through and including the date of the within Agreement.

5. The parties hereby stipulate and agree that the Law Firm of Richard J. Kaplow, P.A., 53 Elm Street, Westfield, New Jersey 07090, as attorney for the Petitioners S.L. and J.L. and Sciarrillo Cornell, Merlino, McKeever & Osborne, LLC, Athina Lekas Cornell, Esq., attorney for the Board of Education of the Borough of New Providence, Union County, New Jersey and the District shall take physical possession of the original and all copies of all of the HIB documents related to the HIB investigation, findings, code of

conduct interventions, detentions, this Agreement, and all other aspects of the HIB proceedings involving J.L. No copies of said documents shall be maintained by any other person or anywhere in or by the District except by the Law Firm of Richard J. Kaplow, P.A. and Sciarrillo Cornell, Merlino, McKeever & Osborne, LLC, as set forth herein. The documents referred to herein shall be transferred to the physical possession of Richard J. Kaplow, P.A. within five (5) days following the ratification of this Agreement by the Board with written notice to counsel.

6. The parties agree that neither Richard J. Kaplow, Esq. nor the Law Firm of Richard J. Kaplow, P.A., Athina Lekas Cornell, Esq. nor the Law Firm of Sciarrillo Cornell, Merlino, McKeever & Osborne, LLC shall release or authorize the release of any document or student record, or any information contained therein, relating to the HIB incident involving J.L. unless specifically directed by court order upon application on notice to all named parties and their counsel.

7. S.L. and J.L. on their own behalf and on behalf of J.L. and the District mutually release and forever discharge each other, its/their officers, employees, administrators, agents and servants from any and all past, present or future claims, whether known or unknown to S.L. and J.L. o/b/o J.L., arising out of the alleged HIB incident that was the subject of this litigation.

8. It is expressly understood and agreed that the parties reserve the right to bring a claim before any tribunal of competent jurisdiction to enforce their rights under this Agreement.

9. In the event that any member, employee or authorized agent or representative of the Parties breaches or violates any provision of this Agreement, then in that event the Parties shall have a right to forthwith seek an order of enforcement from either the New Jersey Department of Education, Office of Administrative Law or New Jersey Superior Court. If the Parties are required to seek enforcement pursuant to this provision, and if any such enforcement is obtained by either Party, the other Party shall be required to pay and/or reimburse the aggrieved Party for all counsel fees and costs incurred in any such enforcement application and proceeding.

10. The terms of this Agreement represent the compromise of disputed claims between the parties. This Agreement shall not be treated as an admission of any liability or wrongdoing whatsoever on the part of the District or either of the Petitioners, or that any party has failed to act in accordance with any laws, statutes, regulations and/or codes.

11. Each party shall be responsible for its own attorney's fees and expert costs.

12. The drafting and negotiation of this Agreement have been participated in by each of the parties and their respective counsel and, for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the parties. No ambiguity shall be resolved against any party based upon authorship. The parties acknowledge that they have been represented by counsel throughout the settlement of this matter, throughout the negotiation of this Agreement, and at the execution of this Agreement, and that they have read and consulted with counsel regarding this Agreement and fully

understand its requirements and limitations. The parties further acknowledge that they enter into this Agreement voluntarily and free of coercion.

13. This Agreement shall be governed by the laws of the State of New Jersey and constitutes a complete legal release of any and all claims related to the alleged HIB incident referenced in this litigation, that were or could have been raised by Petitioners against the District regarding J.L. at any time up through the time of the mutual execution and/or entry hereof.

14. This Agreement shall be subject to ratification by the Board and is without prejudice to either party if the terms are not ratified. Petitioners are not bound by this Agreement until it has been ratified by the Board. Upon ratification of this Agreement, the Board shall cause a copy of the relevant resolution to be forwarded to Petitioners. When ratifying this agreement, the Board shall not identify J.L. or J.L.'s family, and to the extent permitted by law, no member of the public will be permitted to review a copy of the agreement. The Resolution ratifying the Agreement shall not contain any personally identifying information, including J.L.'s student ID number, before or after ratification.

15. This Agreement contains the entire agreement between the parties hereto and is intended to resolve any and all disputes and issues related to the alleged HIB incident referenced in this litigation, between them as of the date of execution of this Agreement.

16. This Agreement shall be considered by the parties to be confidential on a mutual basis and neither the District as collectively defined herein nor any of the Petitioners shall be permitted to disclose the terms and conditions of this Settlement

Agreement except upon court order, issued upon application, on notice to all named parties and their counsel or as otherwise required by law.

17. Upon the signing of this Agreement by all parties, Petitioners shall withdraw their Petition of Appeal (Docket No. EDU-02354-2016 N) without prejudice. Upon ratification by the Board, the Petition of Appeal shall be withdrawn with prejudice.

18. The parties stipulate and agree email or fax signatures on this Settlement Agreement shall have the same effect as an original signature.

On Behalf of Petitioner J.L.:

S.L. b/b/o J.L.

Dated: 16-MAY-2017

J.L. d/b/o J.L.

Dated: 5/16/2017

Richard J. Kaplow, Esq.
Attorney for Petitioners
S.L. and J.L. a/b/o J.L.

Dated: 5/16/2017

On behalf of Respondent Board of Education of the Borough Of New Providence:

~~Dr. David Mikell~~ Adam Smith
~~Superintendent of Schools~~ BOE President
For the New Providence School District

Dated: 5/23/17

Athina Lekas Cornell, Esq.
Attorney for Respondent
Board of Education of the
Borough of New Providence

Dated: 5/22/17

NEW PROVIDENCE SCHOOL DISTRICT

356 ELKWOOD AVENUE, NEW PROVIDENCE, NJ 07974

Fax (908) 464-9041 • www.npsd.k12.nj.us

DAVID M. MICELI, Ed.D.
Superintendent of Schools
908-464-9050 (ext. 225)

SCOTT D. HOUGH
Assistant Superintendent of Educational Services
908-464-9050 (ext. 222)

JAMES E. TESTA
School Business Administrator/ Board Secretary
908-464-9050 (ext. 223)

ANN MARIE INZANO
Interim Director of Curriculum Instruction, and Supervision
908-464-9050 (ext. 221)

May 24, 2017

ACTION ITEM

Mrs. Misiukiewicz moved to approve the action item as listed below:

> Approve the settlement agreement for Student #1240068, copies in the hands of each board member.

The motion was seconded by Mr. Walsh and carried on the following roll call vote:

Mrs. Cuccaro	Yea
Mr. Dibble	Yea
Mr. Dinerman	Yea
Mr. Krauss	Yea
Mrs. Misiukiewicz	Yea
Mr. Smith	Yea
Mr. Walsh	Yea

This is a true copy of the minutes of May 22, 2017.

James E. Testa
School Business Administrator/Board Secretary

JET/JA
J/JT/CertMin/SettlementAgree5-22-17

194-17

C.H., on behalf of minor child, M.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the respondent Board's disciplinary determination with respect to his son, M.H. Petitioner contended that the Board's determination that M.H. had made "terroristic threats" – and the subsequent imposition of a four-day out-of-school suspension, forty-five demerits, and placement in an alternative education program – was improper because the District failed to conduct a manifestation determination in accordance with its policy and applicable law. Concurrent appeals challenging the Board's determination were filed before the Commissioner and the Office of Special Education Programs (OSEP). Based on the ALJ's determinations in the OSEP matter – wherein the ALJ found that M.H.'s behavior did not meet the definition of "terroristic threats" and the District failed to conduct a manifestation determination, as well as establish the existence of any special circumstances for removing M.H. from school – petitioner sought expungement of the four-day suspension and the forty-five demerits. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: the District's own policy with respect to classified students requires that "prior to disciplining a classified student, it must be determined that the student's behavior is not primarily caused by his disability and the program provided meets the student's needs"; while the Individuals with Disabilities Education Act requires a manifestation determination before a student is removed from his/her current placement, the District's policy requires such a determination prior to any discipline being imposed upon a classified student; in this case, the District made no determination as to whether M.H.'s behavior was a manifestation of his disability; the District's assertion that the suspension was warranted, based on M.H.'s actions in writing a rap song that makes reference to guns while at school, was determined to be baseless in the OSEP matter; and the forty-five demerits assessed upon M.H. were never reported in his record, and therefore render that issue moot. The ALJ concluded that the imposition of the four-day suspension was improper, but since it has already been served, the only remedy is to remove the suspension from his disciplinary record. Accordingly, the ALJ ordered that any reference to the suspension in M.H.'s disciplinary record, or other school record, be expunged.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 7/13/17

OAL DKT. NO. EDU 01733-16
AGENCY DKT. NO. 7-1/16

C.H., on behalf of minor child, M.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by respondent, and petitioner's reply thereto. In this matter, petitioner challenges the Board's disciplinary determination pertaining to M.H. Specifically, petitioner contends that the Board's determination that that M.H. made "terroristic threats against staff; students; and/or faculty" and its subsequent imposition of forty-five demerits and a four-day out-of-school suspension on M.H., followed by placement in an alternative education program, were improper because the District failed to conduct a manifest determination in accordance with its policy and applicable law; and therefore, M.H.'s permanent record should be expunged.[1]

Petitioner had filed concurrent appeals before the Commissioner and the Office of Special Education Programs (OSEP) challenging the Board's determination. In the OSEP matter, the Administrative Law Judge (ALJ) determined that the Board improperly placed M.H. in an alternative education program because the District failed to conduct a manifest determination and establish the existence of any special circumstances for removing M.H. from school. The ALJ also found that

[1] This particular disciplinary action was triggered by a staff member's discovery of rap lyrics referencing guns in M.H.'s journal. The parties agree that M.H. was previously advised not to discuss guns in school.

M.H.'s behavior did not meet the definition of "terroristic threats."[2] Based on the ALJ's findings in the OSEP matter, petitioner now seeks expungement of the four-day suspension and the forty-five demerits from M.H.'s records.

In the matter before the Commissioner, the ALJ found that M.H. did not receive the forty-five demerits, thereby rendering the issue moot. The ALJ also found that the District – in violation of its own policy – failed to conduct a manifestation determination before imposing disciplinary action on M.H. The ALJ concluded that imposition of the four-day suspension was improper because the tribunal had already determined that M.H.'s behavior did not rise to the level of "terroristic threats" – which was the Board's sole basis for its disciplinary action in this matter – and as such, any reference to the four-day suspension in M.H.'s records should be removed.

The Board takes exception to the ALJ's determination that the suspension was unmerited and that any reference to same must be expunged from M.H.'s records. The Board argues that irrespective of whether the behavior rose to the level of "terroristic threat," the behavior nonetheless occurred – notably, M.H. defied previous warnings about such behavior. The Board contends that the four-day suspension was, therefore, imposed for good cause, and should be upheld. In reply, petitioner argues that the Board violated its own policy by failing to perform a manifestation determination before imposing the four-day suspension, and therefore, it should not be allowed to maintain a record of the suspension for "terroristic threats," especially when the ALJ found that M.H. did not make terroristic threats.

Upon consideration and review, the Commissioner is in accord with the ALJ's determination that pursuant to *N.J.A.C.* 6A:32-7.7, expungement of the four-day suspension from M.H.'s permanent record is proper because the specific misconduct – terroristic threats – did not occur. The Commissioner also agrees with the ALJ's determination that the District failed to adhere to its

[2] The ALJ did not make a determination on the appropriateness of the four-day suspension or the demerits, nor did the ALJ decide whether M.H.'s behavior was a manifestation of his disability.

own policy when it did not conduct a manifestation determination prior to imposing disciplinary action on M.H.

Board Policy No. 5131 provides, in pertinent part, "before disciplining a classified pupil, it must be determined that: A. The pupil's behavior is not primarily caused by his/her educational disability"; and "B. The program that is being provided meets the pupil's needs." In other words, in accordance with its policy, the Board must conduct a manifestation determination before imposing any form of discipline on a classified student. Here, the Board admittedly did not conduct a manifestation determination before suspending M.H. for four days. The Board now seeks to bypass its policy requirements and maintain the disciplinary action in M.H.'s records, which is improper. More importantly, when the sole basis for the four-day suspension – terroristic threats – is found not to have occurred, there is no justification for upholding such discipline.[3] Therefore, expungement of any reference to the four-day suspension – pursuant to *N.J.A.C.* 6A:32-7.7 – is proper.

Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter. Petitioner's motion for summary decision is granted in part and denied in part. The Board is hereby directed to expunge the record as to M.H.'s four-day suspension in December 2015; however, expungement is moot as regards the demerits, since they were never recorded. The Board's cross-motion for summary decision is denied.

IT IS SO ORDERED.[4]

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 7/13/17
Date of Mailing: 7/13/17

[3] In its exceptions, the Board attempts to argue that the suspension was imposed as a result of M.H.'s defiance of authority and pattern of behavior, which clearly contradicts the substance of the Board's notice of suspension – which was issued in relation to a specific incident that the Board considered to be an act of "terroristic threat."

[4] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 01733-16
AGENCY DKT. NO. 7-1/16

C.H. ON BEHALF OF M.H.,
Petitioner,
v.
SALEM CITY BOARD OF EDUCATION,
Respondent.

Gerald J. Neski, Esq., for petitioner (Garofala & Neski, P.C., attorneys)

Corey E. Ahart, Esq., for respondent

Record Closed: May 19, 2017 Decided: May 31, 2017

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

Petitioner, C.H. on behalf of his minor son, M.H. challenges the Board of Education of the City of Salem's (Board) disciplinary determination and suspension of M.H. from school. The Board disciplined M.H. for allegedly making terroristic threats.

PROCEDURAL HISTORY

On January 15, 2016, petitioner, C.H., filed with the Office of Special Education Programs (OSEP), New Jersey Department of Education, an expedited petition for due process, seeking an order overturning Board's decision to place his son, M.H., in an alternative interim placement due to terroristic threats alleged to have been made by M.H. On January 20, 2016, the matter was filed with the Office of Administrative Law (OAL) for expedited hearing, which was held before this tribunal on February 9, 2016. A decision was rendered in the special education matter on March 1, 2016. Petitioner simultaneously filed this matter seeking the removal of Board's disciplinary determination from M.H.'s record. This matter was filed with the OAL on February 3, 2016. On August 11, 2016, petitioner filed a motion for Summary Decision. Due to the passing of the District's solicitor, a response and Cross Motion for Summary Decision was not filed until December 15, 2016. Oral argument was originally scheduled for January 20, 2017, but on January 17, 2017, both parties agreed to have the matter decided on the papers.

FACTUAL DISCUSSION

M.H. is a fifteen-year-old student who resides within the Salem City School District (District). He is eligible for special education and related services under the classification of Specific Learning Disability (SLD) and the district has prepared an Individualized Education Plan (IEP) to assist him with disabilities in basic reading skills, mathematical problem solving and written expression. He is a Junior at Salem City High School.

On December 12, 2015, M.H. was subjected to discipline by the District for alleged terroristic threats when district employees discovered lyrics to a rap song written in M.H.'s school journal. The Board conducted a hearing on January 6, 2016, and affirmed the recommendations of the Superintendent that M.H. be suspended for four-days, receive forty-five demerits and be placed in an alternative school program at Salem Middle School. As the aforementioned statements are not in dispute, I hereby **FIND** them as **FACT**.

After having had an opportunity to observe the appearance and demeanor of the witnesses, and consider the testimonial and documentary evidence presented at the hearing on February 9, 2016, I made the following additional **FINDINGS** of **FACT**:

1. M.H. wrote in a class journal a rap song that had the following lyrics: "U better dip like a chip because I got a new gun with 2 clips I can't wait to use it better yet shoot it roll up in your club like a blunt we smoke it can't comprehend no more we baking like hot cakes."

2. At the hearing conducted by the Board, the Board affirmed this action after hearing testimony and M.H.'s attorney was given an opportunity to cross-examine witnesses.

3. The term "terroristic threats" is not defined in the District student handbook.

4. M.H. had been warned in November 2015, that this is not appropriate when his father was called in to school after M.H. was taking about shooting a gun at a gun range. M.H. was advised at that time that he cannot talk about guns in school. Both M.H. and his father understood and agreed.

5. District staff secured M.H., checked his bags and locker and found no weapons of any kind. The rap lyrics were not given to anyone or performed in school by M.H. They were discovered by a teacher that was reviewing M.H.'s journal to check his work as required by his IEP.

6. The District's Child Study Team was not consulted as part of the discipline process. In December 2014, the Child Study Team had recommended a psychiatric evaluation be conducted upon M.H., but his father refused the evaluation. The Child Study Team wanted him evaluated because his last psychiatric evaluation was conducted when M.H. was in second grade. At

that time, M.H. drew pictures of guns and stated that he was mad at another child and would shoot him if he had a gun.

7. M.H. does not own a gun, has never shot a gun or even touched a gun in his life.

8. The District recommended a change in placement, primarily based upon a perceived threat to the safety and welfare of the District's staff and students.

I concluded in my March 1, 2016, decision, that the Board cannot remove M.H. to an alternative educational setting because the Board has failed to prove any special circumstance for removal of a child whose conduct has not been determined to be a result of his disability or that maintaining M.H.'s current placement is substantially likely to result in injury to himself or others. 20 U.S.C.A. § 1415(k)(3)(B)(ii); 34 C.F.R. § 300.532(b)(2) (2014); see also N.J.A.C. 1:6A-14.2(e). No determination regarding petitioner's claim that M.H.'s due-process rights were violated at the Board's hearing on January 6, 2016, was rendered in the special education matter. I further made no determination whether the four-day suspension or the demerits imposed upon M.H. were appropriate. It is clear and I **FIND** as **FACT** that M.H. was suspended for four-days for making terroristic threats. I further **FIND** as **FACT** that the District made no determination that M.H.'s behavior was a manifestation of his disability.

In his response and Cross Motion for Summary Decision the District for the first time advises that the forty-five demerits assessed upon M.H. were never recorded and are, therefore not on his permanent record. I therefore **FIND** as **FACT** that M.H. did not receive forty-five demerits and thereby render that issue moot.

LEGAL ANALYSIS AND CONCLUSION

Under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. §§ 1400–1482, and its implementing regulations, a school district "may remove a student to an interim alternative educational setting for not more than forty-five school days without

regard to whether the behavior is determined to be a manifestation of the child's disability", if the child brings a weapon to school, inflicts serious bodily injury on another person at school, or "knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function." 20 U.S.C.A. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g) (2014); see also N.J.A.C. 6A:14-2.8(d), (f). If the school district believes that maintaining the child's current placement is substantially likely to result in injury to the child or others, the school district may request an expedited due-process hearing. 20 U.S.C.A. § 1415(k)(3), (k)(4)(B); 34 C.F.R. § 300.532(a) and (c) (2014); see also N.J.A.C. 6A:14-2.7(n); N.J.A.C. 1:6A-14.2(a). In such a case, a hearing officer may "return a child with a disability to the placement from which the child was removed" under certain circumstances or "order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than forty-five school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others."[1] 20 U.S.C.A. § 1415(k)(3)(B)(ii); 34 C.F.R. § 300.532(b)(2) (2014); see also N.J.A.C. 1:6A-14.2(e).

Under State Law, the school district bears the burden of proof and the burden of production in any due-process hearing held in accordance with the IDEA with respect to "the identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action, of a child with a disability." N.J.S.A. 18A:46-1.1. In a due-process hearing before the OAL, "[t]he judge's decision shall be based on the preponderance of the credible evidence, and the proposed action of the Board of Education or public agency shall not be accorded any presumption of correctness." N.J.A.C. 1:6A-14.1(d).

The District's own policy with respect to classified students requires that "prior to disciplining a classified student, it must be determined that the student's behavior is not primarily caused by his or her disability and the program provided meets the student's needs. (See, J-1 attached to petitioners Brief in Support of Summary Decision at page

[1] The child shall remain in the interim alternative educational setting until an administrative law judge (ALJ) renders a decision or until the expiration of the forty-five-day removal period, whichever occurs first. 20 U.S.C.A. § 1415(k)(4)(A); 34 C.F.R. § 300.533 (2014); see also N.J.A.C. 6A:14-2.7(u); N.J.A.C. 6A:14-2.8(f).

44.) While the IDEA requires a manifestation determination before a student is removed from his/her current placement, District policy requires such a determination prior to any discipline being imposed upon a classified student. Here the District made no determination if M.H.'s behavior was a manifestation of his disability.

The District asserts that the suspension is warranted based on M.H's actions of writing a rap song making reference to guns while in school. The District also concedes that since my March 1, 2016, decision concluded that M.H. did not make "terroristic threats" pursuant to neither District policy nor N.J.S.A. 2C:2-3, any reference to "terroristic threats" will be removed from his Disciplinary Record. In a letter, dated December 11, 2015, the District advised petitioner that the reason for the suspension is "Terroristic threats against staff; students; and or faculty." (See, P-1 attached to petitioner's Brief in Support of Summary Decision.) This is the only reason given for the discipline. It has already been concluded by this tribunal that no "terroristic threats" were made. Although New Jersey Law permits a District to suspend a student for good cause, which includes many various acts of misconduct, the specific act of misconduct alleged to have occurred by M.H., based on my March 1, 2016, decision, did not occur. I therefore **CONCLUDE** that the imposition of the four-day suspension was improper. N.J.A.C. 6A:32-7.7 permits a parent or adult student to seek to expunge inaccurate, irrelevant or otherwise improper information from a student record. M.H. has already served the suspension. The only remedy is to remove the suspension from his disciplinary record. For the foregoing reasons, I **CONCLUDE** that any reference made to the four-day suspension served by M.H. on December 10, ,11, 14 and 15, 2015 should be expunged.

ORDER

Accordingly, it is hereby **ORDERED** that any reference made in M.H.'s disciplinary record or any other record maintained by the District to the four-day suspension served by M.H. on December 10, 11, 14 and 15, 2015, shall be expunged.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5/31/17
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency May 31, 2017

Date Mailed to Parties: May 31, 2017

JSK/dm

APPENDIX

EXHIBITS

Petitioner:

Brief in Support of Summary Decision with Exhibits A, B, J-1, J-3 and P-1

Respondent:

Brief in Response and Cross Motion for Summary Decision with Exhibits A and B

196-17

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges by

ELIZABETH BOARD OF EDUCATION

"Petitioner"

-against-

JERRY PASCHER

"Respondent"

Pursuant to N.J.S.A. 18A:28-5 and 6-10

Agency Docket No. 71-3/16

APPEARANCES

FOR THE PETITIONER
FLORIO, PERRUCCI, STEINHARDT & FADER
By: Jenna A. Rottenberg, Esq.

FOR THE RESPONDENT
OXFELD & COHEN
By: Gail Oxfeld Kanef, Esq.

BEFORE: Earl R. Pfeffer, Arbitrator

DISCUSSION AND FINDINGS

On January 7, 2016, Helga Hugelmeyer, Superintendent for the Board of Education of the City of Elizabeth ("the Board"), filed Sworn Tenure Charges against Respondent Jerry Pascher in accordance with N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, and also on January 7, 2016, same were served on Respondent with notice of opportunity to submit evidence and argument in opposition to the Charges. Thereafter, the Board, following its review of the Charges and any opposition thereto at a duly convened meeting on February 18, 2016, found probable cause to credit the evidence in support of the Charges and it consequently determined to certify the Charges to the Commissioner of Education for a hearing pursuant to law. Thereafter, Harold E. Kennedy, Jr., the Board's Business Administrator and Secretary, signed a Certification of the Board's actions and same was served upon Pascher.

On or about February 29, 2016, Respondent, through counsel, filed his Answer denying all counts set forth in the Charges, and on March 14, 2016, I was appointed Arbitrator to hear and decide this tenure matter. A Status Conference was scheduled for March 28, 2016, and subsequently adjourned to April 7, 2016, and reconvened on April 25, 2016. On May 9, 2016, counsel advised me the parties had agreed upon the terms of a stipulation settling the Charges and same was signed on May 11, 2016. It received final Board approval on August 4, 2016.

Thereafter, the parties informed me they had reached agreement settling this case, and on March 28, 2017, pursuant to N.J.A.C. 6A:3-5.6, they forwarded to me for review and approval a fully executed copy of their Employment Separation Agreement and Release ("Agreement"), which is attached and incorporated herein.

I have carefully reviewed the Agreement and I determine it satisfies the statutory requirements for withdrawal and settlement of tenure charges, as set forth in N.J.A.C. 6A:3-5.6. In particular:

1. The nature of the Charges are part of the record of this proceeding and were known to all parties to the Agreement;

2. The circumstances justifying settlement and withdrawal are incorporated into the Agreement. For the Respondent, the Board agreed to withdraw the Charges and to extend his employment until an agreed-upon retirement date of June 30, 2016. For the Board, Pascher's retirement is irrevocable, and he has agreed in perpetuity to waive any rights to re-employment or to a consultant relationship with the Board. The Board has promised to cooperate with the Pension Board and/or any other State or Local government body promptly and completely with respect to Pascher's pension application, and Pascher has provided the Board with a broad release which irrevocably and unconditionally waives and discharges any and all claims or rights stemming from the facts and circmstances that gave rise to the instant Charges. The release broadly extends to the Board's members, officers, administrators, agents, attorneys and employees, and includes without limitation claims under common law as well as federal, state and local labor laws and regulations. The Board has promised it will provide to Pascher neutral references in response to any future employment inquiries, and both parties are protected by a broadly worded non-disparagement provision.

3. The Agreement advised Respondent of his rights under

the Older Workers Benefit Protection Act of 1990, in particular of his right to review and consider the Agreement for a period of up to twenty-one (21) days and of his right revoke and rescind his execution of the Agreement within seven (7) calendar days after he signed it on May 11, 2016.

4. The Agreement is signed by the parties and their representatives, and incorporates the May 12, 2016, Board Resolution accepting Pascher's resignation and its authorization the Board President and it authorizes the Business Administrator/Board Secretary to execute the Agreement and carry out the actions of the Board stipulated therein. Pascher has averred he entered into the Agreement freely and voluntarily, with a full understanding of his rights following satisfactory and unimpeded discussions with his representative which were conducted without duress or coercion. I find it complies with N.J.A.C. 6A:3-5.6(b)

5. The Agreement, I find, does not contain terms which restrict access to information or records deemed public by law, accurately represents the circumstances of Respondent's resignation and is in the public interest.

I approve the Agreement.

June 28, 2017.

Earl R. Pfeffer, Arbitrator

STATE OF NEW JERSEY)
) ss.:
COUNTY OF ESSEX)

On this 28th day of June 2017, before me personally came and appeared EARL R. PFEFFER, Arbitrator, ~~became known and~~ known ~~by me~~ to be the individual described herein, and who executed the foregoing instrument and who acknowledged to me that he executed the same.

Sworn to and subscribed
before me this 28th day
of June 2017.

Notary Public

SHAWN P POLANCO
Notary Public
State of New Jersey
My Commission Expires Jan 16, 2019

EMPLOYMENT SEPARATION AGREEMENT AND RELEASE

This Agreement and Release ("Agreement") is entered into and effective as of the 11TH day of MAY, 2016 by and between the Elizabeth Board of Education ("Board") and Jerry Pascher.

WHEREAS, the Board is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A: 11-1, which is entrusted with maintaining and conducting the public schools of said school district; and

WHEREAS, the Board has its administrative offices located at 500 North Broad Street, Elizabeth, New Jersey 07028; and

WHEREAS, Mr. Pascher, a tenured teacher employed by the Board, has his current address located at 231 Palisade Road, Elizabeth, NJ 07208; and

WHEREAS, on or about January 7, 2016, Olga Hugelmeyer, Superintendent of Schools, filed Sworn Tenure Charges, together with a Sworn Statement of Evidence in support of the charges, against Mr. Pascher, with the Board; and

WHEREAS, on or about February 18, 2016, the Board certified the Charges to the Commissioner of Education; and

WHEREAS, Mr. Pascher does not wish for the Board to proceed to a hearing regarding the subject tenure charges, but intends to continue employment through and retire effective June 30, 2016; and

WHEREAS, the parties, now desiring to resolve the within matter amicably and without the need for further litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein; and

NOW, THEREFORE, the parties hereby agree, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged, as follows:

TENURE CHARGES TO BE MOOT/NO FURTHER BOARD ACTION

The Board agrees that upon execution of the within Agreement by the parties and Mr. Pascher's fulfillment of the obligations as set forth herein, that the subject tenure charges shall be moot and shall be deemed withdrawn, and that no further action shall be initiated by the Board regarding the underlying charges. The Board reserves all rights in the event this Agreement is breached by Mr. Pascher, as well as with respect to any third party claims that may be made against the Board as a result of any acts and/or omissions by Mr. Pascher during his employment with the Board. Mr. Pascher retains his rights to enforce this agreement should the Board breach same.

RESIGNATION

Mr. Pascher, by signing this Agreement, hereby tenders his irrevocable resignation for the purposes of retirement (annexed hereto as Attachment A) effective June 30, 2016. Mr. Pascher shall not be responsible for providing the Board with sixty (60) days' notice of his resignation for the purposes of retirement. Mr. Pascher's retirement shall be irrevocable upon approval of this Agreement by the Board. Mr. Pascher agrees that he will not seek any future employment or consultant relationship with the Board in perpetuity and that the Board has no obligation, contractual or otherwise, to re-hire or re-employ him.

NO ADMISSIONS

This Agreement is entered into for the sole purpose of resolving issues related to Mr. Pascher's employment, and neither the execution, delivery, nor performance of this Agreement, nor Mr. Pascher's retirement shall constitute or be construed at any time or for any purpose to be an admission of liability or wrongdoing by any of the parties; the parties further agree that neither this Agreement and Release nor Mr. Pascher's retirement shall be used as evidence in any judicial, administrative, or quasi-judicial proceedings, except to enforce the terms of this Agreement.

NO FURTHER COMPENSATION/BENEFITS

Prior to the effective date of Mr. Pascher's resignation for the purposes of retirement, he shall be entitled to salary and benefits during the period April 1, 2016 through June 30, 2016. He shall be entitled to no further compensation or fringe benefit of any kind with the exception of any summer pay to which he is entitled and pay for unused sick days to which he is entitled. Mr. Pascher specifically waives his right to any additional pay and benefits, except for any benefits to which he may lawfully be entitled under the Workers' Compensation Act or the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"). Mr. Pascher represents that as of the date of this agreement, he has not filed and does not intend to file any Workers' Compensation claim related to his employment with the Board.

LEAVE PERIOD

The parties recognize that during the period February 23, 2016 through March 31, 2016, Mr. Pascher was on unpaid administrative leave.

DUE DILIGENCE

The Board shall cooperate fully with the Pension Board and/or any other State or Local governmental body and comply promptly and completely with all requests and requirements in conjunction with Mr. Pascher's future pension application.

RELEASE

In exchange for the above consideration, Mr. Pascher, his heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any and all claims or rights stemming from the facts and circumstances which gave rise to the tenure charges referred to herein or the basis for same, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, all officers and administrators, its attorneys, agents and employees, personally and officially, as well as their successors, and assigns, including, but not limited to any and all claims for attorney's fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this Agreement, and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Act of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retraining Notification Act, the New

Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Consclentious Employee Protection Act, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any and all other claims that could be initiated in any venue, for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims arising under the Worker's Compensation Act, N.J.S.A. 34: 15-1 et seq., for health insurance continuation coverage under and pursuant to COBRA, and any claims concerning enforcement of this agreement.

INQUIRIES

The Board agrees not to make any disparaging remarks regarding Mr. Pascher in response to any future employment inquiries and will limit any statements made, either orally or in writing, to confirming the dates of Mr. Pascher's employment within the District, the amount of Mr. Pascher's salary in the final year of his employment, and the position(s) that Mr. Pascher held with the District. Nothing herein shall be deemed to limit the Board's actions in compliance with the Open Public Records Act, or its obligation to respond fully and accurately to any and all inquiries from State agencies, such as, without limitation, the Public Employees Retirement System, the State Department of Education and the State Board of Examiners and its agents.

NON-DISPARAGEMENT

The parties and their agents shall refrain from public negative comments regarding each other, and each other's employees and/or agents. However, nothing in this Agreement shall be construed to limit Mr. Pascher or the Board and its agents' obligation to provide accurate information in response to legitimate requests for public information, including copies of the Tenure Charge documents, nor to provide information requested by various State Agencies, including, but not limited to, the State Department of Education, the State Board of Examiners and its agents, the Division of Pensions and Benefits and the Unemployment Compensation Board and/or their agents

SURRENDER OF BOARD PROPERTY

Mr. Pascher shall surrender all school keys and property in his possession to the Superintendent of Schools or her designee. If necessary, the Superintendent of Schools shall arrange an appointment for Mr. Pascher to retrieve his personal property.

BOARD APPROVAL

This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

ASSENT TO TERMS

Mr. Pascher hereby acknowledges that he enters into this Agreement with a full understanding of his rights and that he was fully informed of the implications of this Agreement by his attorney, and does so without duress of his own free will and volition.

Mr. Pascher further acknowledges that he was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and was given seven (7) days from the execution of this document to revoke this Agreement, by delivering written notification to Jenna A. Rottenberg, Esq., Florio Perrucci Steinhardt & Fader, LLC, 235 Broubalow Way, Phillipsburg, New Jersey 08865. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Mr. Pascher will not be entitled to the consideration described herein. Furthermore, it is understood that if this Agreement is revoked, the underlying tenure charge proceedings shall be reinstated and the Board will not be obligated to re-serve Mr. Pascher and/or his attorney with a copy of same but may consider and certify, if it so chooses, said tenure charges at its next Board of Education meeting following said revocation.

SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

PUBLIC INTEREST

This proposed settlement will serve the public interest. As a result of Mr. Pascher having tendered his irrevocable resignation for the purposes of retirement, the Board will not have to engage in litigation related to his employment.

ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations,

discussions, and understandings and agreements, whether oral or written. This Agreement shall not be amended, changed or modified, except in a writing signed by all parties. Each party acknowledges that neither the other party, nor any agent or attorney or the other party, have made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

SEVERABILITY

If any non-material portion of this Agreement shall be determined by any court or agency of competent jurisdiction to be contrary to law, then it shall be deemed to be severed from the remainder of this Agreement, which shall continue in full force and effect. Should any material provision be stricken by a court or agency of competent jurisdiction, then the entire Agreement shall by null and void, ab initio.

GOVERNING LAW

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

Witness:

Jerry Pascher

JERRY PASCHER

Dated: MAY 11, 2016

Diane Gourley

DIANE GOURLEY

Dated: May 11, 2016

For the Elizabeth Board of Education

CHARLENE BATHELUS

Board President

Dated: 9/4/16

HAROLD E. KENNEDY, JR.

Board Secretary/Business Administrator

Dated: 9/4/2016

Attachment A

Irrevocable Resignation for the Purposes of Retirement

Elizabeth Board of Education

c/o Harold E. Kennedy, Jr., Board Secretary/Business Administrator

500 North Broad Street

Elizabeth, New Jersey 07208

Re: Irrevocable Resignation for the Purposes of Retirement

Dear Ladies and Gentleman,

Subject to the terms and conditions of our Separation from Employment Agreement and Release, and approval of same by the Board of Education, I hereby tender my irrevocable resignation for the purposes of retirement, effective June 30, 2016 from all employment with the Elizabeth Board of Education.

Very truly yours,

Jerry Pascher

Jerry Pascher

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BOARD OF EDUCATION

RESOLUTION ACCEPTING RESIGNATION

BE IT RESOLVED that the Elizabeth Board of Education hereby approves the attached Employment Separation Agreement with Jerry Pascher (Employee 100966); and

BE IT FURTHER RESOLVED that the Elizabeth Board of Education hereby accepts Jerry Pascher's (Employee 100966) irrevocable resignation for the purposes of retirement effective June 30, 2016.

NOW, THEREFORE, BE IT RESOLVED that the Elizabeth Board of Education authorizes the Board President and the Business Administrator/Board Secretary to execute the Employment Separation Agreement on behalf of the Board; and to take such further steps as may be necessary to effectuate the within Employment Separation Agreement and carry out this action of the Board

Elizabeth, New Jersey
May 12, 2016

15-237

T.N., on behalf of minor child, L.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE ETHICAL COMMUNITY CHARTER SCHOOL, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the respondent Board's practices for identifying, investigating, and resolving allegations of harassment, intimidation and bullying (HIB) at the Ethical Community Charter School. Petitioner had filed a grievance seeking improvement in these practices, after which her claims were investigated by the Board. The Board communicated the findings of that investigation to the petitioner on July 15, 2015. Petitioner filed her appeal on October 27, 2015. The Board filed a motion to dismiss in lieu of an answer, based upon the failure of the petitioner to file an appeal within ninety days pursuant to *N.J.A.C.* 6A:3-1.3(i).

The ALJ found, *inter alia*, that: the petitioner filed her appeal on October 27, 2015, 105 days after notice of the Board's decision; in order to relax the ninety-day rule, the circumstances must be exceptional or the reason compelling, pursuant to *N.J.A.C.* 6A:3-1.16; there is no basis herein by which the petitioner is entitled to relax the ninety-day rule. The ALJ concluded that petitioner is barred by *N.J.A.C.* 6A:3-1.3(i) from bringing her appeal out of time. Accordingly, the petition was dismissed.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 7/18/17

OAL DKT. NO. EDU 18839-15
AGENCY DKT. NO. 350-11/15

T.N., on behalf of minor child, L.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE ETHICAL COMMUNITY CHARTER SCHOOL, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination that the petition of appeal was time barred under *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 7/18/17
Date of Mailing: 7/19/17

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 18839-15
AGENCY DKT. NO. 350-11/15

T.N. ON BEHALF OF L.C.,
Petitioners,
v.
BOARD OF TRUSTEES OF THE ETHICAL COMMUNITY CHARTER SCHOOL, HUDSON COUNTY,
Respondent.

T.N., petitioner, pro se

Thomas O. Johnson, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: May 1, 2017 Decided: June 9, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

Petitioner, T.N. on behalf of L.C., filed a grievance with the respondent Board of Trustees of the Ethical Community Charter School (Board) on June 8, 2015.

Respondent acknowledged receipt of the grievance and an investigation was conducted by the respondent regarding the allegations contained therein. After the completion of the investigation, the respondent gave notice of the findings of that investigation to the petitioner, T.N., on July 15, 2015.

PROCEDURAL HISTORY

On October 27, 2015, the petitioner filed a petition before the Commissioner of Education regarding the decision. Respondent raises grounds for the dismissal of the petition herein based upon a failure of the petitioner to file a petition within ninety days of the action of Ethical, N.J.A.C. 6A:3-1.3(4)(i) via a motion to dismiss in lieu of an answer. Respondent maintains that it processes applications based upon a procedure authorized under N.J.A.C. 6A:19-2.3(b). The only submission made by the petitioner was submitted on February 29, 2016, and no additional submissions were made by the petitioner despite requests for same.

The New Jersey State Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-8.2 where it was filed on November 24, 2015, and assigned to Administrative Law Judge Tiffany Williams. Thereafter, Judge Williams resigned and the case was reassigned to the undersigned. The respondent moved for a dismissal based on a motion to dismiss in lieu of an answer. Petitioner opposed said motion based on previously submitted documents.

DISCUSSION

Initially, I note that petitioner provided no certification or affidavit in opposition to the respondent's motion in this matter or no follow up reply to the respondent's motion. For this record, the undersigned will rely on respondent's motion for dismissal and the submission by the petitioner T.N. without any certification or affidavit. The petitioner stated that she was going to file opposition paperwork, after a telephone conference; however, no such submission was ever filed by the petitioner. I will rely extensively on

the fully briefed motion submitted by the respondent, along with a supporting certification.

FACTS

The following **FACTS** are not disputed, and I **FIND**:

1. The Ethical Community Charter School in Hudson County is a charter school established pursuant to N.J.S.A. 18A:36A-1.

2. Petitioner is a parent and a student enrolled in the Ethical School and filed a grievance seeking improvement in the practices for identifying, investigating, and resolving HIB allegations at the Ethical School.

3. Respondent investigated the claims of the petitioner and communicated its final decision to the petitioner on July 15, 2015.

4. Petitioner filed a Petition of Appeal on October 27, 2015

ADDITIONAL FACTS FOUND

Based upon the review of respondent's certification and moving papers, including excerpts of the certified answers to interrogatories, and the request for hearing, I **FIND** the following as additional **FACTS**:

5. Petitioner's submission stated that she filed a grievance that was not about the bullying investigation.

6. L.C. is a gender non-conforming student at the respondent school with allegations of bullying other student from March 2014 until the end of the school year.

7. The allegations of bullying include hitting L.C. and telling L.C. that he was a "freak, gay and had no friends."

8. After the investigation, the respondent found that the incident between L.C. and the other student was a back-and-forth situation and L.C. was required to apologize to the other student.

9. T.N., L.C.'s mother, had difficulty with the manner in which the HIB investigation was conducted.

10. As a basis to the above, T.N. requested that the respondent open another investigation.

LEGAL DISCUSSION

A motion to dismiss the petitioners' appeal is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute and the application to that set of material facts of the applicable law and standard of proof lead to a determination of the case without the necessity of a hearing at which evidence and testimony need be taken. The procedure is equally applicable in judicial and executive-branch administrative cases. N.J.A.C. 1:1-12.5.

Petitioner acknowledged that the petition was received from the respondent on July 15, 2015. Based on the document submitted by the respondent, the petitioner clearly filed the petition on October 27, 2015, 105 days after notice of the decision.

There is no basis for which the petitioner is entitled to relax or otherwise not apply the ninety-day rule. In order to relax the ninety-day rule the circumstances must be exceptional or the reason must be compelling. N.J.A.C. 6A:3-1.16. Respondent cites Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572,590 (1993) in support of their position that the petitioner has failed to file the petition within ninety days. The adequate notice to trigger the ninety-day statute of limitations is from the day

the petitioner learns of the existence of facts that would enable one to file a timely claim. Ibid. The Kaprow Court stated that "[t]he limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days." Id. at 582. This limitation is put in place in order "to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims" and "to penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs." Ibid. In addition, the Kaprow Court found that "unofficial or informal notice is sufficient to trigger the ninety-day limitations period." Id. at 588.

The Commissioner of Education promulgated N.J.A.C. 6A:3-1.3(4)(i), as requiring a petition be brought within ninety days of notice of the action. T.N. did not do that here. Furthermore, T.N. did not substantiate any exceptional or compelling reasons for the failure to file.

The ninety-day rule must be strictly applied and has been strictly followed by the Commissioner of Education. Markalin v. Bd. of Educ. of the Twp. of Neptune, 92 N.J.A.R.2d (EDU) 406. In addition, New Jersey courts have strictly construed the ninety-day requirement. Riely v. Bd. of Educ. of Hunterdon Central Reg'l High Sch. Dist., 173 N.J. Super. 109 (App. Div. 1980). As argued by the respondent and supported by caselaw, this ninety-day rule represents a fair and necessary requirement for the proper and efficient resolution of disputes under the school laws and expresses a public policy of giving school districts the security of knowing that decisions regarding the administrative operations of the school district cannot be challenged after the time period. Kaprow, supra, 131 N.J. at 582.

In this case, the evidence clearly confirms that the petitioner was given notice of the respondent's findings as to their grievance on July 15, 2015. The evidence also confirms that the petitioner filed the appeal on October 27, 2015, which exceeds the ninety-day rule as the October date is 105 days from the date of the respondent's decision.

CONCLUSION

I **CONCLUDE** petitioner is barred by N.J.A.C. 6A:3-1.3(4)(i), from bringing this petition out of time. I **CONCLUDE** petitioner has failed to demonstrate that she is entitled to a waiver of the time period of N.J.A.C. 6A:3-1.3(4)(i).

ORDER

It is hereby **ORDERED** that respondent's motion for summary decision is **GRANTED**, and petitioner's petition is **DISMISSED** and **DENIED** in all respects. This Initial Decision disposes of all issues in controversy in this matter.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 9, 2017
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: June 9, 2017

Date Mailed to Parties: JUN 12 2017

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OAL DKT. NO. EDU 8838-17
AGENCY DKT. NO. 121-6/17

M.K., on behalf of minor child, M.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 7/18/17
Date of Mailing: 7/19/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION ON EMERGENT RELIEF
OAL DKT. NO. EDU 08838-17
AGENCY DKT.NO. 121-6/17

M.K. ON BEHALF OF M.K.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKE, BERGEN COUNTY
Respondent.

M.K., petitioner, pro se

Stephan Fogarty, Esq. for respondent (Fogarty & Hara, attorneys)

Record Closed: June 27, 2017 Decided: June 27, 2017

BEFORE **KIMBERLY A. MOSS,** ALJ:

Petitioner, M.K., brings this action seeking an order to compel Franklin Board of Education (District) to document and incorporate a process for students to achieve the standards in the New Jersey Student Learning Standards (NJSLS) that are outside of the regular school offering of the school and require the District to approve and grant credit for established group programs outside of the District based upon specific

instructional objectives aimed at meeting or exceeding NJSLS in the same manner that in-district curriculum is approved.

On June 22, 2017, the Office of Special Education Programs transmitted the matter to the Office of Administrative Law (OAL) under Docket No. EDU 08838-17. Oral arguments were held on June 27, 2017, on which date the record closed.

FACTUAL DISCUSSION

After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony, I **FIND** the following **FACTS**:

M.E.K. has recently completed the seventh grade at Franklin Avenue Middle School. He is a general education student. Students attending the seventh grade in the district are placed into one of three mathematics courses: Math 7, Math Advanced 7, or Algebra 7. Placement is determined by seven factors: Math in focus assessment, basic math knowledge test, Terranova results, Cog AT 5 results, Iowa Algebra, students final grade in the sixth grade and work habit scores. M.E.K satisfied his math requirement by completing Math 7 Advanced. Petitioner filed for a Due Process hearing on January 10, 2017 requesting that M.E.K. be immediately moved from Math 7 Advanced to Algebra 7. The Office of Special Education Programs (OSEP) returned the due process request to petitioner for failure to follow substantive requirements. Petitioner filed a second due process petition with OSEP on February 8, 2017 again requesting that M.E.K. be moved from the Math Advanced 7 to the Algebra 7. Mediation was held on March 7, 2017 and the petition was withdrawn.

On June 6, 2017 Petitioner advised the District that M.E.K. would be enrolled in a summer algebra program and requested that the district give M.E.K. credit for the course. Petitioner proposed M.E.K. take the course at one of the following: Bergen Community College New Work for Credit, Mountain Lakes High School Summer Academy, Montclair Kimberly Academy Summer Skills for Success or the New Jersey

Virtual School. These programs will begin on either June 27, 2017 or July 5, 2017. Leisel McDonnell Steines, the District's Director of Curriculum and Instruction responded by email on June 7, 2017 stating:

> Essentially there is no circumstance in which courses that are already among the districts offerings are considered for credit (and thus appearing on the student's transcript) from an outside institution. The one exception would be remediation situations in which the student is taking summer school course for the purpose of credit recovery, which is not the case with your child.

Petitioner alleges that the District violated N.J.A.C. 8-5.1.

LEGAL ANALYSIS AND CONCLUSION

The standards for the granting of emergent relief are set forth in N.J.A.C. 6A:3-1.6(b). Emergent relief may be granted if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

N.J.A.C. 6A:8-5.1 provides:

> 6A:8-5.1 Graduation requirements
>
> (a) For a State-endorsed diploma, district boards of education shall develop, adopt, and implement local graduation requirements that prepare

students for success in post-secondary degree programs, careers, and civic life in the 21st century, and that include the following:

1. Participation in a local program of study of not fewer than 120 credits in courses designed to meet all of the NJSLS, including, but not limited to, the following credits:

i. At least 20 credits in English language arts, aligned to grade nine through 12 standards, effective with the 2009-2010 grade nine class;

ii. At least 15 credits in mathematics, including algebra I or the content equivalent effective with the 2008-2009 grade nine class; geometry or the content equivalent effective with the 2010-2011 grade nine class; and a third year of mathematics that builds on the concepts and skills of algebra and geometry and that prepares students for college and 21st century careers effective with the 2012-2013 grade nine class;

iii. At least 15 credits in science, including at least five credits in laboratory biology/life science or the content equivalent effective with the 2008-2009 grade nine class; one additional laboratory/inquiry-based science course, which shall include chemistry, environmental science, or physics effective with 2010-2011 grade nine class; and one additional laboratory/inquiry-based science course effective with 2012-2013 grade nine class;

iv. At least 15 credits in social studies, including satisfaction of N.J.S.A. 18A:35-1 and 2; five credits in world history; and the integration of civics, economics, geography and global content in all course offerings;

v. At least 2.5 credits in financial, economic, business, and entrepreneurial literacy, effective with 2010-2011 grade nine class;

vi At least 3 3/4 credits in health, safety, and physical education during each year of enrollment, distributed as 150 minutes per week, as required by N.J.S.A. 18A:35-5, 7 and 8;

vii. At least five credits in visual and performing arts;

viii. At least five credits in world languages or student demonstration of proficiency as set forth in (a)2ii(2) below;

ix. Technological literacy, consistent with the NJSLS, integrated throughout the curriculum; and

x. At least five credits in 21st century life and careers, or career-technical education;

2. The 120-credit requirement set forth in (a)1 above may be met in whole or in part through program completion of a range of experiences that enable students to pursue a variety of individualized learning opportunities, as follows:

i. District boards of education shall establish a process to approve individualized student learning opportunities that meet or exceed the NJSLS.

(1) Individualized student learning opportunities in all NJSLS areas include, but are not limited to, the following:

(A) Independent study;

(B) Online learning;

(C) Study abroad programs;

(D) Student exchange programs; and

(E) Structured learning experiences, including, but not limited to, work-based programs, internships, apprenticeships, and service learning experiences.

(2) Individualized student learning opportunities based upon specific instructional objectives aimed at meeting or exceeding the NJSLS shall:

(A) Be based on student interest and career goals as reflected in the Personalized Student Learning Plans;

(B) Include demonstration of student competency;

(C) Be certified for completion based on the district process adopted according to (a)2ii below; and

(D) Be on file in the school district and subject to review by the Commissioner or his or her designee.

(3) Group programs based upon specific instructional objectives aimed at meeting or exceeding the NJSLS shall be permitted under this section and shall be approved in the same manner as other approved courses.

ii. District boards of education shall establish a process for granting of credits through successful completion of assessments that verify student achievement in meeting or exceeding the NJSLS at the high school level, including standards achieved by means of the individualized student learning opportunities enumerated at (a)2 above. Such programs or assessments may occur all or in part prior to a student's high school enrollment; no such locally administered assessments shall preclude or exempt student participation in applicable Statewide assessments at grades three through 12.

(1) District boards of education shall choose assessments that are aligned with or exceed the NJSLS and may include locally designed assessments.

(2) District boards of education shall choose from among the following assessment options to determine if students have achieved the level of language proficiency designated as Novice-High as defined by the ACTFL and recognized as fulfilling the world languages requirement of the NJSLS:

(A) The STAMP online assessment;

(B) The OPI or MOPI; or

(C) Department-approved locally designed competency-based assessments;

iii. District boards of education shall establish a process to approve post-secondary learning opportunities that may consist of Advanced Placement (AP) courses, CLEP, or concurrent/dual enrollment at accredited higher education institutions.

(1) District boards of education shall award credit for successful completion of an approved, accredited college course that assures achievement of knowledge and skills that meets or exceeds the NJSLS.

3. Local student attendance requirements;

4. Any other requirements established by the district board of education;

5. Any statutorily mandated requirements for earning a high school diploma;

6. The requirement that all students demonstrate proficiency in the high school end-of-course PARCC assessments in ELA 10 and Algebra I, or through the alternative means set forth at (f) through (i) below;

7. Students graduating from an adult high school shall demonstrate proficiency in the high school end-of-course PARCC assessments in ELA 10 and Algebra I, or through the alternative means set forth at (f) through (i) below.

(b) In the development of Personalized Student Learning Plans according to N.J.A.C. 6A:8-3.2(a), district boards of education shall actively encourage all students who have otherwise met the requirements for high school graduation according to (a)1 through 3 above, to include in their programs of study the following additional credits:

1. Five credits in mathematics during each year of enrollment, aimed at preparation for entrance into post-secondary programs or 21st century careers;

2. Five credits in a laboratory science during each year of enrollment, aimed at preparation for entrance into post-secondary programs or 21st century careers;

3. Five credits in social studies during each year of enrollment, aimed at preparation for entrance into post-secondary programs or 21st century careers; and

4. Five credits in world languages during each year of enrollment, aimed at preparation for entrance into post-secondary programs or 21st century careers.

(c) Through the IEP process and pursuant to N.J.A.C. 6A:14-4.11, district boards of education may specify alternate requirements for a State-endorsed diploma for individual students with disabilities as defined in N.J.A.C. 6A:14-1.3.

1. District boards of education shall specifically address any alternate requirements for graduation in a student's IEP, in accordance with N.J.A.C. 6A:14-4.11.

2. District boards of education shall develop and implement procedures for assessing whether a student has met the specified alternate requirements for graduation individually determined in an IEP.

(d) District boards of education shall provide to the executive county superintendent their graduation requirements each year they are evaluated through QSAC and update the filed copy each time their graduation policies are revised.

(e) District boards of education shall provide each student entering high school and his or her parents or legal guardians with a copy of the district board of education's requirements for a State-endorsed diploma and the programs available to assist students in attaining a State-endorsed diploma, in accordance with N.J.S.A. 18A:7C-5.

(f) To ensure adequate transition to the new Statewide assessment system, district boards of education shall provide students who have not demonstrated proficiency on the high school end-of-course PARCC

assessments in ELA 10 and Algebra I with the opportunity to demonstrate such competence through one of the alternative means set forth below:

1. For the graduating classes of 2016, 2017, 2018, and 2019, students who did not take both the ELA 10 and the Algebra I end-of-course PARCC assessment or who take, but do not achieve a passing score on both assessments, as required by (a)6 above, may satisfy the State requirement to demonstrate proficiency in English language arts and mathematics in one of the following ways:

i. Achieve a passing score, as determined by the Commissioner, on a corresponding substitute competency test in English language arts and/or mathematics, as applicable, or substitute a passing score on another end-of-course PARCC assessment, including ELA 9, ELA 11, Geometry, or Algebra II; or

ii. Meet the criteria of the portfolio appeals process; and

2. For the graduating class of 2020, students who take all applicable high school end-of-course PARCC assessments for all courses in which they are enrolled, including those students who received a waiver for ELA 11 pursuant to N.J.A.C. 6A:8-4.1(c)3i, as of September 6, 2016, and thereafter, but do not achieve a passing score on both the ELA 10 and Algebra I end-of-course PARCC assessments pursuant to (a)6 above, may satisfy the State requirement to demonstrate proficiency in English language arts and mathematics in one of the following ways:

i. Achieve a passing score, as determined by the Commissioner, on a corresponding substitute competency test in English language arts and/or mathematics, as applicable, or substitute a passing score on another end-of-course PARCC assessment, including ELA 9, ELA 11, Geometry, or Algebra II; or

ii. Meet the criteria of the portfolio appeals process.

(g) Beginning with the graduating class of 2021, students who take all applicable high school end-of-course PARCC assessments for all courses in which they are enrolled, including those students who received a waiver for ELA 11 pursuant to N.J.A.C. 6A:8-4.1(c)3i, as of September 6, 2016, and thereafter, but do not achieve a passing score on both the ELA 10

and Algebra I end-of-course PARCC assessments pursuant to (a)6 above, by the conclusion of their senior year and after multiple opportunities to take the assessments, may satisfy the State requirement to demonstrate proficiency in English language arts and mathematics by meeting the criteria of the portfolio appeals process.

(h) All ELLs shall satisfy the requirements for high school graduation, except ELLs may demonstrate they have attained State minimum levels of proficiency through passage of the portfolio appeals process in their native language, when available, and passage of a Department-approved English fluency assessment.

(i) Students with disabilities as defined in N.J.A.C. 6A:14-1.3 or eligible under Section 504 of the Rehabilitation Act who participate in the alternative assessment for students with disabilities are not required to participate in repeated administrations of high school end-of-course PARCC assessments.

In this case, after hearing the arguments of petitioner and respondent and considering the documentation submitted, I **CONCLUDE** that petitioner is not entitled to emergent relief because the proofs submitted have failed to establish the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b).

The District did not violate N.J.A.C. 6A:-8-5.1 in this matter. N.J.A.C. 6A:8-5.1 addresses graduation requirements for high school students, not elementary or middle school students. Throughout the regulation there are references to ninth grade class, grade nine to twelve standards, NJSLS high school level, requirements for high school graduation, and high school end of course PARCC. This regulation does not apply to elementary or middle schools. Petitioner has not shown the legal right underlying the petitioner's claim is settled. Petitioner has not shown that there is a legal right underlying her claim. Petitioner has not shown that she has a likelihood of success on the merits. The regulation that she sites does not apply to students in elementary or middle school.

Petitioner has not shown that M.E.K. will suffer irreparable harm if he is not allowed to take the math class over the summer, since the district has that class and M.E.K. would not be taking the course for the purpose of credit recovery. He completed the requirements for the seventh grade.

I note that the requirements are stated in the conjunctive and, consequently, the moving party must meet all four requirements in order to prevail. Failure to sustain even one of the requirements defeats the application.

After hearing arguments of petitioner and respondent, and considering all the affidavits, certifications and documents submitted, it is **ORDERED** that Petitioner's motion for emergent relief is therefore **DENIED**.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

June 28, 2017

DATE

KIMBERLY A. MOSS, ALJ

Date Mailed to Parties:

ljb

199-17

OAL DKT. NO. EDU 0811-17
AGENCY DKT. NO. 300-11/16

JUSTIN BOZINTA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release (Agreement), and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Under the terms of the Agreement, petitioner was to be paid a certain sum of money within thirty days following the Board's receipt of a fully executed Agreement. The Agreement was signed by petitioner on May 15, 2017, which date has preceded the consideration of the Agreement by the Commissioner of Education.[1] The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon mutually satisfactory alternate dates for the effectuation of the settlement payment. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 7/18/17
Date of Mailing: 7/19/17

[1] Petitioner has also executed a Stipulation of Dismissal with Prejudice – referred to as Exhibit A in the Agreement – which was submitted separately from the Agreement, on July 11, 2017.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 0811-17
AGENCY DKT. NO. 300-11/16

JUSTIN BOZINTA
Petitioner,
v.
CITY OF EAST ORANGE BOARD OF EDUCATION,
ESSEX COUNTY,
Respondent.

Nicholas Poberezhsky, Esq. for petitioner (Caruso, Smith, Picini, attorneys)

Avis Bishop-Thompson, Esq. for respondent (DeCotiis, FitzPatrick, Cole, & Giblin, attorneys)

Record Closed: June 12, 2017 Decided: June 12, 2017

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 18, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and Board resolution.

2. The agreement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the agreement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 12, 2017
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: June 13, 2017

Mailed to Parties: JUN 19 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

LAW OFFICES
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OFFICE OF ADMIN. LAW

DIRECT
AVIS BISHOP-THOMPSON, ESQ.
ATHOMPSON@DECOTIISLAW.COM
201.907.5290

June 8, 2017

Via Lawyer's Service
Hon. Danielle Pasquale, ALJ
Office of Administrative Law
33 Washington St.
Newark, NJ 07102

Re: Justin Bozinta v. East Orange Board of Education
OAL Dkt No.: EDU 00811-2017N
Our File No.: 14-082.1.32

Dear Judge Pasquale:

Enclosed please find an original copy of the resolution approving the settlement of the above-referenced matter and the executed settlement agreement.

Thank you for your continued courtesy and cooperation.

Respectfully submitted,

DeCotiis, Fitzpatrick, Cole & Giblin, LLP

By: _____
Avis Bishop-Thompson

c: Nicholas Poberezhsky, Esq. (via e-mail & regular mail w/ encl.)
Dr. Kevin R. West (w/ encl.)
Marissa McKenzie (w/encl.)

EXTRACT FROM THE MINUTES OF A MEETING
OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the City of East Orange in the County of Essex, New Jersey convened a Special Meeting on Thursday, February 23, 2017 at 6:05 p.m.

The following members of the Board were present:

Mr. Cameron B. Jones, Sr.; Ms. Marjorie Perry; Ms. Terry S. Tucker; and Mr. Bergson Leneus

The following resolution was offered by Ms. Marjorie Perry, duly seconded by Mr. Cameron B. Jones, Sr. and adopted by the Board of Education

Approving Settlement of Litigation - Docket #EDU 00811-2017N

WHEREAS, the Board is Defendant in a matter in the Office of Administrative Law, bearing Docket Number EDU 00811-2017N, Agency Ref. No.: 300-11/16; and

WHEREAS, the Board Attorney and the Superintendent have recommended resolution of this matter in an amount not to exceed $53,134; and

WHEREAS, the Settlement does call for the expenditure of Board funds;

NOW, THEREFORE, BE IT RESOLVED by the East Orange Board of Education that it hereby authorizes the Board attorney to enter into settlement negotiations in this matter.

ROLL CALL: AYES: 4
ABSENT: 3

STATE OF NEW JERSEY}
} ss
COUNTY OF ESSEX}

I, Victor R. Demming, Secretary of the Board of Education, of the East Orange Board of Education, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of said district, fully called and held on Thursday, February 23, 2017 has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Orange Board of Education, original minutes so far as the same related to the subject matter referred to in said extract, in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 16th day of May 2017.

Victor R. Demming

Victor R. Demming, Board Secretary

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (the "Agreement") is entered into this 15th day of May, 2017, by and between Justin Bozinta, ("Petitioner") and the City of East Orange Board of Education ("Board") and jointly as the "Parties". For purposes of this Agreement, the term the "Board" shall mean and include the East Orange Board of Education, its agencies, authorities, its current and former appointed officials, officers, directors, agents, administrators, employees, representatives, counsel, designees, insurers, independent contractors and all of their predecessors and successors. The term "Petitioner" shall mean and include Justin Bozinta and any and all of his executors, heirs, administrators, successors, assigns, agents and representatives. This Agreement constitutes the complete and final settlement of any and all claims Petitioner has or may have against the Board relating to or arising from Petitioner's employment by the Board, the separation from employment, and any claims or actions he has brought or could have brought against the Respondent.

WITNESSETH:

WHEREAS, Petitioner filed an administrative action against the Board in the Department of Education, entitled Justin Bozinta v. City of East Orange Board of Education, Union County, Agency Reference No.: 300-11/16 which was transmitted to the Office of Administrative Law, Docket No. EDU 00811-2017N (the "Administrative Action"); and

WHEREAS, on February 13, 2015, Petitioner was arrested at his home and charged with numerous criminal offenses; and

WHEREAS, the alleged facts set forth by Petitioner in the Administration Action purportedly give rise to the following causes of action: (1) reinstatement to the payroll and benefit plan of the East Orange School District, and (2) reimbursement of salary for the 2016-2017 school year. Petitioner seeks back and future salary, attorneys' fees and costs.

WHEREAS, the on January 31, 2017, the grand jury issued a true bill against Petitioner on the following counts: (1) maintaining or operating a controlled dangerous sub stance production facility – first degree; (2) possession with intent to distribute a controlled dangerous substance – second degree; (3) possession with intent to distribute a controlled dangerous substance within 500 feet of certain public property – second degree; (4) possession of a controlled dangerous substance – fourth degree; and (5) endangering the welfare of a child (possession of child pornography) – third degree; and

WHEREAS, the Parties desire to enter into this Agreement to fully and finally settle and resolve and dismiss with prejudice any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which Petitioner may have against the Respondent; and

WHEREAS, Petitioner acknowledges and agrees that the payment provided for herein is provided as consideration for this Agreement to voluntarily dismiss, waive and withdraw all claims, complaints, charges, administrative actions and civil actions of any kind against the Respondent;

NOW THEREFORE, the Petitioner and Respondent, for the consideration herein specified, agree as follows:

1. **COMPENSATION.** In consideration for Petitioner's and the law firm of Caruso Smith Picini's execution of this Agreement and the promises and covenants contained herein, the Respondent commits that it shall issue and remit the full payment of settlement funds as follows:

a. Petitioner agrees to dismiss with prejudice the Administrative Action entitled Justin Bozinta v. City of East Orange Board of Education, Union County, Agency Reference No.: 300-11/16, OAL, Dkt. No. EDU 00811-2017N. In that regard, Petitioner's Counsel, in accordance with the New Jersey Rules of Administrative Practice, shall, simultaneous with the execution of this Agreement, execute the Stipulation and Order of Dismissal with Prejudice attached to this Agreement as Exhibit A, dismissing the case with prejudice for the reason of the settlement reached by the Parties. It is acknowledged and understood by Petitioner that any and all rights and obligations set forth in this Agreement are conditioned completely and entirely upon the Court's dismissal of the Administrative Action with prejudice.

b. Within thirty (30) days following the Board's receipt of Petitioner's executed copy of this Agreement and signed Stipulation of Dismissal with Prejudice in the form attached hereto as Exhibit A, Respondent Board shall provide Petitioner with payment of Fifty-three Thousand One Hundred Thirty-four Dollars, $53,134.00 which represents Petitioner's salary, subject to such payroll and withholding deductions as may be required by law, for the period from September 1, 2016 to January 31, 2017 (referred to herein as the "Settlement Sum"). The Settlement Sum shall be made payable to "Justine Bozinta and the Trust Account of Caruso Smith and Picini, PC" and shall be delivered to:

Nicholas Poberezhsky, Esq.
Caruso Smith Picini, PC
60 Route 46 East
Fairfield, NJ 07004

c. Respondent will report this payment to the state and federal taxing authorities via an IRS Form 1099. Caruso Smith Picini, PC will immediately provide the Respondent with its taxpayer identification number. Petitioner bears sole responsibility for attorneys' fees and costs. Petitioner's counsel bears sole responsibility for the distribution of the settlement sum to the Petitioner.

d. Petitioner hereby certifies that if any liens exist against the Settlement Sum, they will be paid in full, compromised or satisfied and released by him. If a lien exists

which is not satisfied as required by this Agreement, and a claim is made by anyone to enforce that lien, Petitioner agrees that he will pay that lien in full. This representation is intended to include all liens, including, but not limited to, attorneys' liens, medical provider liens, Medicare and Medicaid liens, workers' compensation liens, all statutory or common law liens, and judgment liens. Petitioner agrees to indemnify and hold the Board harmless in connection with any claim made by reason of liens against or tax obligations associated with payment of the Settlement Sum. If a claim is hereafter made against the Board by anyone seeking payment of the liens, Petitioner will indemnify and hold the Board harmless for any such liens and/or defending against such a claim, including, but not limited to, attorneys' fees, costs of suit, and interest.

2. **INCOME TAXATION**. In the event that it is subsequently determined that Petitioner's owe any taxes with respect to any of the payments described in paragraphs 1, Petitioner expressly acknowledge and agree that Petitioner or his heirs, executors, administrators, successors and assigns, and not the Board, will be responsible for any such taxes, liabilities, payments or costs, interest and penalties. Petitioner agrees to indemnify and hold harmless the Board to the full extent of any such taxes, liabilities, payments, costs, interest or penalties which may be assessed against the Board in connection with any payment made to or on behalf of Petitioner hereunder.

3. **PENSION AND/OR RETIREMENT BENEFITS.** Other than the consideration provided for herein, and any pension and/or retirement benefits to which Petitioner is otherwise entitled under the Board's existing benefit plans and governing plan documents, Petitioner will not receive any compensation or benefits from the Board (including without limitation any compensation, payments or benefits to which Petitioner is entitled under Income and Benefits Policy set forth in the Board's Employee Handbook) for the period of September 1, 2016 through January 31, 2017 until such time as the pending criminal matter has been resolved.

4. **RELEASES**. Petitioner, for the consideration given by the Respondent, as set forth above, which he acknowledges is adequate and satisfactory to her, hereby commits as follows:

a. Petitioner knowingly, voluntarily, irrevocably and unconditionally remises, releases, waives and forever discharges the Board, its present and former agents, directors, present and former officers, present and former representatives, and its and their respective predecessors, successors, heirs, executors, administrators and assigns (hereinafter individually and collectively referred to as the "Releasees," from any and all manner of liabilities, actions, causes of action, contracts, agreements, promises, claims, suits and demands that arise from the subject matter of the instant Administrative action.

b. Petitioner acknowledges and agrees that other than the consideration provided for herein, he is not entitled to and will not receive any additional compensation or benefits of any kind from the Board for the period of September 1, 2016 through January 31, 2017 and that no representations have been made to him regarding any such additional compensation or benefits. Nothing in this Agreement is intended to or should be construed to affect his receipt of benefits in which he is vested or to which he is entitled.

5. **RETURN OF BOARD PROPERTY**. Petitioner agrees to return to the Board by March 5, 2017 any and all property of the Board in his possession or control including, but not limited to, computers, keys, identification cards, reports, documents, correspondence, manuals, ledgers, equipment, software, diskettes, CDs, computer files, customer lists, business cards and other tangible embodiments of the Board's Confidential Information (regardless of the media in which such Confidential Information is stored), including copies thereof, then in Petitioners possession, whether prepared by him or by others.

6. **DISPARAGING COMMUNICATION**. The parties agree that they shall not issue any communication, written, verbal or otherwise, that disparages, criticizes or otherwise reflects adversely upon either party or which encourages any adverse action against the parties, provided that the parties are permitted to testify truthfully under oath pursuant to subpoena.

Additionally, the parties agree not to disparage or make or solicit any comments, statements, or the like to the media, future/prospective employers or to others that may be considered to be derogatory or detrimental to the good name or business reputation of each other. The Board, administration and its agents agree that they will not do anything to impede or hinder any of Petitioner's future job prospects. Nothing contained herein shall be interpreted to prevent the Board and its agents from giving lawful testimony or other information to government agencies and relevant insurance carriers.

7. **PROHIBITION ON DISCLOSURE OR USE OF CONFIDENTIAL INFORMATION**. Unless Petitioner first secures the Board's written consent, he agrees not to directly or indirectly publish, disclose, market, use or authorize, advise, hire, counsel or otherwise procure any other person or entity, directly or indirectly, to publish, disclose, market or use, any secret, confidential, proprietary or trade secret information of the Board of which Petitioner became aware or informed during his employment with the Board, including but not limited to, information concerning the Board's business.

8. **CONFIDENTIALITY**. The parties hereby expressly agree to disclose the terms of this Agreement only to the extent required by law or as may be necessary for tax, unemployment, or other related purposes. Nothing in this Paragraph is intended to apply to information which is already public, nor to information which the public is entitled to procure under any law including, but not limited to, the Open Public Records Act, N.J.S.A. 47:1A-1 et. seq.

9. **NO ADMISSION OF WRONGDOING.** Nothing contained in this agreement shall be construed to constitute an admission of wrongdoing or liability by the Respondent Board.

10. **PROSPECTIVE INQUIRIES.** Responses to any employment or media inquiries that may be directed to the Board concerning Petitioner shall be factual in nature and shall provide directory type information such as length of service, salary, title and basis for separation.

11. **AGREEMENT APPROVAL.** The Board will vote on this Agreement at a duly convened public meeting. The Board President may execute this Agreement on behalf of the Board. If the Board does not approve this Agreement, this Agreement shall become null and void.

12. **ASSENT TO TERMS**. Petitioner hereby represents that he enters into this Agreement without duress and of his own free will and volition, having had the opportunity to consult with counsel of his choosing. Petitioner acknowledges that he was given the opportunity to fully consider this Agreement. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Petitioner will not be entitled to the consideration described herein.

13. **ENTIRE AGREEMENT.** This Agreement represents the entire understanding among the parties and may be modified only in a subsequent written instrument, duly dated and executed by all of the parties. No other promises or representations of any kind have been made by any party hereto and no other promises or representations shall be binding upon the parties.

14. **SEVERABILITY.** In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of the Agreement shall remain in full force and effect.

15. **ADVICE OF COUNSEL.** The parties hereto acknowledge that they have been informed of their right to seek independent legal counsel before signing this Agreement, that they understand the contents of this Settlement Agreement, and that this Agreement is entered into voluntarily. Therefore, no term or condition contained herein shall be construed against any party on the grounds that the party or its/his attorney, proposed or drafted that term or condition. This Agreement and Release constitutes the entire agreement between the parties and constitutes full and final settlement of all issues to date.

16. **GOVERNING LAW, VENUE AND EXCLUSIVE REMEDY.** This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey and claims concerning or relating to this Agreement, the breach hereof or for specific performance shall be solely and exclusively with the jurisdiction of and venued in the New Jersey Superior Court, Law Division, in the Vicinage of Essex County.

17. **EXECUTION IN COUNTERPARTS AND FACSIMILE SIGNATURES.** The Agreement may be executed in two (or more) counterparts, each of which counterparts, when executed and delivered, shall be deemed to be an original, and all of which counterparts, taken together, shall constitute but one and the same agreement. An original signature transmitted by facsimile shall be deemed to be an original for purposes of this Agreement.

IN WITNESS WHEREOF, the duly authorized representatives of the parties have set forth their respective hands and seals on the dates indicated below:

AGREED AND ACCEPTED:

Justin Bozinta

Subscribed and sworn to before me
this 15 day of May 2017

Notary Public
CLARE T. PELLEGRINI
A Notary Public of New Jersey
My Commission Expires November 10, 2020

CARUSO SMITH PICINI, PC

Nicholas Poberezhsky, Esq.

Date: MAY 15, 2017

EAST ORANGE BOARD OF EDUCATION

Bergson Leneus, President

Dr. Kevin R. West, Superintendent

Victor R. Demming
Victor Demming
Business Administrator/Board Secretary

BUSINESS AND GOVERNMENTAL INSURANCE AGENCY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY, AND WILLIS OF NEW JERSEY, INC.	:	
RESPONDENT.	:	

SYNOPSIS

The petitioner – Business and Governmental Insurance Agency, which agency had provided services to the Union Township School District for twenty-three years – challenged the determination of the respondent Board to award a contract for insurance brokerage services to Willis of New Jersey (Willis). Petitioner initially filed an appeal in October 2016, along with a motion for emergent relief, arguing that the Board had not followed proper bidding procedures when it awarded a contract to Willis – which had submitted a proposal for insurance brokerage services in September 2016, well beyond the March 15, 2016 deadline for submission of proposals. Petitioner's motion for emergent relief was subsequently granted, and the Board was directed to rescind the contract with Willis of New Jersey and either award a contract for insurance brokerage services to one of the four vendors who submitted timely responses to the request for proposals (RFP), or reject all of the proposals pursuant to *N.J.S.A.* 18A:18A-22. The Board ultimately rescinded its contract with Willis, rejected all other proposals in order to substantially revise its specifications for the services, and filed a motion to dismiss the petition – contending that the grant of emergent relief had satisfied the demands in petitioner's appeal, and therefore the matter is now moot. Willis filed a similar motion to dismiss.

The ALJ found, *inter alia,* that: the Board complied with the emergent relief order by terminating and rescinding the contract with Willis; pursuant to *N.J.S.A.* 18A:18A-22, a board may reject all bids in order to substantially revise the specifications contained in the RFP; in this matter, it is evident that the Board made substantial revisions to the specifications with respect to the scope of services to be rendered in the second RFP; petitioner's contention that there were no substantial changes is without merit; there is no requirement for a board of education to provide a certification of reasons when it rejects all bids pursuant to *N.J.S.A.* 18A:18A-22, and petitioner's request for respondent to provide such certification is without merit; likewise, petitioner's contention that Willis should be required to disgorge any and all commissions it received from the Board from the time of the award to its rescission is without merit, as the equities of the situation do not support petitioner's request for disgorgement. Accordingly, the ALJ granted the motions to dismiss of both respondents, with prejudice.

Upon full review and consideration of the record in this matter, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision as the final decision in this matter for the reasons well expressed therein. The petition was dismissed as moot.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 14, 2017

OAL DKT. NO. EDU 16782-16
AGENCY DKT. NO. 284-10/16

BUSINESS AND GOVERNMENTAL INSURANCE AGENCY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY, AND WILLIS OF NEW JERSEY, INC.	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner – Business and Governmental Insurance Agency – and the replies thereto submitted by the Union Township Board of Education (Board) and Willis of New Jersey, Inc. (Willis).

Petitioner takes exception to the Administrative Law Judge's (ALJ) conclusion that the equities of the situation did not support petitioner's request for disgorgement. In its exceptions, petitioner argues that the ALJ previously found in the Order Granting Emergent Relief that there were "indications of collusion and favoritism" when – according to Willis – the Board asked it to submit a proposal. Petitioner urges the Commissioner to find that disgorgement is an appropriate remedy because the Initial Decision conflicts with the reasoning in the Order Granting Emergent Relief – which was adopted by the Commissioner – and it is inconsistent to find that the equities do not support disgorgement after already finding that collusion and favoritism exist.

Petitioner also argues that the ALJ erred in finding that it did not mention disgorgement as a form of relief in the petition. Instead, petitioner explains that it included a catch-

all prayer of relief, and that pursuant to *N.J.A.C.* 1:1-6.2, pleadings may be freely amended. Petitioner also points out that it raised the demand for disgorgement in its opposition to the Motions to Dismiss filed by the Board and Willis and at the hearing in this matter.

Finally, petitioner takes exception to the ALJ's conclusion that the Board complied with the Order Granting Emergent Relief. Petitioner contends that the Board's decision to reject all bids was arbitrary, capricious and unreasonable because it did not "substantially revise" the specifications for the goods or services as is required to reject all bids under *N.J.S.A.* 18A:18A-22(d). Petitioner argues that it seems suspicious that the Board would find the specifications in need of revision ten months after the responses to the Request for Proposals were initially due, especially after it previously argued that Willis was substantially performing the contract. Accordingly, petitioner argues that the Initial Decision should be rejected.

In reply, the Board argues that the ALJ properly found that it rejected all proposals to substantially revise the specifications, in accordance with *N.J.S.A.* 18A:18A-22(d), and that it did in fact revise the specifications. In support, the Board explained the many differences between the original specifications and revised specifications, and argues that the ALJ properly found it evident that there were substantial revisions. Additionally, the Board contends that it complied with the Order Granting Emergent Relief, as it terminated and rescinded the contract with Willis and rejected the other four proposals in order to substantially revise the specifications. The Board argues that, contrary to petitioner's arguments, it satisfied the requirements of *N.J.S.A.* 18A:18A-22. The Board also argues that the petitioner's arguments about collusion between the Board and Willis are irrelevant because the statute does not require the Board to explain its rejection of bids. As such, the Board argues that the ALJ properly found this matter is moot and should be dismissed.

Willis argues – in reply to petitioner's exceptions – that the Initial Decision should be adopted by the Commissioner. Specifically, Willis contends that the ALJ properly found that the equities do not support petitioner's claim for disgorgement by Willis. Willis points out that the ALJ never made a finding that there was evidence of collusion and favoritism between the Board and Willis. Although the ALJ stated in dicta that there were indications of collusion and favoritism based on the Board's request for Willis to submit a proposal months after they were due, the ALJ ultimately found that the suggestion of favoritism was not supported as Willis provided the services and should receive compensation. Willis makes clear that its conduct was appropriate from the start; Willis simply complied with the Board's request for it to submit a proposal. Willis also emphasizes that there is no evidence in the record that it ever had any unfair advantage in the preparation of its bids. Procedurally, Willis contends that the ALJ properly found that petitioner did not request disgorgement in its prayer for relief, as courts have found that generalized, catch-all prayers for relief are insufficient. Substantively, Willis maintains that it performed the services for the Board in good faith and it would be inequitable for it to be deprived of its fair compensation. As such, the ALJ appropriately denied petitioner's request for disgorgement.

Willis also contends that the Board complied with the Order Granting Emergent Relief as it terminated Willis, rejected the remaining bids, and substantially revised the specifications. Willis emphasizes that the revised RFP contained multiple substantive changes, which aimed to expand and alter the scope of services. Willis asserts that petitioner's argument in its exceptions – that it is suspicious that the Board would find that the specifications were inadequate and in need of revision after it already found that Willis substantially performed the contract – misses the point. Whether Willis substantially performed the initial RFP bears no

relation to whether the revised RFP expanded the scope of its work. Accordingly, Willis argues that the ALJ appropriately found that the Board complied with *N.J.S.A.* 18A:18A-22 and the Order Granting Emergent Relief.

Upon a comprehensive review of the record, the Commissioner agrees with the ALJ that respondent complied with the Order Granting Emergent Relief. The Board terminated and rescinded the contract with Willis, as it was directed to do. Further, in accordance with *N.J.S.A.* 18A:18A-22, a board may reject all bids in order to substantially revise the specifications for the requested goods or services. The Commissioner agrees with the ALJ that the Board made substantial revisions to the specifications from the first to the second RFP, including: (1) the items required for submission with the RFP; (2) the term length; (3) the fee arrangement; (4) the scope of services to be rendered; (5) the criteria used to evaluate proposals; (6) the submission of detailed broker information; (6) the years of experience required in insurance brokerage services; and (7) the requirements for personnel assigned to provide services. It is clear that there were numerous substantial revisions to the RFP and, therefore, the Board acted in accordance with *N.J.S.A.* 18A:18A-22 when it rejected the remaining proposals and substantially revised the specifications. The Commissioner does not find petitioner's exceptions to be persuasive. Petitioner has not demonstrated that the Board acted in an arbitrary, capricious or unreasonable manner, or that it only made the substantial revisions to the specifications as a ruse to enable it to award the contract to Willis.

Additionally, the Commissioner concurs with the ALJ that the equities of this matter do not support petitioner's request for disgorgement. Willis provided the services under the contract and should receive just compensation. The Commissioner further agrees with the ALJ

that if disgorgement were to be ordered, the Board would receive the benefit of not paying for the services provided, and there is no equitable reason for the Board to receive that benefit.

Accordingly, for the reasons thoroughly expressed therein, the Initial Decision is adopted as the final decision in this matter and the petition is hereby dismissed as moot.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/14/17

Date of Mailing: 8/14/17

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 16782-16
AGENCY DKT. NO. 284-10/16

BUSINESS AND GOVERNMENTAL INSURANCE AGENCY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY, AND WILLIS OF NEW JERSEY, INC.,

Respondents.

Christopher K. Harriott, Esq., for petitioner (Florio Kenny Raval, attorneys)

Paul E. Griggs, Esq., for the Board of Education of the Township of Union (Sciarrillo Cornell Merlino McKeever & Osborne, attorneys)

Robert A. Mintz, Esq., for Willis of New Jersey, Inc. d/b/a Willis Towers Watson (McCarter & English, attorneys)

Record Closed: June 30, 2017 Decided: June 30, 2017

BEFORE **RICHARD McGILL**, ALJ:

Business and Governmental Insurance Agency ("petitioner") filed a petition with the Commissioner of Education, challenging a determination by the Board of Education of the Township of Union ("respondent") to award a contract for insurance brokerage services to Willis of New Jersey, Inc. d/b/a Willis Towers Watson ("Willis"). Respondent and Willis now move to dismiss the petition as moot.

PROCEDURAL HISTORY

Petitioner filed its petition with the Department of Education on October 31, 2016, pursuant to the authority of the Commissioner of Education under N.J.S.A. 18A:6-9 to hear and determine controversies and disputes arising under the school laws. In conjunction with the petition, petitioner filed a motion for emergent relief.

The matter was transmitted to the Office of Administrative Law on November 3, 2016, for determination as a contested case. An oral argument in regard to petitioner's motion for emergent relief was conducted on November 21, 2016, at the Office of Administrative Law in Newark, New Jersey. The undersigned's Order on Motion for Emergent Relief dated November 29, 2016, granting petitioner's motion for emergent relief, was adopted by the Commissioner in a Decision on Application for Emergent Relief dated December 12, 2016.

On February 1, 2017, respondent filed a motion to dismiss the petition contending in essence that the emergent relief had granted the relief requested in the petition and that the matter is now moot. On the same date, Willis filed a motion to dismiss the petition as moot for substantially the same reasons as advanced by respondent.

On February 17, 2017, petitioner filed its opposition to the motions to dismiss. Petitioner's two main arguments are that respondent failed to comply with the order granting emergent relief and that petitioner is now seeking additional relief which was

not specifically mentioned in the petition. Both respondent and Willis submitted replies to the opposition.

MOTIONS TO DISMISS

A. Background

There is no real dispute as to the general course of events in this matter. In early 2016, respondent issued a Request for Proposal for Insurance Brokerage Services. In regard to the timing of any proposal, the request states as follows: "Proposal shall be submitted no later than MARCH 15, 2016. . . . Proposals will be opened . . . at 11:00 a.m. on MARCH 15, 2016. Your proposal must be received prior to that date and time." On March 15, 2016, petitioner submitted a fully responsive proposal. In addition, timely proposals were submitted by three other vendors including Brown & Brown Metro, LLC, Atlantic Associates Insurance Agency, Inc., and Arthur J. Gallagher & Co. Petitioner had provided the services in question for twenty-three years.

Willis submitted a proposal in or about September 2016. On September 20, 2016, respondent adopted a resolution to accept the proposal of Willis. Prior thereto, respondent did not receive consent to extend the deadline to award the contract beyond the sixty days set forth in N.J.S.A. 18A:18A-36. Further, respondent did not take any action to reject the proposals of petitioner and the other vendors that submitted timely responses. On October 5, 2016, petitioner received notice from Flagship Dental Plans, a third party provider of dental benefits, that petitioner was removed as broker of record for respondent effective October 1, 2016.

In the Order on Motion for Emergent Relief dated November 29, 2016, a determination was made that petitioner met all requirements for emergent relief. One requirement for emergent relief is that petitioner has demonstrated a likelihood of prevailing on the merits of the underlying claim. N.J.A.C. 6A:3-1.6(b)3. It is noteworthy that the determination was made that the lateness of the proposal by Willis by five to six

months was an obvious and gross defect in the proposal that was disregarded by respondent. As relief, it was ordered that: (1) "The contract between respondent and Willis be rescinded and deemed null and void" and (2) "Respondent may award the contract for insurance brokerage services to any of the four vendors who submitted timely responses to the request for proposals or reject all of the proposals if the circumstances satisfy the criteria in N.J.S.A. 18A:18A-22."

On December 13, 2016, respondent approved a resolution terminating and rescinding the contract with Willis effective December 31, 2016. On the same date, respondent approved a resolution rejecting the proposals submitted by Atlantic Associates Insurance Agency, Inc., Business and Governmental Insurance Agency, A.J. Gallagher and Company and Brown and Brown Metro because respondent wanted to substantially revise the specifications for the services.

B. Analysis

Respondent and Willis seek dismissal of the petition on the basis of mootness. Courts normally will not entertain cases when a controversy no longer exists, and the disputed issues have become moot. DeVesa v. Dorsey, 134 N.J. 420, 428 (1993). A case is moot when the original issue presented has been resolved. Ibid. Likewise, an issue is moot when the decision sought in the matter can have no practical effect on the existing controversy. Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006). The concept of mootness has been applied to cases before the Commissioner of Education, e.g., Price v. Bd. of Educ. of Washington Twp., OAL Dkt. No. EDU 6121-07, Initial Decision (December 7, 2007), adopted, Comm'r, (January 23, 2008).

In its petition, petitioner requested relief as follows:

(a) Enjoining UBOE from awarding and/or proceeding with any contract for "2016 Request for Proposal for Insurance Brokerage Services";

(b) Rescinding any contract for 2016 Request for Proposal for Insurance Brokerage Services which has already been awarded by UBOE to Willis Insurance;

(c) Requiring the UBOE to award the 2016 contract for Insurance Brokerage Services to one of the four (4) vendors who submitted timely response to the RFP;

(d) Granting such other relief as the Commissioner deems equitable and just.

In regard to petitioner's contention that respondent failed to comply with the order granting emergent relief, it is evident that the first and second items were granted as emergent relief and that respondent in fact terminated and rescinded the contract in question with Willis. The third type of relief was also granted with an alternative recognizing respondent's right to reject all bids. In accordance with N.J.S.A. 18A:18A-22(d), a board of education may reject all bids when it wants to substantially revise the specifications for the goods or services. Petitioner maintains that respondent failed to comply with the Order Granting Emergent Relief in that there was no substantial revision to the specifications. Additionally, petitioner seeks a requirement for respondent to provide a certification of reasons for the rejection of all bids.

In support of their motions, respondent and Willis detailed differences between the first and second requests for proposals. From a review of these submissions, it is evident that there were substantial revisions from the first to the second request for proposals particularly with respect to the scope of services to be rendered. It follows that respondent has not failed to comply with the Order Granting Emergent Relief with respect to N.J.S.A. 18A:18A-22. Further, there is no requirement for a board of education to provide a certification of reasons when it rejects all bids pursuant to N.J.S.A. 18A:18A-22. It follows that petitioner's argument that respondent failed to comply with the Order Granting Emergent Relief is without merit.

The fourth type of relief requested in the petition is "such other relief as the Commissioner deems equitable and just." Petitioner's second contention is that Willis should be required to disgorge any and all commissions that it received under the non-rescinded contract. In support of this contention, petitioner argues that strong remedies are required to deter improper conduct by public officials in the context of public bidding. Further, as a matter of equitable principles, a wrongdoer should be relieved of profits. Since the contract was improperly awarded to Willis, it should be required to disgorge any commissions earned from the time of the award to its rescission.

Willis argues that disgorgement was not included in the relief sought in the petition and that there has been no finding of improper conduct or wrongdoing by Willis. Further, Willis has provided the services in question and should receive the associated fees. Disgorgement would be unfair to Willis and would unjustly enrich respondent. Willis refers to the concept of quantum meruit as a form of quasi-contractual recovery that rests on the principle that a person should not be allowed to enrich himself unjustly at the expense of another.

Here, the equities of the situation do not support petitioner's request for disgorgement. First, petitioner did not mention disgorgement as a form of relief in its petition. Second, strong action has been taken in this case in that the contract in question was terminated and rescinded by respondent as required the Order Granting Emergent Relief. Third, Willis has provided the services in question and should receive just compensation. Fourth, there is no equitable reason for respondent to receive the benefit of disgorgement. It follows that petitioner's argument is without merit.

Accordingly, it is **ORDERED** that:

1. Respondent's motion to dismiss the petition in this matter with prejudice as moot be granted.
2. The motion of Willis to dismiss the petition in this matter with prejudice as moot be granted.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 30, 2017
DATE

RICHARD McGILL, ALJ

Date Received at Agency:

Date Mailed to Parties: JUL 6 2017

ljb

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

224-17

OAL DKT. NO. EDU 02760-16
AGENCY DKT. NO. 11-1/16

CHRISTOPHER WALKER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed stipulation of settlement and release, and the Initial Decision, issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/14/17

Date of Mailing: 8/14/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 02760-16
AGENCY DKT. NO. 11-1/16

CHRISTOPHER WALKER,
Petitioner,
v.
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,
Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Carmen Saginario, Jr., Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: June 26, 2017 Decided: June 27, 2017

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

This matter was transmitted to the Office of Administrative Law on February 24, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 27, 2017
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: 6/28/17

Date Mailed to Parties: 6/28/17

caa

CHRISTOPHER WALKER

vs.

HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

STIPULATION OF SETTLEMENT AND RELEASE OF CLAIMS

OAL DOCKET NO. EDU 02760-2016S

WHEREAS, Christopher Walker ("Walker") is employed as a faculty member for the Hunterdon Central Regional High School Board of Education ("Board"); and

WHEREAS, the Board and Walker have engaged in discussions and have agreed upon the terms of the within Stipulation of Settlement and Release of Claims ("Agreement") which will, among other things, conclude a matter initiated by Walker through an appeal to the Commissioner of Education of the State of New Jersey which matter was referred to the Office of Administrative Law under Docket No. EDU 02760-2016S (the "Petition"); and

WHEREAS, after receiving consent from their respective clients, counsel for the parties placed the terms of the within settlement on the record before Administrative Law Judge Laura Sanders on May 2, 2017; and

WHEREAS, this Agreement is not, and shall not be deemed, an admission by the Board of a violation of any statute, rule, regulation or law, or of wrongdoing of any kind; and

WHEREAS, this Agreement is not, and shall not be deemed, an admission or finding that any claims and/or defenses the parties to this Agreement raised or might have raised against each other, be considered in any way valid or meritorious; and

WHEREAS, Walker and the Board acknowledge that this Agreement is a compromise of claims and/or defenses and that they are entering into this Agreement solely to avoid the inconvenience and expense of further protracted proceedings.

NOW THEREFORE, the parties hereto, intending to be legally bound, hereby stipulate and agree as follows:

1. Each reference to Walker in this Agreement includes Walker and his agents, executors, administrators, heirs, beneficiaries, successors and assigns.
2. This Agreement sets forth the full and final settlement and resolution of any and all claims that Walker may have or may have had against Board for any action and/or omission that has occurred up to the date of the Agreement with regard to Walker's employment with the Board and/or claims or defenses that the Board may have or may have had against Walker for any action that has occurred up to the date of this Agreement with regard to his employment with the Board, including but not limited to all claims and/or defenses that were or might have been raised in the Petition and/or in response thereto. Notwithstanding the foregoing, this Settlement does not resolve any pending workers compensation claim that Walker may have relating to his employment with the School District.
3. Subject to the foregoing sentence, and for and in exchange for the consideration set forth in this Agreement, the receipt and sufficiency of which is hereby acknowledged, Walker knowingly and voluntarily waives, releases, and covenants not to continue to pursue the Petition and/or to initiate any legal or equitable proceeding against the Board and its present or former employees, elected or appointed members, volunteers, servants, agents, attorneys, representatives, predecessors, successors and assigns with

respect to any and all claims of any kind or nature whatsoever based upon any action that has occurred up to the date of this Agreement with regard to his employment with the Board, regardless of whether such claims are now known or are later discovered, including, but not limited to all claims or causes of action which were or might have been asserted in the Petition or any other civil action; all rights, claims or causes of actions under any other federal, state, or local law; and all other claims or causes of action (whether at common law or otherwise) arising out of his employment with the Board, regardless of whether such claims are now known or are later discovered, including but not limited to any alleged violations of the following:

- The National Labor Relations Act;
- Title VII of the Civil Rights Act;
- Civil Rights Act of 1991;
- Sections 1981 through 1988 of Title 42 of the United States Code;
- The Employee Retirement Income Security Act;
- The Fair Credit Reporting Act;
- The Immigration Reform Control Act;
- The Americans with Disabilities Act;
- The Rehabilitation Act;
- The Fair Labor Standards Act;
- The Occupational Safety and Health Act;
- The Family and Medical Leave Act;
- The Equal Pay Act;
- The Uniformed Services Employment and Reemployment Rights Act;

- Worker Adjustment and Retraining Notification Act;
- Employee Polygraph Protection Act;
- The New Jersey Law Against Discrimination;
- The New Jersey Family Leave Act;
- The New Jersey State Wage and Hour law;
- The New Jersey Conscientious Employee Protection Act;
- The New Jersey Equal Pay Law;
- The New Jersey Occupational Safety and Health Laws;
- The New Jersey Smokers' Rights Law;
- The New Jersey Genetic Privacy Act;
- New Jersey laws regarding political activities of employees, lie detector tests, jury duty, employment protection, consumer reports, and discrimination;
- Any other federal, state or local civil rights law or any other local, state or federal law, regulation or ordinance;
- Any public policy, contract (express, written or implied), tort, or common law;
- Any claims for vacation, sick or personal leave pay or payment pursuant to any practice, policy, handbook or manual of the Board, except those referenced below;
- Any allegation for costs, fees or other expenses including attorneys' fees;
- The Age Discrimination in Employment Act of 1967, 20 U.S.C. Section 621 et. seq., as amended and, the Older Workers' Benefit Protection Act of 1990 as amended.

4. Walker releases and forever discharges the Board and its present and former employees, elected and appointed members, and any of its insurers, trustees, employees, volunteers, servants, agents, attorneys, representatives, predecessors, successors, and assigns from any and all claims or causes of action of any type

whatsoever, legal or equitable, arising from or pertaining to any act or circumstance related to Walker's relationship with and contact with Board and anything else that has occurred up to the date of this Agreement, whether known or unknown.

5. In consideration for dismissal of the Petition, the releases provided for herein, and other good and valuable consideration, the Board agrees to restore to Walker's personnel record accumulated sick leave in the amount of 35 days. Such restoration shall be completed as soon as practicable after the parties' execution of this Agreement.
6. Walker agrees not to disclose to anyone other than his spouse and/or his accountant and/or his attorney the terms and conditions of this Agreement unless required by law.
7. Walker represents and agrees that the only consideration that he has received or which he will receive for executing this Agreement is that which is set forth in this Agreement.
8. It is further understood and agreed that neither the undersigned nor the parties' attorneys or other representatives, will in any way disclose or publicize, whether it be directly or indirectly, to any third party, or in any news, communications, or electronic media, including but not limited to newspapers, magazines, radio, television, or any social media outlet, the facts or terms and conditions of this Agreement unless required by law. This paragraph is intended to become part of the consideration for settlement of Walker's claims.

9. In the event that Walker breaches any portion of this Agreement, Walker agrees that Board is entitled to seek injunctive relief and an award of damages and reasonable costs for any such breach.

10. Walker and Board agree that this Agreement and its terms shall be governed by, construed and enforced under New Jersey Law, regardless of New Jersey's choice of law provisions. The parties agree that they have been represented by counsel. Any dispute related to or involving this Agreement will be litigated in the Superior Court of New Jersey, either Law or Chancery Division, Hunterdon County.

11. By signing this Agreement, Walker acknowledges that he has had the opportunity to consult his attorney and that Walker fully understands the meaning and intent of this Agreement, including but not limited to its binding effect.

12. Walker and the Board agree that if any provision of this Agreement is declared or determined by any court of competent jurisdiction to be unenforceable or invalid for any reason, the validity of the remaining parts or provisions shall not be affected thereby, and the said part, term or provision declared or determined invalid or unenforceable shall be deemed not to be part of this Agreement.

13. This Agreement shall become effective and enforceable upon execution by the parties.

Older Worker Benefit Protection Act: Walker understands that the Older Worker Benefit Protection Act requires that he be provided a period of at least twenty-one (21) calendar days within which to consider this Agreement. Further, Walker has the right within seven calendar days of the date of his signature of this Agreement (the "revocation period") to revoke (that is, cancel) this Agreement, including his waiver of rights to claim

damages and/or money under the Age Discrimination in Employment Act and the Older Worker Benefit Protection Act. In the event Walker revokes this Agreement, it shall be null and void as to the foregoing claims only and the parties shall have no obligations hereunder. To be effective, Walker's revocation must be in writing and actually delivered to Gymlyn Corbin, Business Administrator/Board Secretary, at Hunterdon Central Regional High School, with a copy to Carmen Saginario Jr., Esq., at CSaginario@capehart.com within the seven (7) day period. This Agreement shall not become effective or enforceable until the revocation period has expired. Thus, the "effective date" of this Agreement shall be the eighth (8th) day following the date of Walker's signature of this Agreement, provided Walker has not exercised the right of revocation provided herein.

14. This Agreement may be signed in counterparts and shall be deemed fully executed when all parties have signed the Agreement. The parties agree to accept facsimile/scanned signatures in lieu of original signatures which shall have the same validity and effect of original signatures.

15. Walker has read and understands the terms of this Agreement and by signing below acknowledges and voluntarily agrees to accept the terms of this Agreement with full knowledge of its significance. Walker has been and is advised to review and discuss this Agreement with his attorney prior to signing it.

IN WITNESS WHEREOF, the parties have executed this Agreement intending to be legally bound hereby.

5/30/17

CHRISTOPHER WALKER

Dated: 5/30, 2017

Sworn to and subscribed before me on this 30 day of May 2017

Notary Public
State of New Jersey M. Branch S
Any ATLaw at NJ

Interim Superintendent
Hunterdon Central Regional High School District Board of Education

CAPEHART SCATCHARD
ATTORNEYS AT LAW

Carmen Saginario Jr.
856.914.2081
csaginario@capehart.com
Fax: 856.235.2786

June 23, 2017

Hon. Laura Sanders, A.L.J.
State of New Jersey
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625-0049

Re: Christopher Walker v. Hunterdon Central Regional High School
District Board of Education
OAL Docket No. EDU 02760-2016S
Agency Ref. No. 11-1/16
Our File No. 03983-17504

Dear Judge Sanders:

As you will recall, this office represents the Hunterdon Central Regional High School with respect to the above matter. This letter will confirm that the parties have settled the matter. A copy of the executed Stipulation of Settlement is enclosed for the record.

Should you have any questions, please do not hesitate to contact me.

Respectfully,

CAPEHART & SCATCHARD, P.A.

Carmen Saginario Jr.

CS/amc
Enc.
cc: Michael T. Barrett, Esq. (w/o enc.)
Gymlyn Corbin, Business Administrator (w/o enc.)
Gregory Von-Matt, Adjuster (w/o enc.)

Capehart & Scatchard, P.A. 8000 Midlantic Drive, Ste. 300S P.O. Box 5016 Mount Laurel, New Jersey 08054-5016
856.234.6800 Main Fax 856.235.2786 WC Fax 856.439.3168 www.capehart.com

226-17

H.A.-T., ON BEHALF OF MINOR CHILD, T.T.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY; VICTOR VALESKI; EVELYN OGDEN; AND MARK SUTOR,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

In the Spring of 2016, petitioner filed an appeal seeking to have her son's PARCC (Partnership for Assessment of Readiness for College and Career) scores voided, after the respondent Board refused her request to void the scores. The Board asserted that participation in the PARCC assessment is both a requirement in the State of New Jersey, and a graduation requirement in East Brunswick schools. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: in April and May of 2016, T.T. participated in the PARCC assessment; after completing five of six segments, the petitioner contacted the superintendent of schools and instructed that she no longer wanted her son to participate in the assessment; the superintendent thereafter secured the authorization of T.T.'s father to have T.T. complete the PARCC assessment; petitioner subsequently requested that T.T.'s PARCC scores be voided; the Board's attorney represented to petitioner that the Board would seek authorization from the NJ Department of Education (Department) to void T.T.'s scores, and if the Department authorized such action, the Board would in fact void the scores; in a letter dated May 18, 2016, the Board requested written guidance from the Department on whether a completed PARCC assessment could be voided; the Department responded by letter dated May 19, 2016, stating that the Board has the authority to void a PARCC assessment after it has been completed and that the such a decision should be governed by the Board's policies and procedures; despite this guidance from the Department, the Board refused to void T.T.'s PARCC scores, asserting that the PARCC assessment is a State requirement and also a graduation requirement in East Brunswick. The ALJ concluded that the decision of the Board to refuse H.A.-T.'s request to void her son's PARCC assessment – after specifically seeking and receiving guidance from the Department which clarified that a Board does have the authority to void PARCC scores – was arbitrary, capricious and unreasonable. Accordingly, the ALJ determined that the petitioner, not the respondent, is entitled to prevail in this case as a matter of law.

Upon review, the Commissioner concurred with the ALJ that the refusal of the Board to void T.T.'s PARCC scores was arbitrary, capricious and unreasonable. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 14, 2017

OAL DKT. NO. EDU 11407-16
AGENCY DKT. NO. 184-7/16

H.A.-T., ON BEHALF OF MINOR CHILD, T.T.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY; VICTOR VALESKI; EVELYN OGDEN; AND MARK SUTOR,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Board. Petitioner did not file a reply thereto.

The Board takes exception to the Administrative Law Judge's (ALJ) finding that because the Department had not yet amended its regulations to reflect that it was now administering the Partnership for Assessment of Readiness for College and Career (PARCC) test rather than the New Jersey Assessment of Skills and Knowledge (NJASK) or High School Proficiency Assessment (HSPA), the Board was arbitrary, capricious and unreasonable in refusing to void T.T.'s scores because there was no requirement that students must take the PARCC test. Although the regulations still referenced the HSPA, it was clear through guidance and memoranda issued by the Commissioner that the State had transitioned to the PARCC test and that districts were required to administer the assessment.

The Board also takes exception to the ALJ's conclusion that the procedures in place for when a parent refuses to allow his or her child to take the PARCC and the existence of alternative means for a student to demonstrate graduation proficiency contradict the requirement that all students participate in Statewide assessments. The Board emphasizes that the Department does not condone a student's ability to opt out of the PARCC, but rather provides instruction for how to handle the situation when it

arises. Further, the existence of alternative means to demonstrate high school proficiency does not nullify the requirement that students take the PARCC.

Finally, the Board disagrees with the ALJ's finding that Director Jeffrey Hauger of the Office of Assessments for the Department of Education authorized the Board to void T.T.'s PARCC scores. The Board argues that Director Hauger did not give blanket authorization to the Board to void the scores, but instead indicated that a decision to do so must be in accordance with the Board's policies and procedures. The Board pointed out that Board Policy 5460 requires that it consider a student's performance on the State assessments in making determinations for the student's education program or eligibility to graduate, and therefore it would have violated its own policy had it voided T.T.'s scores.

Upon review, the Commissioner concurs with the ALJ that the refusal of the Board to void T.T.'s PARCC scores is arbitrary, capricious, and unreasonable. The Board attorney, Matthew Giacobbe, Esq., told petitioner that the District would seek authorization from the State to void the PARCC scores. Thereafter, Mr. Giacobbe submitted a letter to the Department indicating:

> ... As you may be aware, Mr. [T] objected that his son had to take the PARCC Assessment under the pretense that it was required for graduation and therefore desires to have his son's Assessment voided in its entirety. It is the District's understanding that it is unable and/or not authorized to void a PARCC Assessment once the test has been completed. Accordingly, the District respectfully requests written guidance from the New Jersey Department of Education concerning how to address Mr. [T]'s request to void a completed PARCC Assessment.
>
> (Febres Certification, December 2, 2016, Exhibit A).

In response, Director Hauger wrote:

> ... Please be advised that the Board has the authority to void a PARCC assessment after it has been completed by a student. The determination as to whether the Board will take such action is a local issue and the decision should be governed by the Board's policies and procedures.
>
> (Febres Certification, December 2, 2016, Exhibit B).

The Board does not have a policy prohibiting it from voiding a PARCC score; while Board Policy 5460 references student assessments and their role in assessing student progress, it does not prohibit the Board from voiding a score. The Board reached out to the Department for guidance as it was

unsure whether it had the authority to void a score after a student had completed the assessment. Given that the Board specifically sought authorization from the Department to void the scores, received that authorization, and does not have any policy or procedure prohibiting it doing do, the Board acted in an arbitrary, capricious, and unreasonable manner in refusing to void T.T.'s PARCC scores. The Commissioner does not find the Board's exceptions to be persuasive. Board Policy 5460 did not prohibit it from voiding a score, and therefore the Board would not have violated its own policy.

Accordingly – to the extent that it found the Board was arbitrary, capricious and unreasonable in refusing to void T.T.'s PARCC scores after the Department had expressly given it the authority to do so – the Initial Decision of the OAL is adopted as the final decision in this matter.[1]

IT IS SO ORDERED.[2]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/14/17

Date of Mailing: 8/14/17

[1] The Initial Decision noted that respondents Valeski, Sutor and Ogden were improperly pled. The Commissioner agrees with the ALJ that these respondents should be dismissed.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 11407-16
AGENCY DKT. NO. 184-7/16

H.A.-T., ON BEHALF OF MINOR CHILD, T.T.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY; VICTOR VALESKI; EVELYN OGDEN; AND MARK SUTOR,
Respondents.

H.A.-T., pro se

Frances L. Febres, Esq., for respondents (Cleary Giacobbe Alfieri Jacobs, attorneys)

Record Closed: June 30, 2017 Decided: June 30, 2017

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

In the spring of 2016, the East Brunswick Board of Education (Board) refused to void T.T.'s PARCC[1] scores. The Board asserted that participation in the PARCC assessment is both a State requirement and a graduation requirement in East Brunswick. Did the Board act arbitrarily, capriciously, or unreasonably? Yes. Participation in the PARCC assessment was not and is still not a State requirement or a graduation requirement in East Brunswick under any State law or Board policy.

PROCEDURAL HISTORY

On May 6, 2016, petitioner, on behalf of her son, T.T., filed a petition with the Department of Education to have her son's PARCC scores voided. On May 13, 2016, the Bureau of Controversies and Disputes (Bureau) advised petitioner of the legal requirements for filing such an appeal, and on June 8, 2016, petitioner refiled her appeal with the Bureau. On June 9, 2016, the Bureau again advised petitioner of the legal requirements for filing such an appeal, and on June 20, 2016, petitioner refiled her appeal. On June 21, 2016, the Bureau yet again advised petitioner of the legal requirements for filing such an appeal, and on July 8, 2016, petitioner finally perfected her appeal.

On July 29, 2016, the Bureau transmitted the case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On December 6, 2016, respondents moved for summary decision; on January 19, 2017, petitioner opposed the motion; on May 24, 2017, I held a telephone conference to discuss the motion; and on June 30, 2017, I closed the record.

[1] Partnership for Assessment of Readiness for College and Career.

FINDINGS OF FACT

Based upon the Certification of Victor Valeski, the Certification of Mark Sutor, and the Certification of Frances Febres, and in viewing those certifications in the light most favorable to the East Brunswick Board of Education and not petitioner, that is, as if petitioner had cross-moved for summary decision, I **FIND** the following as **FACT**:

During the 2015–16 school year, T.T. was a ninth-grade student at Churchill Junior High School in the East Brunswick School District in East Brunswick, New Jersey.

From April 19, through May 16, 2016, the East Brunswick Board of Education administered the PARCC assessment to its ninth-grade students. During that time, each building administrator was responsible for issuing his or her own PARCC-related notifications. Since Churchill Junior High School and East Brunswick High School are separate buildings and entities, the parents of students at Churchill Junior High School received different PARCC-related notifications than parents of students at East Brunswick High School.

On December 1, 2015, and on December 8, 2015, Mark Sutor, the principal of Churchill Junior High School, notified parents of students at Churchill Junior High School, by telephone and through email, about a PARCC-assessment presentation that was scheduled to take place at a Parent-Teacher Association (PTA) meeting on December 10, 2015.

At that PTA meeting and presentation on December 10, 2015, the Board explained to those in attendance that students could complete an assessment portfolio to satisfy graduation requirements in the event they did not pass the PARCC assessment.

In addition, on March 28, 2016, Sutor notified parents of students at Churchill Junior High School, again by telephone and email, about the PARCC assessment and referenced a letter that Victor Valeski, the superintendent of schools, had issued about

the PARCC assessment. Sutor also referenced a frequently asked questions (FAQ) sheet about the PARCC assessment that had been emailed to parents and had been uploaded on the school website. In that FAQ sheet, the Board asked, "Is PARCC a required assessment?" and then answered, "All students in the tested grades or courses are required to take PARCC."

The full answer, however, is contradictory. In the first paragraph of that answer, the Board states that all students are required to take the PARCC assessment, and that all students must take the PARCC assessment to graduate, but in the last paragraph of that answer, the Board states that it cannot force a student to take the test. The question and answer is reproduced below in relevant part:

> Is PARCC a required assessment?
>
> PARCC is the State of New Jersey's legally required assessment for all students in grades 3 to 11, and for specific courses at the high school level in order to establish graduation eligibility. All students in the tested grades or courses are required to take PARCC.
>
> . . . .
>
> . . . PARCC testing is not optional and there is no "opt-out provision." We cannot force a student to take the test . . . . A student directed by his or her parent to not take the PARCC will be placed in a separate room from his/her classmates taking the assessment and will occupy their time reading.
>
> [Certification of Marc Sutor dated December 1, 2016, at Ex. C.]

The Board also noted in the FAQ sheet that opportunities other than the PARCC assessment exist for students to meet graduation requirements:

> State Eligibility for Graduation Requirement
>
> PARCC is the official State graduation eligibility assessment
>
> . . . .

> In order for the students who did not score at the proficient level on PARCC to graduate, the State Department of Education set minimal achievement scores for several other standardized assessments, including the PSAT, ACT, ASVB, and ACCUPLACER. The intent was to provide additional opportunities for students to meet the standards and be awarded a high school diploma. Students who do not meet the minimal test standards on any of these tests must participate in the rigorous, lengthy and time consuming State Portfolio Assessment Process in their senior year. If they do not pass the Portfolio Assessment, they are ineligible to graduate.
>
> [Certification of Marc Sutor dated December 1, 2016, at Ex. C.]

Between April 19, 2016, and May 16, 2016, T.T. participated in the PARCC assessment, but after T.T. completed approximately five of the six segments, petitioner contacted Valeski and told him that she no longer wanted her son to participate in the assessment. Valeski encouraged petitioner to change her mind and have her son complete the assessment. Petitioner, however, refused. Valeski then spoke to petitioner's husband, who gave his authorization for T.T. to complete the PARCC assessment.

On May 12, 2016, during a Board of Education meeting, petitioner approached Valeski, in the presence of Matthew Giacobbe, Esq., counsel for the Board, and asked them to void T.T.'s PARCC scores.

Giacobbe then answered, in Valeski's presence, that they would seek authorization from the Department of Education to do so, and if the Department of Education authorized them to void T.T.'s PARCC scores, they would in fact do so.

On May 18, 2016, Giacobbe asked the Department of Education whether the Board could void the PARCC scores, and on May 19, 2016, the Department of Education responded that the Board did have the authority to do so, noting that the determination should be governed by Board policy and procedure.

Nevertheless, the Board refused to void T.T.'s PARCC scores, asserting that participation in the PARCC assessment is both a State requirement and a graduation requirement in East Brunswick.

CONCLUSIONS OF LAW

I.

Respondents submit three arguments in support of their motion for summary decision. I will address each in turn. Before I do so, I note that petitioner improperly pled Valeski, Sutor, and Ogden[2] as parties to this case. Therefore, I will dismiss Valeski, Sutor, and Ogden from this case and will refer to the Board from this point forward as the only respondent in this case.

First, the Board argues through the certifications it submitted that it could not void the PARCC scores because it had no policy or procedure in place for doing so and petitioner demonstrated no exceptional circumstance for the Board to deviate from its policy and practice that all qualifying students participate in statewide assessments. The Board policy the Board refers to is Board Policy 5460. That policy requires all students, with the exception of students with a disability, or those authorized to participate in alternative assessments, to participate in statewide assessments. Yet this argument overlooks the fact that Giacobbe told petitioners that the Board would void the PARCC scores if the Department of Education gave the Board the authority to do so, which it did. Therefore, I **CONCLUDE** that the decision by the Board to refuse to void the PARCC scores is arbitrary, capricious, and unreasonable under the circumstances.

Second, the Board argues in its brief that all students are required to participate in the PARCC assessment. In support of its argument, respondent relies on N.J.A.C. 6A:8-4.1. This citation, however, is misleading. Today, that regulation states that boards of education shall administer the PARCC assessments, see N.J.A.C. 6A:8-4.1 (2016), but in 2015, when this controversy arose, the regulation stated that boards of

[2] Evelyn Ogden is the director of testing for the East Brunswick School District.

education shall administer the HSPA,[3] see N.J.A.C. 6A:8-4.1 (2015). Even though the Department of Education had made it clear in August 2015 in its handout "Year Two of PARCC . . . Parent PARCC Questions Answered" that New Jersey had transitioned from the NJASK[4] and the HSPA to the PARCC, and even though the Department of Education had made it clear in September 2015 in its memorandum "Student Participation in the Statewide Assessment Program" that State law and regulations required all students to take State assessments, and that all students were still expected to participate in statewide assessment programs, the Department of Education had not yet changed its regulations and no State law yet existed to reflect that policy or authorize this transition from the NJASK and the HSPA to the PARCC. Therefore, I **CONCLUDE** that the decision by the Board to refuse to void the PARCC scores is arbitrary, capricious, and unreasonable under the circumstances.

Third, the Board argues in its brief that participation in the PARCC assessment was a graduation requirement. This too is untrue. In the spring of 2016, the regulation governing graduation requirements in New Jersey required students to demonstrate proficiency in all sections of the HSPA, not the PARCC, and, even then, alternative means existed to meet graduation requirements. See N.J.A.C. 6A:8-1.5(a)(6) (2015). Although this regulation was later changed to substitute the PARCC for the HSPA, alternative means still remained to meet graduation requirements, and the PARCC was not, and is still not, a graduation requirement. See N.J.A.C. 6A:8-5.1(a)(6) (2016). In fact, the FAQ sheet upon which respondent relies states as much. In addition, the current regulation phases in the PARCC over a period of years. See N.J.A.C. 6A:8-5.1(f) (2016). Moreover, the current Board policy for high school graduation upon which East Brunswick relies, Board Policy 5460, still does not include the PARCC assessment as a graduation requirement. Therefore, I **CONCLUDE** that the decision by the Board to refuse to void the PARCC scores is arbitrary, capricious, and unreasonable under the circumstances.

[3] The High School Proficiency Assessment.
[4] New Jersey Assessment of Skills and Knowledge.

II.

A party may move for summary decision upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). Such motions shall be served with briefs. N.J.A.C. 1:1-12.5(b). They may also be served either with or without affidavits. Ibid.

Summary decision may ultimately be rendered if the papers, together with the affidavits, show that no genuine issue of material fact exists, and that the moving party is entitled to prevail as a matter of law. Ibid. This standard for granting motions for summary decision under N.J.A.C. 1:1-12.5 is substantially the same as it is for granting motions for summary judgment under R. 4:46-2. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996). Thus, the competent evidential materials presented must be viewed in the light most favorable to the non-moving party. See Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995).

In this case, respondent served its motion with a brief and with certifications. Petitioner then opposed the motion, but did not cross-move for summary decision. Nevertheless, in viewing those certifications in the light most favorable to respondent, I **CONCLUDE** that no genuine issue of material fact exists and that petitioner, not respondent, is entitled to prevail as a matter of law, but not against Valeski, Sutor, and Ogden, because they are improper parties to this case, and the claims against them should be dismissed.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the claims against Valeski, Sutor, and Ogden by petitioner are **DISMISSED**; that the motion for summary decision by the Board against petitioner is **DENIED**; and that the cross-motion against the Board as posited by this tribunal is **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this case. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days, and unless such time limit is otherwise extended, this recommended decision shall become a final decision under N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/30/17

DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: June 30, 2017

Date Mailed to Parties: JUL 5 2017

dr

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

225-17

OAL DKT. NO. EDU 3946-17
AGENCY DKT. NO. 35-2/17

Q.J., on behalf of minor child, D.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT, OF THE CITY OF NEWARK, ESSEX COUNTY	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 8/14/17

Date of Mailing: 8/14/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03946-17
AGENCY DKT. NO. 35-2/17

Q.J. O/B/O OF D.J.,
Petitioners,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Q.J., petitioner, pro se

Arsen Zartarian, Esq., for respondent Newark Public School District

Record Closed: June 20, 2017 Decided: June 26, 2017

BEFORE **JULIO C. MOREJON**, ALJ:

On March 22, 2017, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for prehearing telephone conferences on May 24, 2017 and June 6, 2017, conferences were held and parties agreed to settle the matter. A signed copy of the Settlement Agreement and General Release indicating the terms of settlement was forwarded to the undersigned June 20, 2017, and is attached hereto.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that settlement should be approved. Accordingly, I approve the settlement **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 26, 2017
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: 6-28-17

Date Mailed to Parties: JUN 28 2017 JUN 28 2017
lr
Attachment

Q.J. o/b/o D.J.	:	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	OAL DKT. No. EDU-03946-2017N Agency Ref. No. 35-2/17
vs.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

Respondent, State-operated School District of the City of Newark (hereinafter the "District"), with its principal place of business at 2 Cedar Street, Newark, New Jersey 07102 and Petitioner, Q.J. (hereinafter the "Parent"), individually and on behalf of her minor child, D.J., residing at 382 Dayton Street, Newark New Jersey 07114, seeking to amicably resolve any and all claims, hereby agree as follows:

1. Petitioner filed this action requesting an Order directing that her son, student D.J., be enrolled in the District under the surname of "Jenkins" rather than the surname of "Jenkins-Hepburn" as reflected on official documentation that has been presented to the District.

2. The District has been presented with evidence that Petitioner's other children were enrolled under the name "Jenkins," despite a hyphenated name on their official documentation.

3. In the interest of equity and consistency, and in the absence of any existing legal authority or Order presented to the District mandating any action contrary to Petitioner's request, the District hereby agrees to waive its Policy 5111 in this instance, and enroll D.J. under the surname "Jenkins" rather than the hyphenated name on the birth certificate. As such, all school records relating to D.J. will be under the name of "Jenkins."

4. Q.J. agrees to withdraw her Petition.

5. Q.J. acknowledges that this Agreement sets forth a complete and full resolution of all matters including matters arising in connection with this matter and fully resolves any and all causes of action and claims arising prior to the date of this signed instrument that may otherwise exist against the District, its officials, officers, employees, agents, and attorneys, including claims for damages, fees or costs of any kind in any forum under any State or Federal law, statute, rule or regulation.

6. This Agreement shall not be interpreted as an admission of wrongdoing nor deemed as a precedent in any future District matters.

7. This Agreement shall be construed fairly, according to the plain language of its terms.

8. The Parent and District acknowledge that each is signing this Agreement freely and voluntarily, without duress or coercion.

9. This Agreement constitutes the full and complete agreement of the parties hereto with respect to its subject matter and supersedes any prior or contemporaneous representations, whether oral or written, and may not be modified or amended except by a written instrument signed by all parties hereto.

Q.J., Petitioner Pro Se

Dated: 6/9/17

By: _____
Quamara Jenkins

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

Dated: 6/20/17

By: _____
Christopher Cerf, Superintendent

227-17

OAL DKT. NO. EDU 5-17, 4462-17 AND 4506-17 (CONSOLIDATED)
AGENCY DKT. NO. 309-12/16, 330-12/16 AND 48-3/17

R.M. and R.M., on behalf of minor child, R.M.,	
PETITIONERS,	COMMISSIONER OF EDUCATION
V.	DECISION
BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,	
RESPONDENT.	

The records of these consolidated matters, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/14/17

Date of Mailing: 8/15/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

CONSOLIDATED APPEALS

R.M. AND R.M. ON BEHALF OF MINOR, CHILD R.M.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,
Respondent.

OAL DKT. NO. EDU 00005-17
AGENCY DKT. NO. 309-12/16

R.M. AND R.M. ON BEHALF OF MINOR, CHILD R.M.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,
Respondent.

OAL DKT. NO. EDU 04462-17
AGENCY DKT. NO. 330-12/16

R.M. AND R.M. ON BEHALF OF MINOR, CHILD R.M.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,
Respondent.

OAL DKT. NO. EDU 04506-17
AGENCY DKT. NO. 48-3/17

Julie Warshaw, Esq., on behalf of petitioners R.M. and R.M. o/b/o R.M. (Warshaw Law Firm, attorneys)

Eric L. Harrison, Esq., for respondent Board of Education of the Town of Newton (Methfessel & Werber, attorneys)

Record Closed: June 26, 2017 Decided: June 30, 2017

BEFORE **GAIL M. COOKSON**, ALJ:

These three cases involve appeals from determinations of the Board of Education of the Town of Newton under the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13 et seq. The earliest case was transmitted were transmitted to the Office of Administrative Law (OAL) on December 30, 2016. At the time of the first case management conference, the existence of the other challenges were known and considered to be en route to the OAL. The latter two cases were transmitted on or close to the same time from the agency to the OAL and were filed on March 30 and 31, 2017.

Under Order entered on April 20, 2017, I determined that the two cases docketed as EDU 00005-17 and EDU 04462-17 would be consolidated for all purposes. I further determined that EDU 04506-17 raised enough common questions of fact and would entail the presentation of several common witnesses such that it would proceed as a matter of case management on the same hearing dates but would receive a separate Initial Decision.

On May 31, 2017, the matters were set down for the first day of the plenary hearings. Prior to commencing the hearings, I facilitated a resolution of all the allegations and defenses, the terms of which were placed on the record. On June 26, 2017, counsel for the Newton Board of Education forwarded a fully executed Settlement Agreement and Release between the parties and requested that if approved, I incorporate same into an order.

I have reviewed the record and the terms of Settlement Agreement and Release and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

Therefore, I **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/30/17
DATE

Gail M Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency:

7-5-17

Date Mailed to Parties: JUL 5 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

METHFESSEL & WERBEL
A Professional Corporation

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JOHN METHFESSEL, JR.>
ED THORNTON*>
FREDRIC PAUL GALLIN*+^
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≤Member of PA Bar only
#Member of NJ & LA Bar
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≥Member of NJ, PA & DC Bar
-Member of NY, NJ & DC Bar
=Member of FL Bar

Please reply to New Jersey

June 26, 2017

VIA FACSIMILE
Hon. Gail M. Cookson, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

RE: **R.M. AND R.M. O/B/O R.M. VS. NEWTON BOARD OF ED**
Our File No. : 84142 ELH
Docket No. : 309-12/16 AND OAL EDU 00005-2017N

Dear Judge Cookson:

I am pleased to enclose an executed settlement agreement resolving all pending petitions for inclusion within an Initial Decision for submission to the Commissioner of Education.

Respectfully submitted,
METHFESSEL & WERBEL, ESQS.

Eric L. Harrison
harrison@methwerb.com
Ext. 138

ELH:adl

cc: VIA FACSIMILE: (973) 439-1047
Julie Warshaw, Esq.
Warshaw Law Firm, LLC
266 King George Road, Suite C2
Warren, NJ 07059

VIA FACSIMILE: (973) 993-3152
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44 Whippany Road
Morristown, NJ 07960

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Attorneys for Newton School District Board of Education
Our File No. 84142 ELH

R.M. AND R.M. O/B/O R.M., MINOR CHILD Petitioners, V. NEWTON SCHOOL DISTRICT BOARD OF EDUCATION Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 00005-17, EDU 04462-17, EDU 04506-17 AGENCY REF. NO.: 309-12/16, 330-12/16, 48-3/17 **SETTLEMENT AGREEMENT AND RELEASE**

WHEREAS, the Newton Board of Education ("the Board") is a local educational authority with the responsibility of complying with its obligations under the New Jersey Anti-Bullying Bill of Rights Act ("the ABBRA"), N.J.S.A. 18A:37-13 et seq.; and

WHEREAS, Petitioners R.M. (father) and R.M. (mother) ("Petitioners") are the parents of R.M., a minor student residing within and attending school in the Newton School District ("the District"); and

WHEREAS, the District's anti-bullying staff members conducted an investigation relating to an event involving R.M. which occurred in or about October 2016, following which the staff and the Superintendent determined that R.M. had engaged in HIB against another student; and

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WHEREAS, on November 1, 2016, Petitioners appeared before the Board for a hearing to present their appeal regarding the HIB matter, following which the Board affirmed the determination that R.M. had engaged in HIB against another student; and

WHEREAS, the District's anti-bullying staff members conducted an HIB investigation relating to events involving R.M. and staff members Kurt Walton and Tony Virga which occurred on or about October 20, 2016, following which the staff and the Superintendent determined that Mr. Walton and Mr. Virga had not engaged in HIB against R.M.; and

WHEREAS, the District's anti-bullying staff members conducted an HIB investigation relating to an event involving R.M. and staff member German Rueda which occurred on or about December 14, 2016, following which the staff and the Superintendent determined that Mr. Rueda had not engaged in HIB against R.M.; and

WHEREAS, Petitioners disagreed with the three HIB decisions and filed petitions of appeal with the Commissioner of Education ("the Commissioner"), which were assigned Agency Reference Numbers 309-12/16, 330-12/16, and 48-3/17 and OAL Docket Numbers EDU 00005-17, EDU 04462-17, and EDU 04506-17;

WHEREAS, the parties, each having a desire to amicably settle any and all claims in all jurisdictions, asserted and unasserted, now hereby agree as follows:

1. As part of staff members' annual training occurring prior to commencement of the 2017-18 school year, Mr. Rueda, superintendent Dr. G. Kennedy Greene, Principal Jeff Waldron, and HIB Specialist Lisa Bechtel will receive training on HIB prevention, compliance with statutory mandates under the ABBRA, and sexual harassment.

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2. Mr. Rueda will issue to R.M. a written letter of apology for distress caused by the actions which formed the basis of R.M.'s HIB complaint against him.

3. R.M. will be removed from Mr. Rueda's Spanish class for the remainder of the 2016-17 school year, will be provided with a place to study during that class period, and will never again be placed in Mr. Rueda's class.

4. The District will provide R.M. with a Spanish teacher other than Mr. Rueda for the Spanish class in which she is currently enrolled.

5. Counseling will be made available to R.M. with the school psychologist or guidance counselor as long as R.M. feels it is helpful.

6. All documents relating to these HIB matters and the HIB investigations, including all HIB findings against R.M., will be purged and will not be included in R.M.'s student records. With respect to the disciplinary consequences imposed as a result of the HIB matter, including R.M.'s suspension, such records will be expunged.

7. The District will contact the New Jersey Department of Education ("the DOE") and request that the HIB finding against R.M. be removed from the DOE's NJ Smart records.

8. The District will remove from R.M.'s attendance records any reference to unexcused absences for which verification has been provided and any "verified truancies" with respect to absences for which a parental excuse has been provided.

9. Assistant Principal Kurt Walton will have no contact with R.M. for the remainder of her enrollment in the District.

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10. The Petitioners hereby withdraw their appeal from the administration's finding that Assistant Principal Kurt Walton did not commit an act of HIB at a recent school assembly.

11. Petitioners, on their own behalves and on behalf of R.M., and the Board mutually release and forever discharge each other, its/their officers, employees, administrators, agents, and servants from any and all past, present, or future claims, whether known or unknown to Petitioners or R.M., arising out of events that have occurred prior to the date on which this Agreement is signed, including but not limited to the HIB matters relating to R.M.

12. Petitioners, on their own behalves and on behalf of R.M., release and forever discharge the Board, its officers, employees, administrators, agents, and servants from any and all past, present, or future claims which they or R.M. have or might have against them, because of all damages, liabilities, losses, or injuries to person or property, or both, whether developed or undeveloped, including attorneys' fees, resulting or to result from any matter relating to R.M. from the beginning of time through the date on which this Agreement is signed.

13. The parties agree to refrain from filing any proceeding, action, or complaint regarding any claims by or rights of Petitioners and/or R.M. from the beginning of time through the date of this Agreement. It is expressly understood and agreed, however, that the parties reserve the right to bring a claim before any tribunal of competent jurisdiction to enforce their rights under this Agreement.

14. The terms of this Agreement represent the compromise of disputed claims between the parties. This Agreement shall not be treated as an admission on the part

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of the Board of liability, responsibility, or wrongdoing, that its HIB decisions were incorrect, inappropriate, or unlawful, that any rights of Petitioners and/or R.M. were violated at any time, or that either party has failed to act in accordance with any laws, statutes, regulations, and/or codes.

15. Each party shall be fully responsible for its/their own attorneys' fees and costs.

16. The drafting and negotiation of this Agreement have been participated in by each of the parties and their respective counsel and, for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the parties. No ambiguity shall be resolved against any party based upon authorship. The parties acknowledge that they have been represented by counsel throughout the settlement of this matter, throughout the negotiation of this Agreement, and at the execution of this Agreement, and that they have read and consulted with counsel regarding this Agreement and fully understand its requirements and limitations. The parties further acknowledge that they enter into this Agreement voluntarily and free of coercion. Petitioners have represented that they are satisfied with the legal services provided by their counsel, Julie Warshaw, Esq., Warshaw Law Firm, LLC.

17. The parties further agree that this Agreement may not be altered, amended, modified, superseded, canceled, or terminated except by an express written agreement duly executed by all of the parties or their attorneys on their behalf, which makes specific reference to this Agreement.

18. This Agreement shall be governed by the laws of the State of New Jersey. This Agreement constitutes a complete legal release of any and all claims that were or

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could have been raised by (1) Petitioners or R.M. against the Board regarding Petitioners and/or R.M. from the beginning of time until execution and/or entry hereof, and (2) the Board against Petitioners or R.M. from the beginning of time until execution and/or entry hereof.

19. This Agreement contains the entire agreement between the parties hereto and is intended to resolve any and all disputes and issues, known or unknown, between them as of the date of execution of this Agreement.

20. This Agreement may be executed in counterparts, including by fax, each of which shall be deemed an original and all of which shall constitute one and the same instrument.

21. The Parties agree and acknowledge that each of the provisions of this Agreement is reasonable and should be fully enforceable, and the Parties waive any right to argue, assert, or allege any claim to the contrary. However, if any provision of this Agreement is determined by a Court of competent jurisdiction to be unenforceable because it is overbroad or unreasonable, the Parties agree that such provision(s) may be modified and enforced to the maximum extent permissible. If any provision of this Agreement is held to be invalid and cannot be modified so as to make it enforceable, then such provision shall be deemed to be severed from the Agreement, and the remaining provisions shall remain in full force and effect.

22. This Agreement shall become effective upon entry of an Initial Decision incorporating its terms by the Administrative Law Judge assigned to this matter and approval as a Final Decision by the Commissioner of Education.

Colleen M. Crouch
Notary Public
New Jersey
My Commission Expires 6-16-2021

WITNESS:

Colleen M. Crouch

R.M. (father) on behalf of R.M.

DATED: 6/23/17 DATED: 6/23/17

Colleen M. Crouch
Notary Public
New Jersey
My Commission Expires 6-16-2021

WITNESS:

Colleen M. Crouch Notary

R.M. (mother) on behalf of R.M.

DATED: 6/23/17 DATED: 6/23/17

WITNESS:

Newton Board of Education

By: Donna C Snyder

DATED: 6/23/17

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228-17

228-17L

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

KIMBERLEY HARRINGTON
Commissioner

August 14, 2017

Sandra N. Varano, Esq.
Nirenberg & Varano, LLP
32 Mercer Street
Hackensack, New Jersey 07601

Randall Nathan, *Pro Se*
19 Stone Drive
West Orange, New Jersey 07052

Re: *Randall Nathan v. Board of Education of the South Orange-Maplewood School District, Essex County, OAL Dkt. No. EDU 9346-16, Agency Dkt. No. 115-4/16.*

Dear Parties:

I have considered the papers filed in connection with the respondent's request for interlocutory review of ALJ Joan Bedrin Murray's Order of July 28, 2017, denying the respondent's motion to dismiss the petition for lack of standing in the above-captioned matter. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, the respondent's request for interlocutory review is hereby denied.*

Sincerely,

Kimberley Harrington

Kimberley Harrington
Commissioner

c: Honorable Joan Bedrin Murray, ALJ
County Superintendent
State Law Library

KH/MKD/JKH

Via Facsimile and Regular Delivery

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division in accordance with the applicable Appellate Division Rules.

229-17

E.H., on behalf of minor children, S.H. and SH.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that his children are ineligible for a free public education in respondent's school district. Petitioner and his wife are divorced, and had originally resided at a home in the city of Trenton. However, following the divorce, an Order giving residential custody of the children to Cecilia Tompoe (Tompoe) – an unrelated Ewing resident – was entered in the Superior Court of New Jersey in September 2013, and joint legal custody was given to E.H. and the children's mother, B.H. For the 2014-2015 school year, petitioner's children were registered in Ewing Public Schools at Tompoe's Ewing address pursuant to a host family affidavit wherein E.H. certified that he was living at the same address. The host family arrangement requires annual recertification, and when no such reregistration was filed for S.H. and SH.H for the 2015-2016 school year, the District commenced a residency investigation in which it was determined that the children were residing at their former address in Trenton. Petitioner contends that the host family arrangement is still in place, although he was forced to move back into the Trenton home so that it was not left vacant when his wife moved to Philadelphia; the children spend time at the Trenton address, but remain domiciled in Ewing under the host family agreement.

The ALJ found, *inter alia*, that: the testimony provided by witnesses for both petitioner and respondent in this matter was credible; the facts in this case show a complicated, tripartite custody and residence arrangement, sanctioned by an Order entered in the Superior Court of New Jersey; the 2013 Court Order sets the residence of the children, S.H. and SH.H., at the Ewing home of Tompoe; the parties have a fluid schedule for where the children sleep, dependent upon visitation with two parents and the variable work schedule of Tompoe; however, the Superior Court Order setting the children's residence with Tompoe is ultimately the deciding factor in this case; and petitioner met his burden to show by a preponderance of the evidence that the domicile of his children is that of their residential guardian, as set forth in the 2013 Superior Court order. Accordingly, the ALJ ordered that petitioner's appeal be granted, and that the action of the respondent Board disenrolling S.H. and SH.H. be reversed.

Upon review, the Commissioner concurred with the findings and conclusion of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 16, 2017

229-17

OAL DKT. NO. EDU 1721-16
AGENCY DKT. NO. 5-1/16

E.H., on behalf of minor children, S.H. and SH.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the petitioner established that his children are entitled to attend school in the Ewing School District in accordance with the Order of the New Jersey Superior Court, dated September 9, 2013. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 8/16/17
Date of Mailing: 8/17/16

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01721-16
AGENCY DKT. NO. 5-1/16

E.H., ON BEHALF OF, S.H. AND SH.H.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,
Respondent.

Keith D. Sklar, Esq., for petitioners (Law Offices of Sklar Smith-Sklar, attorneys)

Joseph L. Roselle, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: August 25, 2016 Decided: July 10, 2017

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE

E.H., father of S.H. and Sh.H. (petitioners), challenges the determination of respondent Ewing Township Board of Education (District) that his children did not reside in the District. The District has filed a counterclaim seeking payment of tuition for the number of days S.H. and Sh.H. attended school in the District.

PROCEDURAL HISTORY

In December 2015, the District notified E.H. that his children were being disenrolled based on non-residency. On January 23, 2016, petitioner appealed the decision. On February 2, 2016, the case was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case. The hearing was held on May 2, 2016, and the record remained open for the submission of post hearing briefs by the parties. Petitioner did not file any post hearing submissions and the record closed on August 25, 2016. Extensions of time were granted for the filing of the Initial Decision.

STATEMENT OF FACTS

Many of the material facts in this matter are undisputed. E.H. is the father of S.H. and Sh.H., students attending the District's schools. For the 2014-15 school year, S.H. and Sh.H. had been registered in the District pursuant to host family status whereby a parent certifies that he or she is living with another unrelated Ewing resident. The Ewing resident also certifies to the living arrangement. In March 2014 Cecelia Tompoe (Tompoe) of 66 Pennwood Drive, Ewing registered as the host for the children and E.H. certified as well. On September 9, 2013, an Order giving residential custody to Tompoe (P-1) had been entered in the Superior Court of New Jersey, Joint legal custody was given to E.H. and the children's mother B.H. However, Ewing requires that the host family recertify every year and when no such reregistration was filed on a timely basis for S.H. and Sh.H. for the 2015-16 school year the District commenced a residency investigation. After its residency investigation was completed Ewing took action to disenroll the students and assess tuition against E.H. for the period of September 16 through the present. E.H. contested the District's action and this appeal resulted.

In support of its action the District presented the testimony of David Mikaluskas, its Attendance and Residency Officer and Peter Manetto, an investigator who performed the physical surveillance portion of the investigation. Mikaluskas testified that when the children were not reregistered for the 2015-16 year, the school the children were attending called the Tompoe home but allegedly no one at the number

was familiar with the children. He also stated that no one responded to letters from the District inquiring about enrollment and as a result the District commenced its residency investigation. He then presented the District's computation of tuition owed. Tuition for S.H. on a yearly basis was $13,980.00 and for Sh.H. it was $14,984.00, resulting in a daily rate of $76.39 and $81.87 respectively. On cross-examination Mikaluskas admitted that when an attempt was made to reregister the children for that school year they were not allowed to do so because the District had questions regarding residency.

Manetto also testified for the District and reviewed his investigation into the children's residency. He first surveilled the children on twelve days in September and October 2015 (R-1) and again for days in March and April 2016. The surveillances were conducted at 40 Redding Avenue in Trenton, New Jersey, at a home owned by E.H. and at the Pennwood Avenue home of Tompoe. He stated that on Wednesday, September 16, 2015 and the next day Thursday, he surveilled the Pennwood Avenue address and did not observe the children there. He then surveilled the Redding Avenue address on ten occasions from Tuesday September 22, 2015, through Friday, October 16, 2015. On those days, he observed the children exiting the Trenton address and being transported to the school in Ewing or the Pennwood address where they took a school bus. After E.H. filed this appeal, Manetto conducted the additional eight days of surveillance in March and April 2016. On those days, which covered various days of the week, Manetto observed the children leaving the Trenton address and being transported to Ewing for school.

In response to the District's case petitioner E.H. and Tompoe testified. They both described a complicated family situation arising out the children's parents' divorce. E.H. stated that the family had been living at the Trenton address when he and B.H. divorced. When he and B.H. could not agree on custody B.H. wanted the children to live with Tompoe who was an aunt to the children. Tompoe then received residential custody via the court order and E.H. and B.H., who shared joint legal custody, orally agreed on an arrangement whereby the children had visitation with their mother on weekends and stayed with their father on Thursday and Friday. The remaining time they stayed at the Tompoe home. For a period, E.H. resided at the Tompoe home but returned to the Trenton address after B.H. moved to Philadelphia in order to keep the

house occupied. He further testified that once B.H. relocated from the Trenton home to Philadelphia he moved back to the Redding Avenue home to keep it secure until it was either sold or foreclosed upon.

He did not deny the results of Manetto's investigation but explained that the children's schedules at either home could vary based upon visitation with their mother and Tompoe's work schedule which could require her to be at work extremely early in the morning. He stated that the children stay with him if Tompoe's work or vacation schedule requires it. As to why he did not reregister the children he said that he assumed it was Tompoe's responsibility. As noted earlier the District did not allow reregistration once it became apparent there was an issue.

Tompoe then testified, describing the children as her niece and nephew. Aside from her husband and herself and the children, only her college age daughter resides in the home. She works as a cook at Princeton Medical Center but does not drive, depending on her husband for transportation. If she needs to get to work early on a given morning her husband must drive her and as the children could not be left alone, they might spend the evening at their father's home. If her daughter is home from college, then such an arrangement is not necessary. She testified that the children have their own rooms at her home and, as is the custom in their African community, E.H. does not provide her with payment but contributes food and sundries to their household. According to Tompoe the children stay with her on a Monday, Tuesday and Wednesday schedule unless her job schedule requires that they stay elsewhere to insure they're not being alone in the early morning hours. When questioned regarding the results of Manetto's investigation, she stated that on September 22, 2015 she had to go to work early and on October 12 and 13, 2015, she was on vacation for the week and the children stayed with their father. On March 23, 2016, she had to leave by 4:30 a.m. for her job, and for safety and convenience sake the children stayed with their father.

She corroborated E.H.'s testimony that he had been residing with her when the children were initially registered in Ewing in 2014, and that he had only moved back to

the Trenton residence when it was vacated by B.H. in order to prevent it from being vandalized as a vacant home until it was sold.

In reviewing the record in this case both Mikaluskas and Manetto were credible in their testimony. However, Mikaluskas' statement that school staff called the Tompoe home is excluded as no competent credible corroborating evidence was presented regarding that call. Manetto's testimony set forth the results of the District's investigation and petitioner did not contest the facts it set forth.

Similarly, I **FOUND** both Tompoe and E.H. to be credible. While they did not contest the facts as set forth in Manetto's surveillance, they provided credible explanations for their actions. As English is not their first language their testimony required careful attention as they described a complicated extended family situation in which the parties appeared to be grappling on a daily basis with the needs of children and jobs in an evolving family dynamic. Neither attempted to deny the children's schedule on the limited days Manetto surveilled them, however I **FOUND** their explanations for how the children's schedule was handled and the reasons for it to be credible.

LEGAL DISCUSSION

In New Jersey, a student is eligible to attend a school free of charge if the student is domiciled within the school district. N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a). A child is domiciled within the district when he or she is living with a parent or legal guardian whose permanent home is located within the district. A home is permanent when the parent or guardian intends to return to it after being absent from the home and has no present intent of moving from home, notwithstanding the existence of homes or residences elsewhere. The parent has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)2.

This matter presents an unusual fact pattern for a school residency case, and yet it is one is sanctioned by a New Jersey Superior Court Order. In the usual residency matter an issue often arises when parents have divorced. Although parents have joint

custody a court order can determine the domicile of the child for purposes of enrollment in a given district. Here the matter is complicated by a valid New Jersey Superior Court Order giving Tompoe residential custody of the children with joint legal custody in the divorced parents. Once B.H. moved to Philadelphia and the children began spending time with both parents, while residing with Tompoe, it became a tripartite, rather than a dual living arrangement.

It is important to note that petitioner has shown that this tripartite arrangement is sanctioned by a Superior Court Order. By its very nature, it assumes that Tompoe is the residential guardian of the children with her home as their domicile. As the parents have joint legal custody the Order presumes they will make arrangements among themselves and Tompoe as to their time with the children. As such E.H. has the children with him at least two nights a week on Thursday and Friday, while their mother may take them for the weekend. All agree that the arrangement is flexible depending on their mother's schedule, Tompoe's work schedule and whether there is an adult available at Tompoe's home to oversee the children. Clearly E.H. as their father has attempted to assist Tompoe by being available for the children when her work or vacation schedule requires it.

The District points to the failure to reregister the children and the results of Manetto's investigation as key facts in the decision to disenroll the children. While Manetto's observations were credible, petitioner's explanation for the children's schedule and the terms of the Court Order provide a credible counterpoint to the District's case. Manetto's investigation, while technically covering all days of the week was limited in its scope. Tompoe and E.H. were credible in her explanation of her vacation week in October 2015, and her work schedule. She and E.H. explained days in September and March 2016 when the children stayed at their father's home as a way of keeping them safe when she had to leave in the early morning. As such the sampling of days presented by the District's surveillance was limited in number. Further as testified to by the parties, visitation with their mother B.H. was often ad hoc and could result in the children being dropped off at their father's.

The facts in this matter show a complicated, tripartite custody and residence situation, sanctioned by Court Order. It is important to note, however, that the Court Order of 2013 allows for such an arrangement and sets the children's residence as that of Tompoe. While it appears that the parties have a fluid schedule for where the children sleep, dependent on visitation with two parents and the vagaries of work requirements, the Superior Court Order setting the children's residence with Tompoe is ultimately the deciding factor in this case.

DECISION AND ORDER

Petitioner has met his burden in this matter and has shown by a preponderance of the evidence that the domicile of his children is that of their residential guardian, Cecelia Tompoe as set forth in the New Jersey Superior Order of Janetta D. Marbrey, J.S.C.

It is, therefore, **ORDERED** that petitioner's appealed is granted and the action of respondent Ewing Township Board of Education disenrolling his children S.H. and Sh.H. is **REVERSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 10, 2017
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: July 10, 2017 (emailed)

Date Mailed to Parties: July 10, 2017 (emailed)

/mel

LIST OF WITNESSES

For Petitioner:

E.H.

C.T.

For Respondent:

Peter L. Manetto

David Mikalauskas

LIST OF EXHIBITS

For Petitioner:

P-1 Consent Order of the County of Mercer Family Case Management Office dated September 9, 2013

For Respondent:

R-1 Surveillance of Investigations Report dates September 16 through October 15, 2015

R-2 Surveillance of Investigations Report date March 18, 2016

R-3 Residency Investigation Checklist Complaint date September 2, 2015

R-4 Ewing Township Public School Affidavit dated March 10, 2014

230-17

230-17SEC

AGENCY DKT. NO. 145-7/17

IN THE MATTER OF CHERYL ARNEDT,	:	
MERIT PREPARATORY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL OF NEWARK, ESSEX COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission) finding that respondent violated the School Ethics Act for failure to timely complete the charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed her training after the issuance of the Commission's March 29, 2017 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1] Kimberly Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/17/17

Date of Mailing: 8/21/17

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF CHERYL ARNEDT	:	BEFORE THE SCHOOL ETHICS COMMISSION
MERIT PREPARATORY CHARTER SCHOOL OF NEWARK, ESSEX COUNTY	:	DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER
	:	DOCKET NO.: T11-16

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on March 28, 2017, and mailed on March 29, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on March 29, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require every charter school trustee to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a trustee of a charter school located in the City of Newark, County of Essex. As a result of her position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online and, in this way, any charter school trustee may complete it at any time, from anywhere. By June 30, 2016, Respondent was required to complete the Governance 2 training program.

On January 5, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on July 25, 2016, Respondent was registered to take Governance 2 and an e mail with the link to take the offered training was sent to Respondent's e-mail address. On October 19, 2016, an additional e-mail notice was sent to all charter school trustees who had not yet completed training, including Respondent. In addition, an on-site training was provided at NJSBA's Workshop on Thursday, October 27, 2016. On November 30, 2016, NJSBA sent a letter to Respondent again advising of non-compliance with the mandatory training requirement, and a link to the online training was, once again, provided to Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on November 30, 2016. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in January, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 3, 2017 via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on March 29, 2017.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2016.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Acting Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Acting Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Acting Commissioner of Education for review of the Commission's recommended penalty. Respondent

may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Acting Commissioner, written exceptions regarding the recommended penalty to the Acting Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Acting Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Acting Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Acting Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: June 28, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF CHERYL ARNEDT	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***MERIT PREPARATORY CHARTER SCHOOL OF NEWARK,* ESSEX COUNTY**	:	
	:	**DOCKET NO.: T11-16**

WHEREAS, Cheryl Arnedt (Respondent) is a Charter School Trustee of the Merit Preparatory Charter School of Newark; and

WHEREAS, as a Charter School Trustee, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 2 training program by June 30, 2016; and

WHEREAS, at its meeting on March 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2016 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2016; and

WHEREAS, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on April 25, 2017, the Commission recommended that the Acting Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on June 27, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

231-17

231-17SEC

AGENCY DKT. NO. 141-7/17

IN THE MATTER OF PHOEBE HADDON, LEAP ACADEMY UNIVERSITY CHARTER SCHOOL, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission) – finding that respondent violated the School Ethics Act for failure to timely complete the charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed her training after the issuance of the Commission's March 29, 2017 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/17/17

Date of Mailing: 8/21/17

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF PHOEBE HADDON	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	
	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
LEAP ACADEMY UNIVERSITY CHARTER SCHOOL, **CAMDEN COUNTY**	:	
	:	
	:	**DOCKET NO.: T07-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on March 28, 2017, and mailed on March 29, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on March 29, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require every charter school trustee to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a trustee of a charter school located in the City of Camden, County of Camden. As a result of her position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online and, in this way, any charter school trustee may complete it at any time, from anywhere. By June 30, 2016, Respondent was required to complete the Governance 2 training program.

On January 5, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on July 25, 2016, Respondent was registered to take Governance 2 and an e-mail with the link to take the offered training was sent to Respondent's e-mail address. On October 19, 2016, an additional e-mail notice was sent to all charter school trustees who had not yet completed training, including Respondent. In addition, an on-site training was provided at NJSBA's Workshop on Thursday, October 27, 2016. On November 30, 2016, NJSBA sent a letter to Respondent again advising of non-compliance with the mandatory training requirement, and a link to the online training was, once again, provided to Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on November 30, 2016. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in January, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 3, 2017 via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on March 29, 2017.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2016.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Acting Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Acting Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Acting Commissioner of Education for review of the Commission's recommended penalty. Respondent

may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Acting Commissioner, written exceptions regarding the recommended penalty to the Acting Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Acting Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Acting Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Acting Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: June 28, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF PHOEBE HADDON	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***LEAP ACADEMY UNIVERSITY CHARTER SCHOOL,* CAMDEN COUNTY**	:	
	:	**DOCKET NO.: T07-16**

WHEREAS, Phoebe Haddon (Respondent) is a Charter School Trustee of the Leap Academy University Charter School; and

WHEREAS, as a Charter School Trustee, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 2 training program by June 30, 2016; and

WHEREAS, at its meeting on March 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2016 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2016; and

WHEREAS, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on April 25, 2017, the Commission recommended that the Acting Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on June 27, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

L 19-17

274-17L

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Commissioner

September 8, 2017

Eric Apar, DAG
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625-0112

Joel Ignall, *pro se*
[redacted]
Hopatcong, New Jersey 07843

Re: *In the Matter of the Certificate of Joel Ignall, State Board of Examiners*, State Board of Examiners Dkt. No. 1011-245, Agency Dkt. No. 3-9/16A.

Dear Parties:

I have reviewed the materials filed in connection with appellant Joel Ignall's appeal of a decision of the State Board of Examiners (Board). In a decision dated June 21, 2010, the Board denied the appellant's request to remove all references to the Board's action revoking his county substitute certificate from the Department of Education's website.

Upon review of the submissions, I find that the appellant's appeal was not timely filed in accordance with *N.J.A.C.* 6A:4-2.2. Pursuant to *N.J.A.C.* 6A:4-2.2, "[a]ppeals from final decisions of the Board of Examiners shall be filed within 30 days of the filing date of the decision from which appeal is taken." Guidance as to what constitutes notice sufficient to trigger the running of this regulatory provision was provided by the Supreme Court in *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572 (1993). In *Kaprow, supra,* the Court found that adequate notice of a final order is one which is "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." *Kaprow* at 587.

Here, the Board's June 21, 2010 decision clearly stated that "[t]his matter may be appealed to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-38.4." Yet, the appellant did not file this appeal until September 9, 2016, over six years after the Board issued its decision. Finally, I find that the appellant has not presented any compelling reason or exceptional circumstance which would warrant relaxation of the timely filing requirement.[1] Accordingly, the appeal is dismissed as untimely pursuant to *N.J.A.C.* 6A:4-2.2.[2]

Sincerely,

Kimberley Harrington

Kimberley Harrington
Commissioner

c: State Law Library

KH/MKD/JKH

[1] It should be noted that the appellant failed to submit a brief in support of his appeal.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

234-17

AGENCY DKT. NO. 144-7/17

IN THE MATTER OF TENIA PETERSON, GREAT OAKS LEGACY CHARTER SCHOOL, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission) – finding that respondent violated the School Ethics Act for failure to timely complete the charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed her training after the issuance of the Commission's March 29, 2017 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/17

Date of Mailing: 8/21/17

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF TENIA PETERSON	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***GREAT OAKS LEGACY CHARTER SCHOOL,* ESSEX COUNTY**	:	
	:	**DOCKET NO.: T10-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on March 28, 2017, and mailed on March 29, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on March 29, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require every charter school trustee to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a trustee of a charter school located in the City of Newark, County of Essex. As a result of her position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online and, in this way, any charter school trustee may complete it at any time, from anywhere. By June 30, 2016, Respondent was required to complete the Governance 2 training program.

On January 5, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on July 25, 2016, Respondent was registered to take Governance 2 and an e-mail with the link to take the offered training was sent to Respondent's e-mail address. On October 19, 2016, an additional e-mail notice was sent to all charter school trustees who had not yet completed training, including Respondent. In addition, an on-site training was provided at NJSBA's Workshop on Thursday, October 27, 2016. On November 30, 2016, NJSBA sent a letter to Respondent again advising of non-compliance with the mandatory training requirement, and a link to the online training was, once again, provided to Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on November 30, 2016. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in January, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 3, 2017 via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on March 29, 2017.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2016.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Acting Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Acting Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Acting Commissioner of Education for review of the Commission's recommended penalty. Respondent

may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Acting Commissioner, written exceptions regarding the recommended penalty to the Acting Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to; Acting Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Acting Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Acting Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: June 28, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

IN THE MATTER OF TENIA PETERSON	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***GREAT OAKS LEGACY CHARTER SCHOOL,* ESSEX COUNTY**	:	
	:	**DOCKET NO.: T10-16**

WHEREAS, Tenia Peterson (Respondent) is a Charter School Trustee of the Great Oaks Legacy Charter School; and

WHEREAS, as a Charter School Trustee, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 2 training program by June 30, 2016; and

WHEREAS, at its meeting on March 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2016 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2016; and

WHEREAS, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on April 25, 2017, the Commission recommended that the Acting Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on June 27, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

235-17

235-17SEC

AGENCY DKT. NO. 142-7/17

IN THE MATTER OF CAL MARADONA,	:	
LEAP ACADEMY UNIVERSITY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, CAMDEN COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission) – finding that respondent violated the School Ethics Act for failure to timely complete the charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed his training after the issuance of the Commission's March 29, 2017 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1] Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/17

Date of Mailing: 8/21/17

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF CAL MARADONA	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***LEAP ACADEMY UNIVERSITY CHARTER SCHOOL,* CAMDEN COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T08-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on March 28, 2017, and mailed on March 29, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on March 29, 2017, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require every charter school trustee to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a trustee of a charter school located in the City of Camden, County of Camden. As a result of his position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online and, in this way, any charter school trustee may complete it at any time, from anywhere. By June 30, 2016, Respondent was required to complete the Governance 3 training program.

On January 5, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on July 25, 2016, Respondent was registered to take Governance 3 and an e-mail with the link to take the offered training was sent to Respondent's e-mail address. On October 19, 2016, an additional e-mail notice was sent to all charter school trustees who had not yet completed training, including Respondent. In addition, an on-site training was provided at NJSBA's Workshop on Thursday, October 27, 2016. On November 30, 2016, NJSBA sent a letter to Respondent again advising of non-compliance with the mandatory training requirement, and a link to the online training was, once again, provided to Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on November 30, 2016. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in January, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 3, 2017 via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on March 29, 2017.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2016.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Acting Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Acting Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Acting Commissioner of Education for review of the Commission's recommended penalty. Respondent

may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Acting Commissioner, written exceptions regarding the recommended penalty to the Acting Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Acting Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Acting Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Acting Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: June 28, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

IN THE MATTER OF CAL MARADONA	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***LEAP ACADEMY UNIVERSITY CHARTER SCHOOL*, CAMDEN COUNTY**	:	
	:	**DOCKET NO.: T08-16**

WHEREAS, Cal Maradona (Respondent) is a Charter School Trustee of Leap Academy University Charter School; and

WHEREAS, as a Charter School Trustee, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete his Governance 3 training program by June 30, 2016; and

WHEREAS, at its meeting on March 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2016 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2016; and

WHEREAS, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

WHEREAS, at its meeting on April 25, 2017, the Commission recommended that the Acting Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on June 27, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

236-17SEC

AGENCY DKT. NO. 148-7/17

IN THE MATTER OF LISA MILLER,	:	
MERIT PREPARATORY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL OF NEWARK, ESSEX COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner on July 11, 2017, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately completed training after the issuance of its March 28, 2017 Order to Show Cause, but prior to the Commission's April 25, 2017 meeting; the Commission therefore recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/17

Date of Mailing: 8/21/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF LISA MILLER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***MERIT PREPARATORY CHARTER SCHOOL OF NEWARK,* ESSEX COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T13-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on March 28, 2017, and mailed on March 29, 2017 via regular and certified mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on March 29, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require every charter school trustee to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a trustee of a charter school located in the City of Newark, County of Essex. As a result of her position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online and, in this way, any charter school trustee may complete it at any time, from anywhere. By June 30, 2016, Respondent was required to complete the Governance 1 training program.

On January 5, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on July 25, 2016, Respondent was registered to take Governance 1 and an e-mail with the link to take the offered training was sent to Respondent's e-mail address. On October 19, 2016, an additional e-mail notice was sent to all charter school trustees who had not yet completed training, including Respondent. In addition, an on-site training was provided at NJSBA's Workshop on Thursday, October 27, 2016. On November 30, 2016, NJSBA sent a letter to Respondent again advising of non-compliance with the mandatory training requirement, and a link to the online training was, once again, provided to Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on November 30, 2016. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in January, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 3, 2017 via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on March 29, 2017.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2016.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Acting Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Acting Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Acting Commissioner of Education for review of the Commission's recommended penalty. Respondent

may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Acting Commissioner, written exceptions regarding the recommended penalty to the Acting Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Acting Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Acting Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Acting Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: June 28, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

IN THE MATTER OF LISA MILLER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***MERIT PREPARATORY CHARTER SCHOOL OF NEWARK*, ESSEX COUNTY**	:	
	:	**DOCKET NO.: T13-16**

WHEREAS, Lisa Miller (Respondent) is a Charter School Trustee of the Merit Preparatory Charter School of Newark; and

WHEREAS, as a Charter School Trustee, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 1 training program by June 30, 2016; and

WHEREAS, at its meeting on March 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2016 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2016; and

WHEREAS, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on April 25, 2017, the Commission recommended that the Acting Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on June 27, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

237-16

AGENCY DKT. NO. 149-7/17

IN THE MATTER OF RICHARD IRVING, :
DR. LENA EDWARDS ACADEMIC : COMMISSIONER OF EDUCATION
CHARTER SCHOOL, HUDSON COUNTY. : DECISION
:

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner on July 11, 2017, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately completed training after the issuance of its March 28, 2017 Order to Show Cause, but prior to the Commission's April 25, 2017 meeting; the Commission therefore recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/17

Date of Mailing: 8/21/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF RICHARD IRVING	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***DR. LENA EDWARDS ACADEMIC CHARTER SCHOOL,* HUDSON COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T15-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on March 28, 2017, and mailed on March 29, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on March 29, 2017, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require every charter school trustee to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a trustee of a charter school located in the City of Jersey City, County of Hudson. As a result of his position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online and, in this way, any charter school trustee may complete it at any time, from anywhere. By June 30, 2016, Respondent was required to complete the Governance 3 training program.

On January 5, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on July 25, 2016, Respondent was registered to take Governance 3 and an e-mail with the link to take the offered training was sent to Respondent's e-mail address. On October 19, 2016, an additional e-mail notice was sent to all charter school trustees who had not yet completed training, including Respondent. In addition, an on-site training was provided at NJSBA's Workshop on Thursday, October 27, 2016. On November 30, 2016, NJSBA sent a letter to Respondent again advising of non-compliance with the mandatory training requirement, and a link to the online training was, once again, provided to Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on November 30, 2016. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in January, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 3, 2017 via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on March 29, 2017.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement, and also filed a response to the Commission's OTSC. Importantly, Respondent did not deny that he did not complete training in a timely fashion.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Acting Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Acting Commissioner of Education impose a penalty of **reprimand**.

IN THE MATTER OF RICHARD IRVING	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***DR. LENA EDWARDS ACADEMIC CHARTER SCHOOL,* HUDSON COUNTY**	:	
	:	**DOCKET NO.: T15-16**

WHEREAS, Richard Irving (Respondent) is a Charter School Trustee of the Dr. Lena Edwards Academic Charter School; and

WHEREAS, as a Charter School Trustee, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete his Governance 3 training program by June 30, 2016; and

WHEREAS, at its meeting on March 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2016 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed his training requirement, and also filed a response to the Commission's OTSC that did not dispute that he did not complete training in a timely fashion; and

WHEREAS, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

WHEREAS, at its meeting on April 25, 2017, the Commission recommended that the Acting Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on June 27, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

239-17

AGENCY DKT. NO. 139-7/17

IN THE MATTER OF CHRISTIE RITZ-KING,	:	
RED BANK CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner on July 11, 2017, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately completed training after the issuance of its March 28, 2017 Order to Show Cause, but prior to the Commission's April 25, 2017 meeting; the Commission therefore recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/17

Date of Mailing: 8/21/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF CRISTIE RITZ-KING	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
RED BANK CHARTER SCHOOL, **MONMOUTH COUNTY**	:	
	:	**DOCKET NO.: T20-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on March 28, 2017, and mailed on March 29, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on March 29, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require every charter school trustee to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a trustee of a charter school located in the City of Red Bank, County of Monmouth. As a result of her position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online and, in this way, any charter school trustee may complete it at any time, from anywhere. By June 30, 2016, Respondent was required to complete the Governance 1 training program.

On January 5, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on July 25, 2016, Respondent was registered to take Governance 1 and an e-mail with the link to take the offered training was sent to Respondent's e-mail address. On October 19, 2016, an additional e-mail notice was sent to all charter school trustees who had not yet completed training, including Respondent. In addition, an on-site training was provided at NJSBA's Workshop on Thursday, October 27, 2016. On November 30, 2016, NJSBA sent a letter to Respondent again advising of non-compliance with the mandatory training requirement, and a link to the online training was, once again, provided to Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on November 30, 2016. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in January, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 3, 2017 via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on March 29, 2017.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2016.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Acting Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Acting Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Acting Commissioner of Education for review of the Commission's recommended penalty. Respondent

may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Acting Commissioner, written exceptions regarding the recommended penalty to the Acting Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Acting Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Acting Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Acting Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: June 28, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF CRISTIE RITZ-KING	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***RED BANK CHARTER SCHOOL*, MONMOUTH COUNTY**	:	
	:	**DOCKET NO.: T20-16**

WHEREAS, Cristie Ritz-King (Respondent) is a Charter School Trustee of the Red Bank Charter School; and

WHEREAS, as a Charter School Trustee, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance I training program by June 30, 2016; and

WHEREAS, at its meeting on March 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2016 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2016; and

WHEREAS, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on April 25, 2017, the Commission recommended that the Acting Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on June 27, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

AGENCY DKT. NO. 150-7/17

IN THE MATTER OF DIANA PUNALES :
MOREJON, JERSEY CITY GLOBAL : COMMISSIONER OF EDUCATION
CHARTER SCHOOL, HUDSON COUNTY. : DECISION
:

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner on July 11, 2017, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately completed training after the issuance of its March 28, 2017 Order to Show Cause, but prior to the Commission's April 25, 2017 meeting; the Commission therefore recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/17

Date of Mailing: 8/21/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF DIANA PUNALES MOREJON	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***JERSEY CITY GLOBAL CHARTER SCHOOL,* HUDSON COUNTY**	:	
	:	**DOCKET NO.: T18-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on March 28, 2017, and mailed on March 29, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on March 29, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require every charter school trustee to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a trustee of a charter school located in the City of Jersey City, County of Hudson. As a result of her position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online and, in this way, any charter school trustee may complete it at any time, from anywhere. By June 30, 2016, Respondent was required to complete the Governance 1 training program.

On January 5, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on July 25, 2016, Respondent was registered to take Governance I and an e-mail with the link to take the offered training was sent to Respondent's e-mail address. On October 19, 2016, an additional e-mail notice was sent to all charter school trustees who had not yet completed training, including Respondent. In addition, an on-site training was provided at NJSBA's Workshop on Thursday, October 27, 2016. On November 30, 2016, NJSBA sent a letter to Respondent again advising of non-compliance with the mandatory training requirement, and a link to the online training was, once again, provided to Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on November 30, 2016. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in January, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 3, 2017 via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on March 29, 2017.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement, and also filed a response to the Commission's OTSC. Importantly, Respondent did not deny that she did not complete training in a timely fashion.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Acting Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Acting Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Acting Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Acting Commissioner, written exceptions regarding the recommended penalty to the Acting Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Acting Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Acting Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Acting Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: June 28, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

IN THE MATTER OF DIANA PUNALES MOREJON	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***JERSEY CITY GLOBAL CHARTER SCHOOL,* HUDSON COUNTY**	:	
	:	**DOCKET NO.: T18-16**

WHEREAS, Diana Punales Morejon (Respondent) is a Charter School Trustee of the Jersey City Global Charter School; and

WHEREAS, as a Charter School Trustee, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance I training program by June 30, 2016; and

WHEREAS, at its meeting on March 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2016 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed her training requirement, and also filed a response to the Commission's OTSC that did not dispute that she did not complete training in a timely fashion; and

WHEREAS, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on April 25, 2017, the Commission recommended that the Acting Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on June 27, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

240-17

240-17SEC

AGENCY DKT. NO. 143-7/17

IN THE MATTER OF HEATHER MATUSZEWSKI-BURKE, LEAP ACADEMY UNIVERSITY CHARTER SCHOOL, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission) – finding that respondent violated the School Ethics Act for failure to timely complete the charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed her training after the issuance of the Commission's March 29, 2017 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/17

Date of Mailing: 8/21/17

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF HEATHER MATUSZEWSKI-BURKE	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***LEAP ACADEMY UNIVERSITY CHARTER SCHOOL,* CAMDEN COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T09-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on March 28, 2017, and mailed on March 29, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on March 29, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require every charter school trustee to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a trustee of a charter school located in the City of Camden, County of Camden. As a result of her position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online and, in this way, any charter school trustee may complete it at any time, from anywhere. By June 30, 2016, Respondent was required to complete the Governance 2 training program.

On January 5, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on July 25, 2016, Respondent was registered to take Governance 2 and an e-mail with the link to take the offered training was sent to Respondent's e-mail address. On October 19, 2016, an additional e-mail notice was sent to all charter school trustees who had not yet completed training, including Respondent. In addition, an on-site training was provided at NJSBA's Workshop on Thursday, October 27, 2016. On November 30, 2016, NJSBA sent a letter to Respondent again advising of non-compliance with the mandatory training requirement, and a link to the online training was, once again, provided to Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on November 30, 2016. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in January, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 3, 2017 via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on March 29, 2017.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2016.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Acting Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Acting Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Acting Commissioner of Education for review of the Commission's recommended penalty. Respondent

may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Acting Commissioner, written exceptions regarding the recommended penalty to the Acting Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Acting Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Acting Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Acting Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: June 28, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

IN THE MATTER OF HEATHER MATUSZEWSKI-BURKE	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***LEAP ACADEMY UNIVERSITY CHARTER SCHOOL*, CAMDEN COUNTY**	:	
	:	**DOCKET NO.: T09-16**

WHEREAS, Heather Matuszewski-Burke (Respondent) is a Charter School Trustee of the Leap Academy University Charter School; and

WHEREAS, as a Charter School Trustee, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 2 training program by June 30, 2016; and

WHEREAS, at its meeting on March 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2016 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2016; and

WHEREAS, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on April 25, 2017, the Commission recommended that the Acting Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on June 27, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

241-17

241-17SEC

AGENCY DKT. NO. 146-7/17

IN THE MATTER OF MICHAEL COSACK,	:	
MERIT PREPARATORY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL OF NEWARK, ESSEX COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission) – finding that respondent violated the School Ethics Act for failure to timely complete the charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed his training after the issuance of the Commission's March 29, 2017 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/17

Date of Mailing: 8/21/17

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF MICHAEL COSACK	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***MERIT PREPARATORY CHARTER SCHOOL OF NEWARK,* ESSEX COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T12-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on March 28, 2017, and mailed on March 29, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on March 29, 2017, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require every charter school trustee to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a trustee of a charter school located in the City of Newark, County of Essex. As a result of his position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online and, in this way, any charter school trustee may complete it at any time, from anywhere. By June 30, 2016, Respondent was required to complete the Governance 3 training program.

On January 5, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on July 25, 2016, Respondent was registered to take Governance 3 and an e-mail with the link to take the offered training was sent to Respondent's e-mail address. On October 19, 2016, an additional e-mail notice was sent to all charter school trustees who had not yet completed training, including Respondent. In addition, an on-site training was provided at NJSBA's Workshop on Thursday, October 27, 2016. On November 30, 2016, NJSBA sent a letter to Respondent again advising of non-compliance with the mandatory training requirement, and a link to the online training was, once again, provided to Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on November 30, 2016. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in January, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 3, 2017 via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on March 29, 2017.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2016.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Acting Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Acting Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Acting Commissioner of Education for review of the Commission's recommended penalty. Respondent

may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Acting Commissioner, written exceptions regarding the recommended penalty to the Acting Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Acting Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Acting Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Acting Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: June 28, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

IN THE MATTER OF MICHAEL COSACK	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***MERIT PREPARATORY CHARTER SCHOOL OF NEWARK,* ESSEX COUNTY**	:	
	:	**DOCKET NO.: T12-16**

WHEREAS, Michael Cosack (Respondent) is a Charter School Trustee of the Merit Preparatory Charter School of Newark; and

WHEREAS, as a Charter School Trustee, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete his Governance 3 training program by June 30, 2016; and

WHEREAS, at its meeting on March 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2016 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2016; and

WHEREAS, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

WHEREAS, at its meeting on April 25, 2017, the Commission recommended that the Acting Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on June 27, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

242-17

AGENCY DKT. NO. 137-7/17

IN THE MATTER OF ED BLAKE,	:	
INTERNATIONAL ACADEMY OF	:	COMMISSIONER OF EDUCATION
ATLANTIC CITY CHARTER SCHOOL,	:	DECISION
ATLANTIC COUNTY.	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner on July 11, 2017, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission recommended that the respondent receive a suspension for 30 days for violating the School Ethics Act. If the respondent fails to complete the online training program by the end of the 30 day period, the Commission recommends that the respondent be removed from his position. Respondent did not file exceptions, nor has he submitted proof that he completed the online training program. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon school officials by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. Accordingly, the respondent is suspended from his position as a school official for 30 days from the date of this decision and is hereby ordered to complete the requisite online training program within 30 days. If the respondent does not complete the online training program within 30 days from the date of

this decision the respondent shall be removed from her position as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/17

Date of Mailing: 8/21/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF ED BLAKE	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***INTERNATIONAL ACADEMY OF ATLANTIC CITY CHARTER SCHOOL,* ATLANTIC COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T05-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on March 28, 2017, and mailed on March 29, 2017 via regular and electronic mail, directing the Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on March 29, 2017, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require every charter school trustee to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a trustee of a charter school located in the City of Atlantic City, County of Atlantic. As a result of his position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online and, in this way, any charter school trustee may complete it at any time, from anywhere. By June 30, 2016, Respondent was required to complete the Governance 1 training program.

On January 5, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on July 25, 2016, Respondent was registered to take Governance I and an e-mail with the link to take the offered training was sent to Respondent's e-mail address. On October 19, 2016, an additional e-mail notice was sent to all charter school trustees who had not yet completed training, including Respondent. In addition, an on-site training was provided at NJSBA's Workshop on Thursday, October 27, 2016. On November 30, 2016, NJSBA sent a letter to Respondent again advising of non-compliance with the mandatory training requirement, and a link to the online training was, once again, provided to Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on November 30, 2016. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in January, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 3, 2017 via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on March 29, 2017.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2016, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Acting Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Acting Commissioner of Education impose a penalty of **suspension for thirty (30) days**, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Acting Commissioner of Education. If Respondent fails to complete training within the period of his thirty

(30) day suspension, the Commission recommends that Respondent be **removed from office on the thirty-first (31st) day**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Acting Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Acting Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Acting Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: June 28, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF ED BLAKE	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***INTERNATIONAL ACADEMY OF ATLANTIC CITY CHARTER SCHOOL,* ATLANTIC COUNTY**	:	
	:	**DOCKET NO.: T05-16**

WHEREAS, Ed Blake (Respondent) is a Charter School Trustee of the International Academy of Atlantic City Charter School; and

WHEREAS, as a Charter School Trustee, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete his Governance 1 training program by June 30, 2016; and

WHEREAS, at its meeting on March 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2016 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by June 30, 2016, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

WHEREAS, at its meeting on April 25, 2017, the Commission recommended that the Commissioner of Education impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education; and

WHEREAS, if at the conclusion of the thirty (30) day suspension, Respondent still has not completed his mandatory training requirement, the Commission recommends that he be removed from office on the thirty-first (31st) day; and

WHEREAS, at its meeting on June 27, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

243-17SEC

243-17

AGENCY DKT. NO. 138-7/17

IN THE MATTER OF DENISE SIMMONS, THE BARACK OBAMA GREEN CHARTER HIGH SCHOOL, UNION COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner on July 11, 2017, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission recommended that the respondent receive a suspension for 30 days for violating the School Ethics Act. If the respondent fails to complete the online training program by the end of the 30 day period, the Commission recommends that the respondent be removed from her position. Respondent did not file exceptions, nor has she submitted proof that she completed the online training program. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon school officials by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. Accordingly, the respondent is suspended from her position as a school official for 30 days from the date of this decision and is hereby ordered to complete the requisite online training program within 30 days. If the respondent does not complete the online training program within 30 days from the date of

this decision the respondent shall be removed from her position as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/17

Date of Mailing: 8/21/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF DENISE SIMMONS	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***THE BARACK OBAMA GREEN CHARTER HIGH SCHOOL,* UNION COUNTY**	:	
	:	**DOCKET NO.: T22-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on March 28, 2017, and mailed on March 29, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on March 29, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require every charter school trustee to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a trustee of a charter school located in the City of Plainfield, County of Hudson. As a result of her position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online and, in this way, any charter school trustee may complete it at any time, from anywhere. By June 30, 2016, Respondent was required to complete the Governance 2 training program.

On January 5, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on July 25, 2016, Respondent was registered to take Governance 2 and an e-mail with the link to take the offered training was sent to Respondent's e-mail address. On October 19, 2016, an additional e-mail notice was sent to all charter school trustees who had not yet completed training, including Respondent. In addition, an on-site training was provided at NJSBA's Workshop on Thursday, October 27, 2016. On November 30, 2016, NJSBA sent a letter to Respondent again advising of non-compliance with the mandatory training requirement, and a link to the online training was, once again, provided to Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on November 30, 2016. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in January, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 3, 2017 via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on March 29, 2017.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2016, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Acting Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Acting Commissioner of Education impose a penalty of **suspension for thirty (30) days**, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Acting Commissioner of Education. If Respondent fails to complete training within the period of her thirty

(30) day suspension, the Commission recommends that Respondent be **removed from office on the thirty-first (31st) day**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Acting Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Acting Commissioner, written exceptions regarding the recommended penalty to the Acting Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Acting Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Acting Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Acting Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: June 28, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF DENISE SIMMONS	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***THE BARACK OBAMA GREEN CHARTER HIGH SCHOOL,* UNION COUNTY**	:	
	:	**DOCKET NO.: T22-16**

WHEREAS, Denise Simmons (Respondent) is a Charter School Trustee of The Barack Obama Green Charter High School; and

WHEREAS, as a Charter School Trustee, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 2 training program by June 30, 2016; and

WHEREAS, at its meeting on March 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2016 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2016, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on April 25, 2017, the Commission recommended that the Acting Commissioner of Education impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education; and

WHEREAS, if at the conclusion of the thirty (30) day suspension, Respondent still has not completed her mandatory training requirement, the Commission recommends that she be removed from office on the thirty-first (31st) day; and

WHEREAS, at its meeting on June 27, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

244-17

AGENCY DKT. NO. 140-7/17

IN THE MATTER OF ZANDILE NKABINDE,	:	
JERSEY CITY COMMUNITY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, HUDSON COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner on July 11, 2017, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission recommended that the respondent receive a suspension for 30 days for violating the School Ethics Act. If the respondent fails to complete the online training program by the end of the 30 day period, the Commission recommends that the respondent be removed from her position. Respondent did not file exceptions, nor has she submitted proof that she completed the online training program. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon school officials by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. Accordingly, the respondent is suspended from her position as a school official for 30 days from the date of this decision and is hereby ordered to complete the requisite online training program within 30 days. If the respondent does not complete the online training program within 30 days from the date of

this decision the respondent shall be removed from her position as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/17

Date of Mailing: 8/21/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF ZANDILE NKABINDE	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***JERSEY CITY COMMUNITY CHARTER SCHOOL,* HUDSON COUNTY**	:	
	:	**DOCKET NO.: T17-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on March 28, 2017, and mailed on March 29, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on March 29, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require every charter school trustee to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a trustee of a charter school located in the City of Jersey City, County of Hudson. As a result of her position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online and, in this way, any charter school trustee may complete it at any time, from anywhere. By June 30, 2016, Respondent was required to complete the Governance 1 training program.

On January 5, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on July 25, 2016, Respondent was registered to take Governance I and an e-mail with the link to take the offered training was sent to Respondent's e-mail address. On October 19, 2016, an additional e-mail notice was sent to all charter school trustees who had not yet completed training, including Respondent. In addition, an on-site training was provided at NJSBA's Workshop on Thursday, October 27, 2016. On November 30, 2016, NJSBA sent a letter to Respondent again advising of non-compliance with the mandatory training requirement, and a link to the online training was, once again, provided to Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on November 30, 2016. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in January, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 3, 2017 via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on March 29, 2017.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2016, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Acting Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Acting Commissioner of Education impose a penalty of **suspension for thirty (30) days**, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Acting Commissioner of Education. If Respondent fails to complete training within the period of her thirty

(30) day suspension, the Commission recommends that Respondent be **removed from office on the thirty-first (31st) day**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Acting Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Acting Commissioner, written exceptions regarding the recommended penalty to the Acting Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Acting Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Acting Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Acting Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: June 28, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF ZANDILE NKABINDE	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***JERSEY CITY COMMUNITY CHARTER SCHOOL,* HUDSON COUNTY**	:	
	:	**DOCKET NO.: T17-16**

WHEREAS, Zandile Nkabinde (Respondent) is a Charter School Trustee of the Jersey City Community Charter School; and

WHEREAS, as a Charter School Trustee, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 1 training program by June 30, 2016; and

WHEREAS, at its meeting on March 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2016 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2016, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on April 25, 2017, the Commission recommended that the Acting Commissioner of Education impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education; and

WHEREAS, if at the conclusion of the thirty (30) day suspension, Respondent still has not completed her mandatory training requirement, the Commission recommends that she be removed from office on the thirty-first (31st) day; and

WHEREAS, at its meeting on June 27, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

245-17

AGENCY DKT. NO. 136-7/17

IN THE MATTER OF CYNDEE PHOENIX, INTERNATIONAL ACADEMY OF ATLANTIC CITY CHARTER SCHOOL, ATLANTIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner on July 11, 2017, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission recommended that the respondent receive a suspension for 30 days for violating the School Ethics Act. If the respondent fails to complete the online training program by the end of the 30 day period, the Commission recommends that the respondent be removed from her position. Respondent did not file exceptions, nor has she submitted proof that she completed the online training program. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon school officials by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. Accordingly, the respondent is suspended from her position as a school official for 30 days from the date of this decision and is hereby ordered to complete the requisite online training program within 30 days. If the respondent does not complete the online training program within 30 days from the date of

this decision the respondent shall be removed from her position as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/17

Date of Mailing: 8/21/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF CYNDEE PHOENIX	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	
	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***INTERNATIONAL ACADEMY OF ATLANTIC CITY CHARTER SCHOOL,* ATLANTIC COUNTY**	:	
	:	
	:	**DOCKET NO.: T06-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on March 28, 2017, and mailed on March 29, 2017 via regular and electronic mail, directing the Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on March 29, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require every charter school trustee to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a trustee of a charter school located in the City of Atlantic City, County of Atlantic. As a result of her position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online and, in this way, any charter school trustee may complete it at any time, from anywhere. By June 30, 2016, Respondent was required to complete the Governance 1 training program.

On January 5, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on July 25, 2016, Respondent was registered to take Governance I and an e-mail with the link to take the offered training was sent to Respondent's e-mail address. On October 19, 2016, an additional e-mail notice was sent to all charter school trustees who had not yet completed training, including Respondent. In addition, an on-site training was provided at NJSBA's Workshop on Thursday, October 27, 2016. On November 30, 2016, NJSBA sent a letter to Respondent again advising of non-compliance with the mandatory training requirement, and a link to the online training was, once again, provided to Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on November 30, 2016. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in January, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 3, 2017 via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on March 29, 2017.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2016, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Acting Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Acting Commissioner of Education impose a penalty of **suspension for thirty (30) days**, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Acting Commissioner of Education. If Respondent fails to complete training within the period of her thirty

(30) day suspension, the Commission recommends that Respondent be **removed from office on the thirty-first (31st) day**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Acting Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Acting Commissioner, written exceptions regarding the recommended penalty to the Acting Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Acting Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Acting Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Acting Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: June 28, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF CYNDEE PHOENIX	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***INTERNATIONAL ACADEMY OF ATLANTIC CITY CHARTER SCHOOL,* ATLANTIC COUNTY**	:	
	:	**DOCKET NO.: T06-16**

WHEREAS, Cyndee Phoenix (Respondent) is a Charter School Trustee of the International Academy of Atlantic City Charter School; and

WHEREAS, as a Charter School Trustee, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 1 training program by June 30, 2016; and

WHEREAS, at its meeting on March 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2016 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by June 30, 2016, and also failed to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on April 25, 2017, the Commission recommended that the Acting Commissioner of Education impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Acting Commissioner of Education; and

WHEREAS, if at the conclusion of the thirty (30) day suspension, Respondent still has not completed her mandatory training requirement, the Commission recommends that she be removed from office on the thirty-first (31st) day; and

WHEREAS, at its meeting on June 27, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

246-17

246-17SEC

AGENCY DKT. NO. 147-7/17

IN THE MATTER OF KRISTEN SIGLER, :
MERIT PREPARATORY CHARTER :
SCHOOL OF NEWARK, ESSEX COUNTY. :
:

COMMISSIONER OF EDUCATION
DECISION

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner on July 11, 2017, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately completed training after the issuance of its March 28, 2017 Order to Show Cause, but prior to the Commission's April 25, 2017 meeting; the Commission therefore recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/17

Date of Mailing: 8/21/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF KRISTEN SIGLER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***MERIT PREPARATORY CHARTER SCHOOL OF NEWARK,* ESSEX COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T14-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on March 28, 2017, and mailed on March 29, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on March 29, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require every charter school trustee to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a trustee of a charter school located in the City of Newark, County of Essex. As a result of her position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online and, in this way, any charter school trustee may complete it at any time, from anywhere. By June 30, 2016, Respondent was required to complete the Governance 2 training program.

On January 5, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on July 25, 2016, Respondent was registered to take Governance 2 and an e-mail with the link to take the offered training was sent to Respondent's e-mail address. On October 19, 2016, an additional e-mail notice was sent to all charter school trustees who had not yet completed training, including Respondent. In addition, an on-site training was provided at NJSBA's Workshop on Thursday, October 27, 2016. On November 30, 2016, NJSBA sent a letter to Respondent again advising of non-compliance with the mandatory training requirement, and a link to the online training was, once again, provided to Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on November 30, 2016. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, in January, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 3, 2017 via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on March 29, 2017.

To date, there is no dispute that Respondent did not complete her required training by June 30, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2016.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Acting Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Acting Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Acting Commissioner of Education for review of the Commission's recommended penalty. Respondent

may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Acting Commissioner, written exceptions regarding the recommended penalty to the Acting Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Acting Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Acting Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Acting Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: June 28, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

IN THE MATTER OF KRISTEN SIGLER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***MERIT PREPARATORY CHARTER SCHOOL OF NEWARK,* ESSEX COUNTY**	:	
	:	**DOCKET NO.: T14-16**

WHEREAS, Kristen Sigler (Respondent) is a Charter School Trustee of the Merit Preparatory Charter School of Newark; and

WHEREAS, as a Charter School Trustee, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 2 training program by June 30, 2016; and

WHEREAS, at its meeting on March 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by June 30, 2016 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by June 30, 2016; and

WHEREAS, at its meeting on April.25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on April 25, 2017, the Commission recommended that the Acting Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on June 27, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

249-17R

ADRIAN McCONNEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured physical education teacher, sought an order requiring the respondent Board to reimburse him for his salary that was withheld between September 1, 2013 and March 1, 2014, a period that corresponds to the time between when a criminal indictment against petitioner was dismissed and the date upon which he was reinstated to the payroll. Petitioner contended that a tenured teacher may not be suspended without pay unless that teacher has been indicted or tenure charges have been filed against the teacher; otherwise, a tenured teacher's suspension must be with pay. In the instant case, petitioner resigned from his position effective April 13, 2014, and the Board never filed tenure charges against him. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; pursuant to *N.J.S.A.* 18A:6-8.3, a tenured employee is entitled to back pay when no longer under indictment but before tenure charges are filed; accordingly, petitioner is entitled to back pay during any period that he was not under indictment and there were no tenure charges pending; the negative inferences about petitioner's conduct do not factor into this analysis because even if he were found guilty, he would nonetheless be entitled to suspension with pay for the month of February 2014; further, because the petitioner was not seeking payment during the period that he was under indictment, inquiries into fundamental fairness are not dispositive; and petitioner's request for reimbursement of costs associated with bringing his appeal was not considered, as the issue was raised in the original petition. The ALJ concluded that Board owes petitioner his salary for the month of February 2014. Accordingly, the ALJ granted petitioner's motion for summary decision with respect to payment of his wages for February 2014; denied petitioner's motion regarding his request for costs associated with this proceeding; and denied the Board's motion for summary decision.

Upon a comprehensive review of the record and the exceptions filed by both petitioner and respondent, the Commissioner rejected the Initial Decision and remanded the matter to the OAL for determination of unresolved issues in the case. In so doing, the Commissioner specifically ordered that the ALJ determine whether petitioner is entitled to back pay from September 1, 2013 through March 1, 2014 and whether such determination should include "weighing of the equities" and consideration of "fundamental fairness."

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 21, 2017

249-17R

OAL DKT. NO. EDU 05769-14
AGENCY DKT. NO. 111-5/14

ADRIAN McCONNEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] Exceptions filed by the petitioner and respondent – submitted in accordance with *N.J.A.C.* 1:1-18.4 – were also considered by the Commissioner. In this matter, petitioner seeks back-pay for the period between September 1, 2013 (the commencement of his suspension without pay following his indictment) and March 1, 2014 (the date of his reinstatement into the Board's payroll following dismissal of his indictment).[2] As reflected in the Initial Decision, the ALJ granted petitioner's "motion for summary decision" in part, concluding that petitioner is entitled to payment of his wages from February 4, 2014 through March 1, 2014 because his indictment was dismissed and tenure charges were not filed; and denied in part,

[1] The Commissioner questions the completeness of the record before her as the file transmitted for her review appears deficient, as will be addressed herein.

[2] Petitioner's initial petition – filed on May 2, 2014 – sought back-pay from February 4, 2014 (the date his indictment was dismissed) through to March 1, 2014. The renewed request for relief – back-pay from September 1, 2013 to March 1, 2014 – was set forth in petitioner's proposed amended petition submitted with his motion to amend the petition. Petitioner's motion to amend was granted by the Administrative Law Judge (ALJ) on September 4, 2014. It does not appear that petitioner formally filed an amended petition – and if he did, it is not in the record before the Commissioner. It is evident from the record, however, that the ALJ accepted the proposed amendment to the petition and the parties pursued the matter based on the same.

concluding that petitioner is not entitled to the fees and costs associated with the litigation. The ALJ also denied respondent's "motion for summary decision."[3] Upon a comprehensive review of the record in this matter, the Commissioner remands the matter to the OAL for determination of the unresolved issues in this case.

In the Initial Decision, the ALJ found, "[a] tenured employee [ ] is entitled to back pay when no longer under indictment but before tenure charges are filed . . . Mr. McConney is entitled to back pay during any period that he was not under indictment and there were no tenure charges pending." With regard to petitioner, the ALJ noted, "[t]he negative inferences about his conduct do not factor into this analysis because even if he were found guilty, he would nonetheless be entitled to suspension with pay for the month of February 2014." The ALJ further noted, "[b]ecause the Petitioner is not seeking payment during the period that he was under indictment, inquiries into fundamental fairness . . . are not dispositive." Respondent takes exception to the Initial Decision, arguing that the ALJ relied on an older version of the parties' Joint Stipulation of

[3] As of the date of the Initial Decision, the record does not reflect any cross motions (or requests) for summary decision filed with the ALJ. The record reflects that on February 2, 2016, the ALJ issued a letter to the parties adjourning the hearing date and requesting dates for a briefing schedule for filing of cross motions for summary decision. Thereafter, on March 23, 2016, respondent submitted a letter brief arguing that "fundamental fairness" based on "weighing of the equities" overrides petitioner's entitlement to back-pay during his indictment, and that the petition should be dismissed with prejudice. Said submission did not request summary decision. On March 29, 2016, respondent submitted a correspondence arguing that he is entitled to back-pay for the period between February 4, 2014 and March 1, 2014 only, because he recognizes that the Appellate Division reinstated his indictment. Said correspondence did not request summary decision. Furthermore, on February 21, 2017, petitioner notified the ALJ that he was found "not guilty" on all charges and requested that this fact be added to the record. In his correspondence, petitioner also referenced "the parties' cross-motion for summary decision" under consideration by the OAL. Therefore, it appears that the submissions of March 23, 2016 and March 29, 2016 are the parties' "cross-motions" in this matter. It bears noting that a review of the record further suggests that there are no other outstanding motions, as any such filings were resolved prior to the issuance of the Initial Decision. The pertinent pleadings, documents, and orders are as follows: 1) Petitioner's motion to amend the petition, filed on June 4, 2014; ALJ's Order of September 4, 2014, granting the motion. 2) Respondent's motion to place the case on the inactive list or, alternatively, to dismiss the petition without prejudice, filed on August 20, 2014; petitioner's response thereto, filed on August 21, 2014; respondent's brief in support of adverse inference, filed on October 20, 2014; petitioner's response thereto, filed on October 28, 2014; ALJ's Order of January 5, 2015, denying motion to place matter on inactive list and the motion to dismiss, and granting respondent's request for adverse inference to be drawn from petitioner's invocation of his privilege against self-incrimination. 3) Respondent's motion for summary decision, filed on July 29, 2015; respondent's supplementary submission in support of its motion, filed on August 3, 2015; petitioner's letter brief in response to respondent's motion, filed on August 13, 2015; ALJ's Order of August 20, 2015, denying respondent's motion for summary decision.

Facts, as the findings of facts did not recite respondent's entitlement to adverse inference regarding petitioner's conduct. Respondent further argues that the ALJ failed to consider "fundamental fairness" in awarding petitioner back-pay. Petitioner also filed exceptions, arguing that the ALJ failed to address the entirety of petitioner's claim for back-pay, *i.e.*, September 1, 2013 through March 1, 2014.[4] Petitioner submits that he is entitled to back-pay for the entire period between September 1, 2013 and March 1, 2014. The Commissioner agrees that the ALJ failed to incorporate the revised Joint Stipulation of Facts in the Initial Decision. The Commissioner further agrees that the ALJ failed to adjudicate petitioner's claim in its entirety. The remainder of the exceptions relate to the merits of the unresolved issues in this case; and therefore, the Commissioner will not consider them.

Accordingly, the Initial Decision is rejected; and the matter is remanded to the OAL for proper adjudication of the remaining issues in this case. Specifically, the ALJ must determine whether petitioner is entitled to back-pay from September 1, 2013 through to March 1, 2014, and whether such determination should include "weighing of the equities" and consideration of "fundamental fairness."

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 8/21/17
Date of Mailing: 8/22/17

[4] Petitioner states in his exceptions that he was granted leave to amend the petition to extend the scope of his claim for back-pay from September 1, 2013 to April 13, 2014; however, neither the initial petition nor the proposed amended petition seek back-pay until April 13, 2014. The claim for back-pay ends on March 1, 2014 in both instances.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 05769-14
AGENCY REF.NO. 111-5/14

ADRIAN McCONNEY,
Petitioner,
v.
TOWNSHIP OF PISCATAWAY
BOARD OF EDUCATION,
MIDDLESEX COUNTY,
Respondent.

Steven J. Kaflowitz, Esq., for petitioner (Caruso Smith Picini, PC, attorneys)

David B. Rubin, Esq., for respondent (David B. Rubin, PC, attorneys)

Record Closed: March 31, 2017 Decided: July 6, 2017

BEFORE **LELAND S. McGEE**, ALJ:

STATEMENT OF FACTS

Adrian McConney ("Petitioner" or "Mr. McConney"), and Respondent, Piscataway Township Board of Education ("Respondent" or "Board") (collectively referred to as "the Parties"), in the above-captioned matter, stipulated to the following Statement of Facts in

lieu of proceeding with a hearing, and as such I **FIND** the following to be the **FACTS OF THE CASE**:

1. Mr. McConney, whose home address is XXX Balch Avenue, Piscataway Township, New Jersey, was employed by the Board as a tenured physical education teacher at Piscataway High School ("School").
2. The Board is a public entity, located at 1515 Stelton Road, Piscataway Township, New Jersey 08854, that provides educational and schooling services to students in the Township of Piscataway.
3. On or about August 13, 2013, Mr. McConney was indicted by the Middlesex County Grand Jury on a charge of "Official Misconduct," in contravention of N.J.S.A. 2C:30-2. The charge and corresponding indictment was based on allegations that Mr. McConney engaged in sexual relations with an eighteen (18) year old female student who attended the School. He pled not guilty to the charge at the Superior Court of New Jersey, Middlesex County ("Court").
4. The Board suspended Mr. McConney, who was contracted as a ten (10) month employee, without pay effective September 1, 2013, prior to the start of the 2013-14 school year.
5. Prior to the filing of the indictment, Mr. McConney had no criminal record and was never subject to disciplinary action by the Board.
6. On or about September 20, 2013, Mr. McConney filed a motion to dismiss the indictment and underlying charge of Official Misconduct with the presiding judge for the Court, the Honorable Bradley J. Ferencz, J.S.C. The motion was based on the following grounds: (1) the indictment was fatally flawed because it did not set out the "official function" allegedly breached by Mr. McConney, (2) the prosecution failed to adequately charge the jury in the indictment process, and (3) the prosecution failed to state a claim to prove that Mr. McConney committed official misconduct.
7. On or about February 4, 2014, Judge Ferencz granted Mr. McConney's motion, thereby dismissing the indictment and corresponding charge on even date, on the basis that the facts presented to the grand jury, even if

accepted as true, did not constitute Official Misconduct as defined by statute.

8. The Board reinstated Mr. McConney to its payroll on March 1, 2014.

9. Mr. McConney resigned from his position with the Board effective April 13, 2014. The Board never filed tenure charges against him.

10. On or about May 2, 2014, Mr. McConney initiated the instant action by filing a Petition for Relief with the Commissioner of Education, through which he sought back pay for the period from February 4, 2014 (the date upon which the indictment was dismissed) to April 13, 2014 (the date of his resignation).

11. On or about June 4, 2014, Mr. McConney then filed a motion for leave to amend the Petition to extend the scope of his claim for back pay to the period from September 1, 2013 (the date upon which he was first removed from the Board's payroll) to April 13, 2014 (the date of his resignation). The Board did not oppose his motion and it was subsequently granted by the Honorable Leland S. McGee, A.L.J.

12. Thereafter, the Middlesex County Prosecutor's Office appealed the Court's decision to grant Mr. McConney's motion to dismiss the indictment to the Appellate Division. On February 9, 2015, the Appellate Division issued an opinion reversing Judge Ferencz's decision, thereby reinstating the indictment and underlying charge against Mr. McConney, and remanding the matter back to the Court for adjudication.

13. As of the date of this stipulation, the indictment against Mr. McConney is still pending before the Court, and no hearing dates have been scheduled in the criminal case.

14. Mr. McConney acknowledges that if the Board called him to testify as a witness in the instant action, he would decline to do so, invoking his Fifth Amendment right against self-incrimination.

15. Mr. McConney further acknowledges that he declined to respond to discovery requests from the Board's attorney inquiring about his alleged sexual activity with the student in question, also invoking his Fifth Amendment privilege against self-incrimination.

By letters dated February 21, 2017, the parties acknowledged that during the criminal proceedings against Petitioner, a jury found him "not guilty" of all charges. The record closed March 31, 2017.

Parties Arguments

Petitioner seeks payment of his salary for the month of February 2014, the period in which he was suspended without pay, was not under indictment, and tenure chargers were not filed against him. Petitioner also seeks reimbursement for the fees and costs associated with generating, filing, and pursuing this relief. This request was not a prayer for relief in his original petition.

Respondent argues that an indictment was pending against Petitioner after it was dismissed, so a weighing of fundamental fairness is required to determine if the Petitioner is entitled to back pay. Respondent argues that the weight is against Petitioner because the assertion of his Fifth Amendment rights allows Respondent to make inferences about discovery. Respondent also argued that Petitioner's acquittal would not entitled him to back pay because his conduct was morally reprehensible, even though the student was eighteen. Finally, Respondent seems to argue that the court should treat the tenure charges as having been filed because the Petitioner, if the charges had been filed, would not have prevailed. The implication is that the intention of Petitioner's swift submission of his resignation was to prevent the Board from filing, and certifying tenure charges.

LEGAL DISCUSSION

New Jersey Statutes (N.J.S.A. 18A:6-8.3) provides:

> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, *other than by reason of indictment*, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.

> (Emphasis added) (LexisNexis, Lexis Advance through New Jersey 217th Second Annual Session, L. 2017, c. 87, and J.R. 4).

"Thus, a tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. In all other circumstances, a suspension must be with pay." Slater v. Board of Educ. of Ramapo-Indian Hills Regional High School Dist., 237 N.J. Super. 424, 426 (App. Div. 1989). In Slater, a custodian was arrested for distributing marijuana to an undercover police officer. Id. He was suspended without pay, pled guilty, and his position was forfeited by the conviction. Id. at 267. No tenure charges were filed against him. Id. The court held that his suspension without pay was valid only from the point of his indictment forward. Therefore, the custodian was entitled to back pay up to the date of his indictment, despite his arrest and subsequent conviction. Id.

A tenured employee is also entitled to back pay when no longer under indictment but before tenure charges are filed. In re Morton, EDU 0253-97, Initial Decision, (June 11, 1999), adopted Comm'r (July 30, 1999) http://njlaw.rutgers.edu/collections/oal/. In re Morton, held that a teacher who was in possession of cocaine was entitled to pay between the date of his conviction and the certification of his tenure charges because a forfeiture order was not entered.

Slater and In re Morton are particularly relevant here because they show that even if McConney was convicted, he would still be entitled to back pay for the time he was not under indictment until tenure charges were certified. Mr. McConney is entitled to back pay during any period that he was not under indictment and there were no tenure charges pending. The negative inferences about his conduct do not factor into this analysis, because even if he were found guilty, he would nonetheless be entitled to suspension with pay for the month of February 2014.

Respondent points to Lopez v Bridgeton Board of Education, and Beatty v Newton Board of Education to assert that "an employee is not automatically entitled to back pay upon dismissal of an indictment...". (Resp't Br. 4.) These cases are distinguishable

because they both pertain to when a petitioner is entitled to back pay *during* the period of indictment, not *before* it. Lopez v Bridgeton Board of Education, EDU 6786-02, Initial Decision (October 3, 2003), modified, Commissioner, (November 6, 2003), reversed, State Board (November 3, 2004), http://njlaw.rutgers.edu/collections/oal/ (police officer was arrested on charges of child endangerment and was indicted; after being found not guilty, the State Board awarded pay for the entire period of his suspension); Beatty v Newton Board of Education, 1991 S.L.D. 1001 ("Fundamental fairness dictates that petitioner be granted back pay for the period of his unpaid suspension given that a trial by jury yielded a verdict of not guilty on the indictment which provided the basis for the suspension without pay...")

There is no disagreement between Lopez and Slater because they pertain to different periods in the process. Because the Petitioner is not seeking payment during the period that he was under indictment, inquiries into fundamental fairness, as per Lopez, are not dispositive. Furthermore, any argument based upon the indictment pending during the month of February is unnecessary. The appeal of Judge Ferencz's dismissal of the indictment was not filed until at least four months after the indictment was dismissed, and the indictment was not reinstated until a year later.

Following the enactment of N.J.S.A. 18A:6-8.3, in Beatty v. Newton Board of Education, 1991 S.L.D. 1001, the Commissioner considered whether a suspended teacher should receive back pay following his acquittal of criminal charges. Beatty was suspended without pay following his indictment on charges of sexual misconduct against several minor females, including his stepdaughter. After the jury returned a verdict of not guilty, completely acquitting him of all charges, he requested reinstatement and back pay. The board rejected his demand for back pay pursuant to N.J.S.A. 18A:6-8.3 and brought tenure charges. Agreeing with the board's contention that this was a case of first impression, the Commissioner held "[n]otwithstanding the absence of specific statutory language, ... in weighing the equities of this matter, fundamental fairness dictates that petitioner be granted back pay for the period of his unpaid suspension given that a trial by jury yielded a verdict of not guilty on the indictment which provided the basis for the suspension without pay under N.J.S.A. 18A:6-8.3." Id. at 1008-09. He explained:

> At the present time, petitioner has not been found guilty of any wrongdoing and the indictment upon which the suspension is based has been disposed of in his favor, therefore, it is concluded that as a matter of equity, back pay is warranted under the circumstances, ... The fact that tenure charges are pending against petitioner and he has been lawfully suspended without pay under the provisions of N.J.S.A. 18A:6-10 does not alter the equities of the matter. If petitioner is found guilty of the tenure charges, an appropriate penalty shall be fashioned by the Commissioner, which could include but is not limited to reduction in salary or dismissal.
>
> [Id. at 1009-10.]

The question of whether an employee should receive back pay following acquittal of criminal charges was also considered in Griffin v. Paterson Board of Education, 93 N.J.A.R.2d (EDU) 882. Griffin, a custodian was arrested and charged with various sexual offenses by two young female students of the school to which he was assigned. Following his indictment on charges of sexual assault and endangering the welfare of a child, the Board suspended him without pay. After a jury trial, he was acquitted of most counts of the indictment and the remaining counts were dismissed. He requested reinstatement with back pay and reimbursement of counsel fees. In concluding that Griffin was entitled to back pay, ALJ Diana Sukovich stated the facts of the case were "strikingly similar" to those of Beatty, supra. Id. at 886. She also noted the fact that the board did not issue tenure charges against him bolstered his claim for back pay, although this distinction was not determinative. Ibid. The Commissioner adopted ALJ Sukovich's decision for the reasons outlined in her decision.

Unlike, Beatty, where tenure charges were pending and Griffin, where tenure charges were not filed, in Camden Board of Education v. Hovington (Hovington II), EDU 6675-97, Initial Decision (January 29, 1998), <http://njlaw.rutgers.edu/collections/oal/>, adopted, Commissioner (March 30, 1998)[1], the question as to whether an employee was entitled to back pay following acquittal of criminal charges was considered after the

[1] This decision is not reported. The parties apparently settled their dispute prior to the Commissioner's issuance of a final decision and the Commissioner wrote in his final decision that he "finds no need to reach the substantive merits of respondent's claims. Accordingly, the order of the ALJ is entered as the final decision in this matter for the reasons expressed herein." Hovington, supra, Comm'r Decision.

employee had been found guilty of tenure charges, which related to the same misconduct for which he was indicted.

In the prior tenure proceeding, Camden Board of Education v. Hovington (Hovington I), EDU 4318-95, Initial decision, (October 2, 1996), adopted, Commissioner (November 18, 1996), 97 N.J.A.R.2d (EDU) 168, remanded, State Board (April 2, 1997), 97 N.J.A.R.2d (EDU) 419, Initial Decision adopted on remand, Commissioner (August 5, 1997), http://www.state.nj.us/education/legal/index.html, Hovington, a teacher and track coach was indicted on charges of sexual misconduct with a female student whom he had coached. After a series of three criminal trials, he was acquitted of the charges. The board then filed tenure charges related to the same alleged sexual misconduct. ALJ Jeff Masin determined that Hovington had violated his tenure by engaging in sexual misconduct with the same student who was the alleged victim of the matters for which the indictment had been returned, as well as a second student who was not an alleged victim of the offenses charged in the indictment.

In Hovington II, supra, Hovington subsequently sought to recover the pay withheld from him during the pendency of the indictment. In deciding the matter, ALJ Masin reviewed the Romanowski, Beatty and Griffin decisions. He noted at the time of the Romanowski case there was no authority for a suspension upon indictment except where written charges had been brought against the tenured employee before the Commissioner and he explained Beatty and Griffin, relied upon equity as the basis for recovery. Thus, he held the determination of whether Hovington could recover the pay for the period he was suspended while under indictment required an examination of the facts relevant to his case to determine whether equities lie with him. In concluding they did not, he explained:

> In neither Beatty nor Griffin did the respective Boards of Education pursue tenure charges to completion prior to the determination of the claim for pay withheld during the suspension imposed during the pendency of the criminal indictments, each of which had resulted in an acquittal. Thus, in judging the equities of the claimants in each of those cases, the Commissioner was presented with an employee who had never been proven to have engaged in inappropriate conduct, either to the satisfaction of the criminal proof standard of

> beyond a reasonable doubt or to the civil/administrative standard of preponderance of the evidence. Beatty and Griffin thus were apparently innocent persons, who had suffered a loss of pay while successfully defending themselves against what, at the time of the Commissioner's decision on the back-pay claims, were presumptively unsupported and unproven allegations. Here, Mr. Hovington stands in an entirely different position. While the ultimate outcome of the criminal proceedings was an acquittal, and the charges were thus not proven beyond a reasonable doubt, they were amply proven in the tenure hearing, and in fact, a new allegation, never part of the criminal process, was also proven. Therefore, Hovington's position as a supplicant seeking equity from the Commissioner is far different than the presumptively innocent claimants in Beatty and Griffin. "Fundamental fairness," the touchstone of the commissioner's reasoning in Beatty, hardly demands that this Board be required to pay this petitioner for six years in which he did not work for the Board, when in fact he was guilty of serious tenure violations committed before his suspension. If anything, "fundamental fairness" to the citizens and taxpayers of the City of Camden demands that he not be paid where he so flagrantly violated his trust as a professional educator.
>
> [Hovington II, supra, Initial Decision.]

In Lacey Township Board of Education v. Yatauro, EDU 793-99, Initial Decision (July 12, 1999), modified, Commissioner (October 13, 1999), <http://njlaw.rutgers.edu/collections/oal/>, ALJ Jeff Masin reiterated his Hovington II analysis. Yatauro was a band director and music instructor that was suspended without pay following his indictment for criminal charges related to an inappropriate sexual relationship with a student. He was eventually acquitted of the criminal charges after a jury trial. After his acquittal, the board-certified tenure charges against him and he was subsequently stripped of his tenure when it was determined in the tenure proceeding that the inappropriate sexual relationship had transpired. He sought to recover the salary withheld from him, while he was under indictment.

Yatauro's attorney rejected the Hovington II analysis and argued that since N.J.S.A. 18A:6-8.3 is unclear on its face as to an employee's right to recover pay withheld following acquittal of criminal charges in an indictment, the common-law determination

announced in Romanowski was still the guidepost. As for the Beatty and Griffin cases, he argued, even if the right to repayment is equitable, in Beatty the Commissioner did not wait for the determination of a tenure case, but decided the back-pay issue prior to such determination, when only the favorable resolution of the criminal matter was before him. He averred:

> The equities that the Beatty case reviewed was limited to the fundamental fairness of not paying Beatty for the period of his suspension by reason of indictment when a jury of his peers had acquitted Beatty, in essence, finding that the indictment was without adequate factual basis. In making this determination of fundamental fairness, *Beatty* did not consider the merits of the tenure charges. By deciding the motion for backpay while the tenure case remained pending, the Commissioner implicitly recognized that the merits of the tenure charges would be relevant to the determination of the 120-day suspension pending tenure hearing under N.J.S.A. 18A:6-14, not the indefinite suspension pending indictment under N.J.S.A. 18A:6-8.3.
>
> [Yatauro, supra, Initial Decision.]

In rejecting the attorney's argument, ALJ Masin explained:

> It is true that the Legislature did not directly address the *Romanowski* ruling, which was rendered in a case in which there appears not to have been a tenure charge pending when the court wrote its decision. Since that time, no appellate court has addressed the issue and the Commissioner has only addressed it in the context of matters in which the administrative proceeding had either not been completed, or had never even been invoked against the employee. In the absence of Legislative direction, in *Beatty* the Commissioner saw fit to consider fundamental fairness and equity as the basis for deciding the claim. In *Hovington* II and here in *Yatauro,* the decision as to whether the now-former employee should recover the pay withheld from him during the pendency of the indictment is made in a markedly different factual setting than existed in *Romanowski, Beatty*, or *Griffin.* The application of equity principles to decide this issue is in keeping with the Commissioner's view of the law expressed in *Beatty*, and in the absence of express Legislative direction, affords a reasonable means of considering all of the material information now available to decide if an employee who did

> not work for the Board while suspended and was ultimately determined guilty of serious tenure charges which mirror the criminal charges should nevertheless be allowed to collect this withheld pay.
>
> [Ibid.]

Based upon considerations of fundamental fairness and equity, ALJ Masin concluded that where a tenured employee seeks to recover salary which was withheld after an indictment from which the employee has obtained a favorable disposition, but where the employee has subsequently been proven in a tenure proceeding to have committed the same misconduct which was the essential subject of the criminal charges, the employee may not recover salary withheld during the pendency of the indictment. Therefore, he denied Yatauro's claim for back pay.

An employee's entitlement to back pay during a period of suspension was considered in Lopez v. Bridgeton Board of Education, EDU 6786-02, Initial Decision (October 3, 2003), modified, Commissioner, (November 6, 2003), reversed, State Board (November 3, 2004), <http://njlaw.rutgers.edu/collections/oal/>. Lopez, a campus police officer employed by the board was arrested on charges of child endangerment. Following his arrest, he was suspended without pay and was subsequently indicted. The charges were based upon an accusation made by Lopez's daughter, who was a student at the middle school where he was employed. Lopez contended the charges were the result of an on-going custody dispute between him and his former wife. After considering the nature of the indictment and the evidence offered by the State, the court found that the indictment was unsupported by credible evidence and had been improperly obtained. The court dismissed the indictment in its entirety and Lopez was reinstated to his former position. After the board denied his request for back pay and emoluments, he filed an appeal with the Commissioner.

ALJ Miller granted Lopez's request for back pay and emoluments for the entire period of his unpaid suspension. In his decision, ALJ Miller explained:

> I **FIND** that petitioner, a school employee, was involved in an unfortunate contentious family matter. An immediate

suspension appeared to be justified given the nature of the allegations and pending charges. However, as of October 12, 2001, petitioner was totally exonerated of the charge. There has been no evidence offered by the district that petitioner should have remained suspended, even in the absence of criminal charges. The record is barren of any evidence that petitioner acted wrongfully or was a risk to students. In essence, petitioner did nothing wrong if measured by a criminal or civil standard. The allegation of any wrongdoing was dismissed as baseless. In fact, petitioner asserts that "Mr. Lopez was arrested because of an overzealous prosecutor who pursued a cause of action on untrue assertions in the face of evidence that contradicted the compliant by an adolescent seeking to shed the parental yoke of her father in favor of a permissive lifestyle with her mother who never enjoyed the custody the child." (Petitioner's brief at page 10). Apparently, the criminal trial Judge agreed. In the spectrum of possible outcomes, a pretrial dismissal of an indictment is about the best possible vindication. In view of the aforementioned, the district reinstated petitioner but refused to do so with back pay and other benefits. Had petitioner been culpable in a civil sense, applied for Pretrial Intervention, accepted a plea agreement or presented some other concern to the district, then withholding back pay would be plausible. However, none of the aforementioned occurred.

Therefore, I **CONCLUDE** that petitioner must be awarded all of his back pay, vacation time, benefits, pension credit and any other benefits from the first day of such suspension. Griffin, supra., N.J.S.A. 18A:6-8.3; N.J.S.A. 18A:6-14. To suspend a school employee, without pay, because they were silent on the issue of involved in a contentious family matter resulting in criminal charges is reasonable. However, if they are fully exonerated, as in this case, it is unreasonable to not fully reinstate the teacher with all rights and emoluments. The districts failure to do so does not comport with "fundamental fairness" as expressed in *Griffin*, *Beatty, supra.* This type of action could have a chilling effect upon school board employees involved in difficult family matters. It may impact or deter necessary child discipline for fear losing one's wages and benefits. Mere "trumped up charges" and the fear of the related consequences, including a suspension with no right to recover back pay, could negatively impact important family matters and decisions. The threat of filing charges could disrupt the process of resolving family matters. The present matter is a clear indication of just how family matters can carelessly spiral out of control and spill over in a way that seriously affects the family unit's financial well-being. I

> **CONCLUDE** that withholding back pay and benefits, under the circumstances presented in this case, is simply not justified.
>
> [Lopez, supra, Initial Decision.]

Upon review, the Commissioner modified ALJ Miller's decision and directed that Lopez be awarded back pay and emoluments only for the period of his unpaid suspension prior to his indictment. Noting that N.J.S.A. 18A:6-8.3 is silent on the issue of back pay subsequent to the disposition of a criminal indictment, the Commissioner cited Busler v. East Orange Board of Education, EDU 3916-00, where the Commissioner declared and the State Board affirmed there was no basis under education law to award back pay regardless of the disposition of the criminal indictment. The Commissioner rejected Lopez's argument that Busler was not relevant since Busler availed himself of the pretrial intervention program as a way of avoiding the prosecution for which he was indicted. He held the holding in Busler was not so limited. Lopez, supra, Comm'r Decision.

On appeal, the State Board reversed the Commissioner's decision and held Lopez was entitled to back pay and emoluments for the entire period of his unpaid suspension. The Board explained:

> Contrary to the Commissioner's determination, Busler does not stand for the general proposition that an employee suspended without pay following an indictment is precluded from receiving back pay after an acquittal or dismissal of the criminal charges. Nor did the State Board intend such a result in its decision in that case. Rather, as previously indicated, the denial of Busler's claim was predicated in part on the fact that the criminal charges filed against him had been dismissed only after he had successfully completed a pretrial intervention program ("PTI"). Under those circumstances, the State Board agreed with the Commissioner that Busler, an assistant principal, had not demonstrated his entitlement to back pay on fundamental fairness grounds for the period of his unpaid suspension following his indictment.
>
> [Lopez, supra, State Board Decision.]

Citing In re Pawlak, No. A-3298-87 (App. Div. July 7, 1989), the Board explained the completion of a PTI program "signifies nothing concerning the truth of the charges; it is indicative only of the fact that the prosecutor's office thought he was a good candidate for rehabilitation or diversion from the criminal process." Ibid.

Then, reiterating the Commissioner's reasoning in Beatty, supra, the Board agreed with ALJ Miller's conclusion that fundamental fairness dictates that Lopez be awarded back pay and emoluments. It explained the indictment against Lopez was dismissed in its entirety by the judge who found that the prosecutor had misled the grand jury as to the actual offense charged and had improperly obtained an indictment without offering sufficient proofs of the alleged offense. Under these circumstances, the Board determined fundamental fairness dictates that the petitioner be awarded his back pay and emoluments. Ibid.

In the present case, Respondent asserts that there has been no complete and final exoneration from wrongdoing. It argues petitioner was charged with having sexual relations with a student enrolled at the high school where he taught. The indictment, however, was dismissed because there was a legal question as to whether his actions were a violation of the statute because the student was eighteen years old. Further, it asserts that even though a jury found Petitioner "not guilty" after a criminal trial, that verdict does not mean that Petitioner is "innocent." As such, Respondent asserts, the equities do not weigh in his favor and its original discovery requests were propounded to determine whether he committed the act of having sex with a student.

In opposing Respondent's motion, Petitioner primarily argues that the charge against him was dismissed because he committed no crime and thus he was exonerated. He avers a tenured teacher may not be suspended without pay unless that teacher has been indicted or tenure charges have been preferred against the teacher and certified to the Board of Education. In all other circumstances, a tenured teacher's suspension must be with pay. Accordingly, he contends the truth of the charges underlying the indictment filed against him was not relevant to his request for back-pay.

Respondent also argues that Petitioner's prompt resignation precluded the bringing of tenure charges and had they been brought, he would have been found guilty with the lower burden of proof. (Resp't Br. 6). This argument has no relevance to the narrow case at hand because no tenure charges were filed. Even if they were, the suspension of pay would not be valid until they were filed and certified by the Commissioner. In re Morton, EDU 0253-97. Even if, in the remote chance, this court was to treat the tenure charges as having been filed, until those charges were certified, he would still be entitled to his salary for the month of February, 2014.

Finally, Petitioner's Motion seeks costs associated with the filing which was not included in his original Petition of Appeal. In discussing amendments to pleadings, the Uniform Administrative Procedure Rules ("UAPR") states "[u]nless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice." N.J. Admin. Code. § 1:1-6.2(a). In addition, discussing jurisdiction, the UAPR provides that

> "When the Office of Administrative Law acquires jurisdiction over a matter that arises from a State agency's rejection of a party's application, and at the hearing the party offers proofs that were not previously considered by the agency, *the judge may either allow the party to amend the application to add new contentions, claims or defenses* or, if considerations of expediency and efficiency so require, the judge shall order the matter returned to the State agency. . ."

N.J. Admin. Code § 1:1-3.2 (emphasis added).

The UAPR further provides that

> "[t]he Office of Administrative Law shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the Office of Administrative Law or as otherwise authorized by law except as provided by N.J.A.C. 1:1-17. *The Office of Administrative Law shall not receive, hear or consider any pleadings, motion papers, or documents of any kind relating*

> *to any matter until it has acquired jurisdiction over that matter*, except as provided by N.J.A.C. 1:1-17."

N.J. Admin. Code. § 1:1-6.2(a) (emphasis added).

Petitioner's request for costs sought in his motion is, in effect, an attempt to include a pleading that is outside of the "contested case" as determined by the agency head, and is not cognizable in the context of this proceeding.

CONCLUSION

For the foregoing reasons, I **CONCLUDE** that Petitioner's Motion for Summary Decision should be **GRANTED** with respect to payment of his wages for the month of February 2014, and **DENIED** with respect to his request for costs associated with this proceeding. I further **CONCLUDE** that Respondent's Motion for Summary Decision should be **DENIED**.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Petitioner's Motion for Summary Decision with respect to payment of his wages for the month of February 2014 is hereby **GRANTED.**

It is further **ORDERED** that Petitioner's Motion for Summary Decision regarding his request for costs associated with this proceeding is hereby **DENIED.**

It is further **ORDERED** that Respondent's Motion for Summary Decision is **DENIED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 6, 2017
DATE

LELAND S. McGEE, ALJ

Date Received at Agency: July 6, 2017

Date Mailed to Parties: JUL 7 2017
LSM/lr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

250-17

AGENCY DKT. NO. 362-12/11

S.S., ON BEHALF OF MINOR CHILDREN, A.S. AND A.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO, MONMOUTH COUNTY,	:	ORDER
RESPONDENT.	:	

On October 10, 2013, a final agency decision was rendered in this matter, wherein the Commissioner found S.S. liable for tuition in the amount of Twenty Thousand Five Hundred Ninety Eight Dollars ($20,598.00), representing tuition for a period of ineligible attendance by her children, A.S. and A.S., in the Marlboro Township School District during the 2011-2012 school year. The Marlboro Township Board of Education (Board) subsequently notified the Commissioner that S.S. had failed to comply with the decision and it requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10.

In response to the Board's request, S.S. claimed that the Commissioner's decision was appealed to the Appellate Division of the Superior Court, and as such the Commissioner should not request that the final order in this matter be docketed while the case is on appeal. On April 17, 2015, the Appellate Division issued a decision affirming the Commissioner's October 10, 2013 decision. Additionally, on September 14, 2015, the New Jersey Supreme Court denied S.S.'s petition for certification. This matter is no longer on appeal and S.S. has offered no

reasons that have not been fully and fairly adjudicated as to why the judgment against her should not be so docketed.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Salina Segobind is now subject to entry of a judgment by the court in the amount of $20,598.00, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/23/17

Date of Mailing: 8/23/17

251-17

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF EARLY CHILDHOOD DEVELOPMENT,	:	
RESPONDENT.	:	

SYNOPSIS

The petitioner, Board of Education of the City of Elizabeth (Board), contended that the respondent, New Jersey Department of Education, Division of Early Childhood Education (Department), insufficiently funded the Board's 2015-2016 preschool programs, thereby making it impossible to provide thorough and efficient programming for its preschool-age children. The Department asserted that the Preschool Education Aid (PEA) awarded to the Board was entirely compliant with the requirements of the School Funding Reform Act (SFRA), *N.J.S.A.* 18A:7F-43 to -66, and that, accordingly, the petition should be dismissed.

The ALJ found, *inter alia*, that: PEA supports districts like Elizabeth as part of the SFRA's obligation to fund public preschool education; the level of PEA is determined as set forth in statute; the record of this matter revealed no evidence that the Department's PEA award to Elizabeth for the 2015-2016 school year was in any way at odds with the statutory formula; the Board's argument that the PEA funds allotted were insufficient – and that the shortfall is the fault of the statute and the Department – is without merit; the Board has presented no evidence that the SFRA is unconstitutional as it was applied to its PEA grant for 2015-2016; and the record shows that any financial shortfall experienced by Elizabeth that year was due to its own inefficiencies and mismanagement of funds. Accordingly, the ALJ ordered that the petition of appeal be dismissed.

Upon careful consideration and review, the Commissioner adopted the ALJ's recommended decision as the final decision in this matter, for the reasons well expressed therein. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 24, 2017

251-17

OAL DKT. NO. EDU 9004-15
AGENCY DKT. NO. 94-4/15

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF EARLY CHILDHOOD DEVELOPMENT,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon a comprehensive review of the record, the Commissioner concurs with the Administrative Law Judge's (ALJ) determination – for the reasons thoroughly expressed in the Initial Decision – that the amount of preschool education aid (PEA) that the Elizabeth School District received during the 2015-2016 school year was consistent with the School Funding Reform Act (SFRA), *N.J.S.A.* 18A:7F-43-66. The Commissioner also is in accord with the ALJ's determination that Elizabeth failed to offer any evidence to indicate that the SFRA is unconstitutional as it was applied to Elizabeth's PEA grant for the 2015-2016 school year. Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/24/17
Date of Mailing: 8/24/17

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09004-15
AGENCY DKT. NO. 94-4/15

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF EARLY CHILDHOOD EDUCATION,

Respondent.

Mark R. Peck, Esq., for petitioner (Florio, Perrucci, Steinhardt and Fader, attorneys)

Lauren A. Jensen, Deputy Attorney General, and **Beth N. Shore**, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: May 31, 2017 Decided: July 14, 2017

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

The Elizabeth Board of Education ("the Board") contends that the New Jersey Department of Education, Division of Early Childhood Education, ("the Department") insufficiently funded the Board's 2015–2016 preschool programs, thus making it impossible to deliver thorough and efficient programming to its preschool-age children. The Department replies that the Preschool Education Aid ("PEA") awarded the Board was in all respects compliant with the requirements of the School Funding Reform Act ("SFRA"), N.J.S.A. 18A:7F-43 to -66, and that, accordingly, the petition of appeal should be dismissed.

PROCEDURAL HISTORY

The petition of appeal was filed on April 27, 2015. The Department filed an answer on June 16, 2015; the contested case was transmitted to the Office of Administrative Law ("OAL") on June 18, 2015; and was assigned to the Honorable Caridad Rigo, ALJ.

On November 25, 2015, the Department filed a motion for summary decision. The Board opposed the motion on December 17, 2015, and the Department replied to the opposition on December 24, 2015. Oral argument was conducted on January 14, 2016. Via letter dated January 15, 2016, Judge Rigo denied the motion and directed that the matter proceed to hearing. Several hearing dates were adjourned before the matter was reassigned to me on January 9, 2017, after Judge Rigo's retirement.[1]

A Joint Stipulation of Facts was filed by the parties in January 2017, and hearings were conducted on February 15, 2017, and March 30, 2017. Post-hearing submissions were filed on May 31, 2017, at which time the record closed.

[1] Along the way, the Board changed counsel, which also, in part, delayed proceeding to hearing.

FINDINGS OF FACT

Stipulated Facts

The salient background facts were agreed upon by the parties, who stipulated to the process via which PEA is calculated under the SFRA. I **FIND**:

1. Each year, the districts formerly known as the Abbott districts ("the Abbott districts"), including Elizabeth, receive PEA from the Department.

2. PEA is a State-aid category provided to districts in order to allow them to implement a high-quality preschool program, as required by the School Funding Reform Act ("SFRA"), L. 2007, c. 260 (N.J.S.A. 18A:7F-43 to -66).

3. PEA supports three different types of preschool programs: in-district programs, licensed private-provider programs, and Head Start programs. An in-district program is a program provided inside a district school building. A private-provider program is a program provided in a nursery school or other private program in the community. A Head Start program is part of the federal Head Start program.

4. Under the SFRA, each type of program is designated a different per-pupil aid amount. The SFRA designated the following per-pupil aid amounts for each of the types of preschool programs for the 2008–2009 school year: $11,506 for in-district programs; $12,934 for licensed private-provider programs; and $7,146 for Head Start programs.

5. For each subsequent school year, the SFRA directs that the preschool per-pupil aid amounts be established in accordance with N.J.S.A. 18A:7F-46.

6. Under N.J.S.A. 18A:7F-46, the Governor, after consultation with the Commissioner of Education, recommends to the Legislature, through the

issuance of an Educational Adequacy Report ("EAR"), any appropriate adjustments to, among other things, the per-pupil amounts for full-day preschool.

7. The SFRA directs that an EAR be submitted by September 1, 2010, and by September 1 every three years thereafter. The EAR is applicable to the next three school years, with the per-pupil amounts for full-day preschool, among other things, to be adjusted by the Consumer Price Index ("CPI"), as defined by N.J.S.A. 18A:7F-45, for each of the two school years following the first school year to which the report is applicable.

8. The per-pupil amounts set out in the EAR are deemed approved for the two subsequent school years, unless the Legislature adopts a concurrent resolution stating that the Legislature is not in agreement with any specific part of the report.

9. In accordance with the SFRA, an EAR was issued on December 14, 2012, setting out per-pupil amounts that would apply to the 2013–2014, 2014–2015, and 2015–2016 school years.

10. The Fiscal Year 2014 Educational Adequacy Report ("FY14 EAR") reassessed the adequacy of the SFRA's 2008–2009 per-pupil aid amounts for each of the three types of preschool programs. (J-1.)

11. In reassessing the per-pupil aid amounts for preschool, it was determined that districts had been able to meet code requirements with the funding levels established in the SFRA. Accordingly, the FY14 EAR recommended that the Department continue to fund preschool programs based on annual CPI increases to the per-pupil amounts listed in the SFRA.

12. Specifically, the FY14 EAR set out the following per-pupil aid amounts for each of the types of preschool programs for the 2013–2014 school year: $12,788 for in-district programs; $14,375 for licensed private-provider programs; and $7,943 for Head Start programs.

13. While the Legislature did issue a concurrent resolution stating that it did not agree with specific parts of the FY14 EAR, it took no issue with the adjusted per-pupil aid amounts for preschool. Thus, the preschool per-pupil aid amounts as set out in the FY14 EAR were deemed approved and superseded the per-pupil aid amounts set out in the SFRA.

14. Accordingly, the preschool per-pupil aid amounts set out in the SFRA have been updated.

15. Each of the SFRA per-pupil aid amounts is also adjusted using the Consumer Price Index ("CPI") and county-based geographic cost adjustment.

16. Elizabeth is one of the thirty-one Abbott districts. As adjusted, Elizabeth's per-pupil aid amounts for the 2015–2016 school year were: $13,021 for in-district programs; $14,637 for licensed private-provider programs; and $8,088 for Head Start programs.

17. Under the SFRA formula, set out in N.J.S.A. 18A:7F-54, PEA is calculated by multiplying the number of general-education students (non-special-education students) in each of the three types of programs by their respective per-pupil aid amounts and adding the total costs of each of these three types of programs together.

18. The SFRA provides that each year, Abbott districts will receive the greatest of three preschool funding allocations: (1) the per-pupil allocation under the SFRA described above; (2) the district's per-pupil allocation in its approved 2008–2009 early-childhood plan multiplied by its projected enrollment for the upcoming school year; or (3) the district's total amount of preschool aid in the 2008–2009 school year after an enrollment adjustment for that year.

19. The purpose behind this funding scheme is to ensure that no district receives less in PEA than it received before the SFRA went into effect.

20. Districts that would receive less under the SFRA formula in any given year are "held harmless" at the rate of PEA they received for the 2008–2009 school year, using the higher of the two 2008–2009 amounts described above.

21. Annually, the Abbott districts must submit documents to the Department, which the Department considers in determining the amount of PEA each district will receive for the following school year.

22. These documents include: the district's Five-Year Preschool Program Plan Annual Update ("Plan"); One-Year Enrollment Projections Workbook; and Budget Planning Workbook.

23. The purpose of the Plan is to provide a comprehensive description of how the school district will implement each component of high-quality preschool programming for three- and four-year-old children. The Plan is developed every five years, with annual updates in the years in-between. The purpose of the One-Year Enrollment Projections Workbook is for the district to provide current enrollment data, as well as projections for the following school year. These projections are used to calculate the district's PEA. The Budget Planning Workbook allows the district to indicate how PEA will be used to support the high-quality preschool program described in its Plan, meeting all Administrative Code requirements.

24. Upon reviewing these documents, the Department determines the amount of PEA that each district should receive under the SFRA.

25. Annually, the Department reviews each Abbott district's enrollment projections, runs the SFRA formula, and compares the resulting calculation to the district's 2008–2009 funding amounts to determine the district's PEA for the upcoming school year.

26. Elizabeth submitted its 2015–2016 Five-Year Preschool Program Plan Update; 2015–2016 Enrollment Projections Workbook; and 2015–2016 Budget Planning Workbook to the Department. (J-2; J-3; J-4.)

27. In its 2015–2016 Enrollment Projections Workbook, Elizabeth projected a total enrollment of 3,268 general-education students: 2,468 students in in-district programs; 610 students in private-provider programs; and 190 students in Head Start programs.

28. The Department reviewed Elizabeth's enrollment projections for the 2015–2016 school year and did not modify them.

29. Using these enrollment projections, the Department applied the SFRA formula, multiplying the enrollment projections for each of the three types of preschool programs by the per-pupil aid amounts for those programs as follows: *(enrollment) x (per-pupil aid amount) = funding amount.*

30. Applying the SFRA funding formula, the Department calculated the amount of funds available to Elizabeth for the 2015–2016 school year:

PROGRAM TYPE	PROJECTED ENROLLMENT	PER-PUPIL AID AMOUNT	TOTAL AMOUNT
In-District	2,468	$13,021	$32,135,828
Private Provider	610	$14,637	$8,928,570
Head Start	190	$8,088	$1,536,720

31. Added together, the above funding amounts totaled $42,601,118 of PEA under the SFRA formula.

32. Because the SFRA requires that Abbott districts receive the greatest of three potential funding calculations, the Department then compared the SFRA total of $42,601,118 PEA to Elizabeth's 2008–2009 approved preschool budget, which totaled $40,764,852.

33. Because the 2015–2016 SFRA calculation exceeded Elizabeth's 2008–2009 approved budget, the Department then calculated the amount of funding Elizabeth would receive using its 2008–2009 average per-pupil rates for preschool, regardless of program placement. Elizabeth's per-pupil rate in 2008–2009 was $14,052. Multiplying Elizabeth's total projected enrollment for the 2015–2016 school year by its 2008–2009 per-pupil rate yielded an amount greater than its SFRA formula total:

PROJECTED ENROLLMENT	x	2008–2009 PER-PUPIL RATE	=	TOTAL AID
3,268		$14,052		$45,921,936

34. Since the SFRA mandates that the former Abbott districts receive the highest amount of funding under the three funding calculations, the Department determined that Elizabeth would receive $45,921,936 in PEA, as further shown below:

A	B	C	RESULT
TOTAL AMOUNT OF PEA USING SFRA FORMULA	TOTAL 2008–2009 APPROVED PRESCHOOL BUDGET	TOTAL OF PROJECTED ENROLLMENT x 2008–2009 PER-PUPIL RATE	HIGHEST AMOUNT OF FUNDING COMPARING COLUMNS A, B, AND C
$42,601,118	$40,764,852	$45,921,936	$45,921,936

In other words, for the 2015–2016 school year, Elizabeth was "held harmless" at an amount above the total amount of funding it would receive under the SFRA's formula.

35. Elizabeth received $45,921,936 in PEA for the 2015–2016 school year, $3,320,818 more than it would have received under the SFRA formula.

36. As one of the seven districts "held harmless" under the SFRA for the 2015–2016 school year, Elizabeth received more PEA than other former Abbott districts on a per-pupil basis.

37. Of the thirty-one former Abbott districts, Elizabeth's average per-pupil amount of PEA for the 2015–2016 school year was the fourth highest in the state, as shown below:

DISTRICT	AVERAGE PER-PUPIL AMOUNT OF PEA FOR 2015–2016
Asbury Park	$16,106.00
Harrison Town	$14,794.00
Union City	$14,237.35
Elizabeth	**$14,052.00**
Trenton	$13,926.95
Perth Amboy	$13,914.00
West New York	$13,873.08
Hoboken	$13,639.06
New Brunswick	$13,508.48
Vineland City	$13,498.00
Irvington	$13,440.38
Plainfield	$13,431.62
Jersey City	$13,417.44
Paterson	$13,398.87
Passaic City	$13,218.33
East Orange	$13,202.91
Newark	$13,139.00

Garfield	$13,026.00
Phillipsburg	$12,775.85
Jersey City	$12,728.00
Long Branch	$12,728.00
Neptune Township	$12,728.00
Pemberton Township	$12,704.94
Burlington City	$12,594.00
Pleasantville	$12,586.62
Gloucester City	$12,490.00
Salem	$12,408.00
City of Orange	$12,266.85
Millville City	$12,244.62
Bridgeton City	$12,236.00
Camden City	$11,989.13

38. In its initial 2015–2016 Budget Planning Workbook, submitted to the Department on or about December 15, 2014, Elizabeth indicated that it would also use prior year PEA carryover of $404,768 and funding in the amount of $2,979,024 for students with special needs included in general-education classrooms.

39. Including the PEA of $45,921,936 it would receive under the SFRA, Elizabeth had a total of $49,305,728 to allocate to its preschool program for the 2015–2016 school year.

40. In its initial 2015–2016 Budget Planning Workbook, Elizabeth allocated a total amount of $53,469,632 to the preschool program. This is $4,163,904 more

than the district had to allocate, including the 2015–2016 PEA, carryover, and funding for preschoolers with special needs.

41. On or about March 20, 2015, the Department sent a letter to Elizabeth stating that, under the SFRA, Elizabeth would receive PEA in the amount of $45,921,936 for 3,268 general-education students. (J-5.)

42. The March 20 letter also indicated that Elizabeth needed to submit a revised version of its Budget Planning Workbook with funding allocated to match $49,305,728 (the district's 2015–2016 PEA amount of $45,921,936 along with its prior year PEA carryover of $404,768 and special-education funding in the amount of $2,979,024).

43. Elizabeth submitted a revised version of its Budget Planning Workbook showing a reduction in the total amount of preschool-program staff salaries budgeted to the preschool program to balance its total budget of $49,305,728. (J-6.)

The Testimony

1. The Budget Cuts

Tracy Crosby is the director of early childhood education, having held this position for ten years. Together with a fiscal specialist, she drafts the preschool budget. Crosby urged that in 2008, when the SFRA was adopted, the amount of money allocated met the needs of her department. But in the years that followed, her PEA has remained unchanged and is insufficient to provide a high-quality program to Elizabeth's preschoolers.

Elizabeth operates a total of 232 preschool classrooms, to include 177 classrooms in-district; 42 classrooms at eight provider sites; and 13 classrooms via Head Start. After ensuring that there are sufficient teachers, aides, classroom supplies and materials, whatever is left is allocated among remaining line items. The initial

budget exceeded $53 million, but after making some initial cuts, Elizabeth sought $49,305,728 in funding. Since the PEA only amounted to $45,921,936, the district cut six master teachers, three nurses, three vice principals, and one social worker. The Board picked up the cost of eighteen custodians and eighteen security guards. The Board picked up $2.5 million in transportation costs. The specific budget shortfalls were discussed by Crosby. Her testimony was uncontroverted and I **FIND**:

Custodians

The State recommends one custodian for every six classrooms, per the Department's "District Budget Planning Workbook Instructions," <http://www.nj.gov/education/ece/archives/budget/>. As there are 177 classrooms, twenty-nine and a half custodians was the appropriate number to retain. But the budget ultimately approved by the Department would only allow funding for five custodians. Crosby explained that this would permit about one custodian for every thirty-six classrooms. With the help of local funding, the Board ultimately employed twenty-three custodians.

Security Guards

Similarly, the "District Budget Planning Workbook Instructions" recommends one security guard for every stand-alone early-childhood-education center. The budget approved by the Department permitted the hiring of only one security guard. Crosby indicated that nineteen were needed to properly operate her program. Elizabeth has over fifty classrooms in trailers, or "temporary classroom units" (TCU), and Crosby views it as necessary that a security guard be with the students and teachers in each of these units. The district policy is to assign one security guard to every six classrooms; the Board made up the budget shortfall and retained eighteen additional security guards at a cost of $1,187,576.

School Nurses

School nurses perform vision, hearing, height, and weight screenings. They make referrals to doctors, and take care of sick children. They maintain and review immunization records. For the 2015–2016 school year, the district sought eleven nurses, and three were cut from the budget, leaving eight. Noting that the district sought to employ one nurse for every 300 students, per Administrative Code requirements, N.J.A.C. 6A:13A-4.5, Crosby explained that the cut added about 100 students to each nurse's load. This budget cut was not restored by the Board.

Transportation

Crosby discussed the costs attached to transportation at the preschool level. All children residing more than one and one-half miles away from school receive transportation. Insofar as they are still quite young, Elizabeth determined that it is appropriate to provide transportation door-to-door. Noting that there is already an absenteeism issue in the preschools, Crosby urged that without transportation many of these students would not attend school, and she referenced the district's obligation to cast a wide net in offering preschool programming. Indeed, N.J.A.C. 6A:13A-2.3(a) provides that "[d]istrict boards of education that received preschool expansion aid or education opportunity aid in the 2007–2008 school year shall document the school district's strategies to serve at least 90 percent of the universe of eligible preschool children in the five-year preschool program plan and/or annual update, as required and approved by the Department."

Master Teachers

Master teachers serve as a coach and provide instructional support in the classroom. They observe instruction, model lessons, and assist the classroom teacher in reflecting upon and improving his or her classroom practices. The district included twelve master teachers in its budget. Indeed, N.J.A.C. 6A:13A-4.2(a) requires that "[t]he district board of education shall provide master teachers at a ratio of no more than 20 preschool classrooms for each master teacher to ensure coaching and classroom

support for classroom teachers." But Elizabeth was only able to fund six master teachers; it thus had a ratio of one master teacher for every forty classrooms. The master teachers were spread thin, and were only able to assess half of the classrooms during the 2015–2016 school year. Nor is the district utilizing them in the manner intended, with the master teachers instead offering more generalized professional development, as opposed to the one-on-one guidance in the classroom setting that was intended by the regulation.

Social Workers

Elizabeth sought funding for nine social workers, and could secure funding for only eight. Crosby asserted that per the Administrative Code, there should be one social worker for about every 250–300 students. N.J.A.C. 6A:13A-4.6. Due to this budget cut, however, the needs of the district students were being met at a ratio of 1:332 students.

Vice Principals

Likewise, the district was forced to reduce the number of vice principals. Per Crosby, the district no longer has administrators who are knowledgeable in preschool education supervising instruction in the classroom.

Lunchroom Aides

There should be a ratio of two adults to fifteen students during lunch and rest times; Crosby urged that this ratio is critical for student safety. While the classrooms have a teacher and aide present during instructional time, per contract, lunch and rest periods are break times for regular classroom staff. An additional adult is thus needed to maintain adequate supervision. The district fully funded this line item, as there was insufficient State aid to cover this expense.

2. District Inefficiencies

The Department argues that "Elizabeth has consistently made expensive, inefficient, and sometimes inappropriate decisions across several areas of its preschool program." The evidence was disturbing, uncontroverted, and, unfortunately, confirms that the Department is correct. I **FIND**:

Transportation

Raymond Zirilli is a senior transportation specialist for the Department. He evaluates transportation efficiency for local school districts using data submitted by the districts and certified to be accurate via the completion of a District Report of Transported Resident Students. Zirilli's report compares the total number of students being transported to the district's total "vehicle capacity." "Vehicle capacity" is defined as 90 percent of the total number of seats available on all buses in use by the district. The Department's analysis results in an efficiency rating, which is calculated by dividing the total number of students by the district's total vehicle capacity. The State standard for efficiency is 1.2, or 120 percent of total vehicle capacity. Elizabeth inefficiently used its buses; its efficiency rating was only 0.8.

Of the forty-one school buses in use during the 2015–2016 school year, many were less than full. By way of example, the District dispatched seventeen buses with the capacity to carry fifty-four students, but some carried as few as two students; none carried more than thirty students. The Department urged that "[h]igher efficiency equals lower costs, so if Elizabeth were using its buses more efficiently, it could save money on transportation." The Department moreover pointed out that Elizabeth's per-pupil cost for preschool transportation is high compared to that of other former Abbott districts. For the 2015–2016 school year, its total cost for transportation of preschool-aged children was $1,669,582. When this number is divided by the 469 preschoolers who receive transportation, the per-pupil cost is $3,560. In Millville and Vineland, students are transported less expensively. Granted, these districts are in southern New Jersey, where costs could differ. But the difference is astronomical: Millville spent $608 per pupil; Elizabeth spent nearly six times as much. Vineland spent a bit more, $1,053 per

pupil; Elizabeth spent about three times as much. These two districts had better efficiency ratings: 1.51 for Millville, and 1.2 for Vineland. And those districts are much larger than Elizabeth, geographically.

Elizabeth expands its transportation services well beyond regulatory requirements.[2] Of the 469 preschoolers receiving transportation, 269 of them were being provided services not mandated by law. Elizabeth offers door-to-door transportation—again, a costly option, and one that is not mandatory. Finally, Elizabeth contracts with costly vendors. In 2015–2016, Elizabeth contracted with three different companies to provide transportation: Dover/S&E/Fossett ("Dover"); Durham School Services L.P. ("Durham"); and Lun and Run T/A J&J ("Lun and Run"). All the routes serviced by Lun and Run were nearly half the cost of the routes serviced by Dover and Durham. For example, a Durham route with a twenty-four-seat capacity transporting seventeen students cost $75,420, while a comparable Lun and Run route cost only $37,800. Zirilli questioned this large differential for an almost identical service; Elizabeth offered no witness to clarify or explain. And he pointed out that his Department stands ready to assist districts in efforts to achieve efficiencies, including recommendations for ways to share routes with neighboring districts. Yet, Elizabeth has never turned to Zirilli's Department for assistance.

Staff Salaries

Elizabeth's salaries and benefits are described by the Department as "notably high." I agree. Karin Garver, formerly an education specialist in the Department, conducted a detailed analysis of Elizabeth's average preschool-staff salaries and benefits as compared to Newark, Paterson, and Jersey City, all large former Abbott districts in the same general geographic area. She compared the average cost of salaries and benefits for teachers, assistant teachers, relief teachers, clerical workers, custodians, security guards, fiscal specialists, master teachers, social workers, nurses, preschool intervention and referral team members, principals, assistant principals, and

[2] Per N.J.A.C. 6A:27-1.4, preschool-age students who reside more than two miles from school must receive transportation. A district may transport other students, but is not required to do so. N.J.A.C. 6A:27-1.5.

director or supervisor positions. These are all positions that are PEA funded. By multiplying the average cost of each position's salary and benefits by the number of staff Elizabeth had budgeted for each position for the 2015–2016 school year, Garver could directly compare Elizabeth's average salary and benefits to those in these neighboring districts.

The results of her analysis are startling. Using Newark as a comparison, she readily demonstrated that if Elizabeth's costs were comparable to Newark's it could save about $7,000,000 a year. Indeed, the average teacher's salary and benefits cost $97,268 in Elizabeth. In Newark the cost is $84,062. Similarly, an assistant teacher in Newark receives an average of $46,912 in salary, compared to $63,984 in Elizabeth. Garver demonstrated that if Elizabeth's costs mirrored those in Paterson, it could save some $9,000,000 per year. The numbers are less dramatic relative to Jersey City, but Garver indicated that Elizabeth spends about $780,000 more in salaries than this comparable former Abbott district.

Elizabeth replies that it is bound by collective-bargaining agreements that afford it little wiggle room relative to salary and benefits. But Garver stressed that savings could nonetheless be effectuated in salary and benefits if Elizabeth reduced the number of staff employed in positions not mandated by regulation. For example, while the Department makes recommendations for the number of clerical workers, custodians, and security guards employed, it does not require a given number to operate a high-quality preschool program. And Elizabeth could have eliminated the fiscal specialist position, which is likewise not required. Nor are lunch aides required by regulation.

Garver pointed out that in Elizabeth, only certificated preschool teachers are hired to serve as relief teachers. But the Department does not require this credential. See N.J.A.C. 6A:13A-4.3(a) (certification is applicable only to the classroom teacher). The Department's data reveals that non-certificated teachers have lower salaries. And Elizabeth hires relief teachers to teach "specials" such as art, music, and physical education. This approach is not recommended by the Department, which prefers instead to incorporate such instruction into the regular classroom day, to be delivered by

the classroom teacher. Garver urged that hiring teachers certificated to teach these special subjects increases overall instructional costs for the district.

Accounting Errors

Kevin Dehmer is the chief financial officer and assistant commissioner for the Division of Finance at the Department of Education. He shared that each year the Department issues budget guidelines, intended to assist districts in complying with Department rules and regulations regarding budget development. District accounting systems are required to be organized on "a fund basis." Each fund is "a fiscal and accounting entity, with a self-balancing set of accounts recording cash and other resources, together with related liabilities and residual equities or balances, or changes therein." Each fund is completely independent of the others. The General Fund is applicable only to services in grades kindergarten through twelve. Special Revenue Funds are "accounts for the proceeds of specific revenue sources . . . that are legally restricted to expenditures for specified purposes." Dehmer explained that preschool is a Special Revenue Fund because PEA is a revenue source usable for preschool-related expenses only. Accordingly, a school district should be accounting for all preschool revenues and expenditures in the Special Revenue Fund for preschool.

With this background in mind, Dehmer discussed Elizabeth's obligation to account for Chapter 78 contributions in its budget. Chapter 78 requires employees to contribute to their health-benefit packages. The Department's budget guidelines direct that there be a line item for expenditures for employee health benefits, and that Chapter 78 contributions offset that amount. Dehmer offered the following example: if benefit costs totaled $10,000,000 and the Chapter 78 withholdings totaled $1,000,000, the budget line item for employee health benefits would show a net of $9,000,000. During the 2015–2016 school year, Elizabeth withheld $1,778,335 in Chapter 78 moneys, but recorded these funds as revenue in its General Fund. This is inconsistent with the Department's budget guidelines. Had Elizabeth properly recorded this offset in the Preschool Special Revenue Fund budget line, it would have reduced its health-benefit expenditures for the preschool program by $1,778,335. Put another way, I **FIND** that

over $1.5 million dollars was budgeted incorrectly and should have been available to the district for preschool expenses.

Outside Providers

But perhaps the greatest concern about mismanagement of the preschool budget surrounds the district's relationship with its outside providers. Odell Jackson is the fiscal specialist for the Elizabeth public schools, having served in that position for the last eight years. She is a liaison among the private preschool providers, the State Department of Education, and the school district. She also assists with the preparation of the budget. In 2015–2016 there were 630 preschool students educated in forty-two private-provider classrooms, through eight licensed private providers. Their services are retained via a contractual agreement using a Department form. The district funds the private-provider programs via PEA funds, and if at the end of the school year there are unspent funds, these must be recouped. The private providers are selected via a process that includes State review and involvement and approval.

Each month, from September through June, a local district like Elizabeth gives the private provider one-tenth of its budget for the school year. Each quarter, the provider submits an expenditure report to the district. This allows the district to ensure that the provider is in compliance with its contract, and that there is supporting documentation for all noted expenditures. See N.J.A.C. 6A:13A-4.7. And it allows the district to remedy any overpayment or underpayment promptly. Thus, the Department notes, in the event of an overpayment, a local district can reduce or withhold the monthly budget payment or request that the provider reimburse the district via a payment plan.

Jackson readily agreed that since 2011–2012 the eight private providers have routinely overcharged the district; each one has been overpaid, at least once. PEA in the amount of $842,710 remains owing to Elizabeth. Jackson reviewed an outstanding-payment ledger, which confirmed that some of these providers carried yearly overpayment balances up through and until the 2015–2016 school year. Jefferson Park and New Hope are the most glaring examples, having been overpaid annually each and

every year for five years in succession. As to why at some point Elizabeth did not simply allocate less funds to these providers was not adequately clarified by Jackson. And several other providers, to include Proceed I, Proceed II, and Wonder World, were overpaid more than once. These three providers alone owe Elizabeth some $117,732, enough money to buy at least one of the aides, or nurses, or security guards the district claims to sorely need.

The Department urges that Elizabeth "has failed to take meaningful steps to either reduce the amount of PEA it pays to its private providers or to recoup the funds it is owed." I must agree. Suzanne Fenske works for the Department's Office of Fiscal Accountability and Compliance (OFAC) and conducts fiscal reviews for early-childhood education. She highlighted her audit of the two providers with the largest arrearages: New Hope and Jefferson Park. For the 2013–2014 fiscal year, New Hope had overcharged Elizabeth for preschool programming in the amount of $151,306. But since Elizabeth had withheld $28,693 of PEA from New Hope, it owed $122,613 to the district. In a report issued in October 2015, OFAC memorialized this finding. The report also noted, however, that this was not the only year that such an overpayment took place. Between July 1, 2009, and June 30, 2013, the provider accrued arrears totaling $295,065. Jackson's ledger revealed that New Hope owed Elizabeth $418,592.69 at the end of the 2015–2016 year (R-27).

Similarly, OFAC's investigation revealed that Jefferson Park had underspent during the 2011–2012 year in the amount of $176,276. Elizabeth withheld only $52,879 in underspent PEA funds. The overpayments continued in 2012–2013, with OFAC concluding that $17,844 was owed the district that year. Jackson's ledger revealed that Jefferson Park owed Elizabeth $253,136.27 at the end of the 2015–2016 school year.

Elizabeth does not dispute these findings, and in January 2016 submitted a Corrective Action Plan to the Department. But as of October 2016, Elizabeth still had not finalized a plan to recover the funds payable to the district. Elizabeth did not enter into contracts for repayment with New Hope or Jefferson Park until December 2016. Finally, Fenske noted that during the 2011–2012 fiscal year, Elizabeth had given New Hope a $51,666,65 loan to cover the provider's rent arrearages, even though Elizabeth

had already paid New Hope for its facility costs and the school owed arrears dating back to the 2009–2010 fiscal year. This amount has yet to be repaid to the district.

CONCLUSIONS OF LAW

The SFRA was enacted in 2008 as part of New Jersey's ongoing effort to ensure that public schools throughout the state receive the financial support needed to deliver a thorough and efficient free public education to our children. N.J. Const. art. VIII, § 4; N.J.S.A. 18A:7F-43 et seq. The statute sought to create a "clear, unitary, enforceable statutory formula to govern appropriations for education." N.J.S.A. 18A:7F-44(g). The Legislature recognized as follows regarding preschool education for at-risk students:

> In light of the demonstrable, beneficial results and success of the current Abbott preschool program, it is appropriate to build upon this success by incorporating in the formula an expanded high-quality preschool program for all children who qualify for free and reduced price meals in all districts. It is appropriate for the formula to acknowledge that at-risk children do not always receive the same educational exposure at an early age as their peers and to provide the additional resources necessary through high-quality preschool to prepare every child to learn and succeed.
>
> [N.J.S.A. 18A:7F-44(k).]

PEA supports districts like Elizabeth as part of the SFRA's obligation to fund public preschool education. The level of PEA is determined as set forth in the statute. This record has revealed no evidence that the Department's award of PEA during the 2015–2016 was in any way at odds with the statutory formula. I **CONCLUDE** that Elizabeth received PEA during the 2015–2016 school year in an amount consistent with SFRA requirements. Indeed, it received the highest amount available under the statute.

Elizabeth nonetheless urges that the money it was allotted was insufficient, and it puts the blame for the shortfall on both the statute and the Department. Its arguments are meritless. Elizabeth questions the statute's constitutionality. A per se challenge to

the constitutionality of the SFRA is beyond the purview of my jurisdiction. And, in any event, our Supreme Court has determined that

> [t]he legislative and executive branches of government have enacted a funding formula that is designed to achieve a thorough and efficient education for every child, regardless of where he or she lives. On the basis of the record before us, we conclude that SFRA is a constitutionally adequate scheme.
>
> [Abbott v. Burke, 199 N.J. 140, 175 (2009).]

But "'administrative agencies are competent to pass upon constitutional issues germane to proceedings before them,' and . . . 'such action is necessary so as to better focus the issues for judicial review, if such action is later necessary.'" Hunterdon Cent. High Sch. Bd. of Educ. v. The Hunterdon Cent. High Sch. Teachers' Ass'n, 174 N.J. Super. 468, 475 (App. Div. 1980), aff'd, 86 N.J. 43 (1981) (quoting Alcala v. Wyoming State Bd. of Barber Exam'rs, 365 F. Supp. 560, 564 (D. Wyo. 1973)). A challenge to a statute as applied may be appropriately reviewed at the administrative level. See id. at 474.

I **CONCLUDE** that Elizabeth has offered no evidence that the SFRA is unconstitutional as it was applied to its PEA grant for the 2015–2016 school year. To the contrary, I agree with the Department that any financial shortfall experienced by the district that year was due to its own inefficiencies, and its mismanagement of funds. The record confirms that transportation was inefficiently delivered, and private providers were overfunded repeatedly. The Department demonstrated that well over a million dollars was improperly budgeted. Elizabeth needs to get its fiscal house in order. Then and only then could it possibly have a colorable claim that the PEA awarded by the State is constitutionally inadequate.

Moreover, the record reveals that many costs incurred by the district resulted from choices it was not mandated to make, to include courtesy door-to-door bussing, and its use of relief teachers. A fiscal specialist is not a mandated position. N.J.A.C. 6A:13A-4.7. The district can certainly choose to supplement the PEA it receives with funds from its general account. See Millville Bd. of Educ. v. New Jersey Dep't of Educ.,

183 N.J. 264, 278 (2005). But Elizabeth's choice to incur additional costs does not and cannot give rise to a claim that the SFRA has not provided funding that passes constitutional muster. See, e.g., Bacon v. New Jersey Dep't of Educ., EDU 2637-00, Comm'r (February 9, 2001), <http://njlaw.rutgers.edu/collections/oal/>, where the Commissioner stated that relative to a claim of constitutional deficiency, "each petitioning district must first prove that deficiencies do, in fact, exist, and second, that these cannot be remedied by different programmatic and fiscal choices within the framework of current law and funding levels." Elizabeth urges that in several areas it was unable to meet regulatory requirements for staffing levels. Master teachers and nurses are examples. See N.J.A.C. 6A:13A-4.2, -4.5. But again, Elizabeth failed to demonstrate that its inability to do so could not have been remedied via more prudent fiscal planning.

ORDER

Based on the foregoing, I **ORDER** that the petition of appeal be **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 14, 2017

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: July 14, 2017

Date Mailed to Parties: July 17, 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner:

Tracy Crosby
Odell Jackson

For Respondent:

Raymond Zirilli
Kevin Dehmer
Karin Garver
Suzanne Fenske

Exhibits

Joint Exhibits

J-1 FY 2014 Educational Adequacy Report
J-2 Elizabeth's Five-Year Plan (2015—2016)
J-3 Enrollment projections workbook (2015–2016)
J-4 Budget Planning Worksheet (2015–2016)
J-5 Letter dated March 20, 2015
J-6 Revised Budget Planning Workbook

For Petitioner:

P-1 Memorandum dated December 16, 2013
P-2 Memorandum dated December 10, 2013
P-3 Board Resolution

For Respondent:

R-1 Not admitted
R-2 Table of average experience and salaries
R-3 Graph of salaries
R-4 Not admitted
R-5 Chart of Elizabeth funded vs. actual enrollment
R-6 Not admitted
R-7 Comparison of preschool salaries
R-8 Comparison of preschool salaries
R-9 Comparison of preschool salaries
R-10 2016 Transportation efficiency table
R-11 Chart of bus routes (vehicle capacity)
R-12 Chart of bus routes (operator name)
R-13 Per-pupil transportation cost and aid estimates (Elizabeth)
R-14 Per-pupil transportation cost and aid estimates (Millville)
R-15 Per-pupil transportation cost and aid estimates (Vineland)
R-16 Chart of Elizabeth bus routes
R-17 OFAC report, October 2015
R-18 Not admitted
R-19 OFAC Report, June 2015 (2011–2012)
R-20 OFAC Report, June 2015 (2012–2013)
R-21 Not admitted
R-22 Corrective Action Plans
R-23 OFAC Report, October 2016
R-24 OFAC Report, October 2016
R-25 Preschool Education Contract
R-26 Preschool Education Contract
R-27 Early childhood provider analysis
R-28 Emails with attachments
R-29 Answers to interrogatories
R-30 Transportation cost aid estimates
R-31 Uniform Minimum Chart of Accounts

253-17

STATE OFNEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

IN THE MATTER OF TENURE HEARING OF)
)
PLEASANTVILLE BOARD OF EDUCATION,)
)
Petitioner)
)
v.) CONSENT
) AWARD
LATANYA ELIAS,)
Respondent)
)
)
Docket No. 91-5/17)
)

Before: Robert T. Simmelkjaer, Esq.
Arbitrator

APPEARANCES

FOR THE PETITIONER

Benjamin B. Brenner, Esq., The Carroll Law Firm

FOR THE RESPONDENT

Robert P. Merenich, Esq., Gemmel, Todd & Merenich

BACKGROUND

In accordance with N.J.S.A. 18A:6-10 and N.J.S.A. 18A:6-11, on May 12, 2017 the Pleasantville Board of Education, County of Atlantic, State of New Jersey ("Petitioner" or "PBOE") instituted sworn tenure charges against Ms. Latanya Elias ("Respondent"). Pursuant to N.J.A.C. 6A:3-5.1(b)(6), counsel for the Petitioner, by letter dated May 11, 2017, submitted the following documents to the Commissioner of Education: (1) Signed Sworn Statement of Tenure Charges, (2) Signed Certificate of Determination, (3) Signed Sworn Statement of Evidence and (4) Certification from counsel as to the certification of charges by the Petitioner and certification of proof of service upon the employee and employee's representative.

The Respondent was charged with "Conduct Unbecoming Toward Students, Neglect of Duty in the Classroom, Unbecoming Conduct Toward Administrative Personnel and Other Staff, Misrepresentation, and Insubordination (i.e., "wrongfully refusing to undergo a psychiatric examination pursuant to PBOE Policy #1361 – Examination for Cause").

By letter dated May 30, 2017, the Respondent submitted her Statement of Position to the Statement of Tenure Charges, generally denying all charges and specifications, and specifically denying the allegations preferred with respect to each charge.

On June 9, 2017, the tenure charges were referred to the undersigned pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2015, c.109. Pre-hearing teleconferences were held on June 22, 2017 and July 12, 2017.

On July 14, 2017, the Petitioner filed a Motion In Limine "to exclude evidence and testimony that is irrelevant, unreliable and prejudicial at the arbitration hearing presently set to begin on Friday, July 21, 2017."

On July 18, 2017, the Respondent submitted a Motion for Summary Decision "to dismiss all counts of the tenure charges brought against her. We respectfully request a ruling on this motion prior to our response to the Petitioner's Motion In Limine because the removal of some or all of the charges obviously obviates the need to present some or all evidence."

By letter dated July 19, 2017, the Petitioner submitted its Opposition to the Respondent's Motion for Summary Decision.

The hearing began on July 21, 2017.

On August 16, 2017, the parties submitted to the Arbitrator a document entitled, "Mutual Release and Settlement Agreement," indicating that "the PBOE and Ms. Elias and her counsel have amicably settled the charges."

The undersigned Arbitrator pursuant to his authority under N.J.S.A. 18A:6-9 "to hear and make a final determination on a controversy and dispute arising under subarticle B of article 2 of chapter 6 of Title 18A of the New Jersey Statutes

(C.18A:6-10 et seq.)," having reviewed the terms of the Mutual Release and Settlement Agreement ("Settlement") between the Petitioner Pleasantville Board of Education and Respondent Latanya Elias, as well as the PBOE Resolution approving the Settlement, with respect to the Tenure Charges the Petitioner filed against the Respondent, finds that the terms and conditions of the Settlement set forth herein (attached) meets the standards established by the State Board of Education in the matter entitled *In re Cardonick*, State Board decision of April 6, 1983 (1990 *School Law Decisions* (S.L.D.) (842,846).

CONSENT AWARD

Accordingly, I approve the terms of the Settlement and memorialize its terms and conditions in a Consent Award.

August 21, 2107

Robert T. Simmelkjaer

STATE OF NEW JERSEY
COUNTY OF BERGEN

On the 21st of August 2017 before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument, which is his award.

Notary Public

Jin An
Notary Public
New Jersey
My Commission Expires 5-4-2021
No. 50037586

THE CARROLL LAW FIRM PLC
1 N. New York Rd., Suite 39
Galloway, NJ 08205
Phone: (609) 404-3440
Fax: (609)404-3441

James J. Carroll, III (AZ and NJ Bar) CasinoAtty@aol.com
Benjamin B. Brenner (NJ Bar) Ben@CarrollLawFirm.com
Daniel J. Gallagher (NJ Bar) *Of Counsel*
Darryl Rhone (NJ Bar) *Of Counsel*

August 16, 2017

Via email: **simmelkjaer@att.net**
Robert T. Simmelkjaer, Arbitrator

Re: In the matter of Tenure Charges against Latanya Elias
Dkt. No. 69-4/17

Dear Mr. Simmelkjaer:

Pursuant to your email dated July 31, 2017, enclosed please find a fully executed Settlement and Release in the above matter and a Resolution passed by the PBOE at its regularly scheduled Board meeting last night.

We respectfully submit that the enclosed settlement fully and adequately addresses the following standards established by the State Board of Education in the matter entitled, In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846) and all requirements of the administrative code:

1. **Accompaniment by documentation as to the nature of the charges**. PBOE respectfully asserts that the filed Tenure charges in this matter contain sufficient and significant documentation explaining the nature of the charges filed.

2. **Explication of the circumstances justifying settlement or withdrawal**. The parties respectfully assert that the penalties agreed upon are reasonable and sufficient in response to the alleged unbecoming conduct and justify the settlement of the matter.

3. **Consent of both the charged and charging parties**. Both parties have consented to and signed the enclosed Settlement and Release.

4. **Indication the charged party entered into the agreement with a full understanding of his or her rights**. The enclosed signed Settlement and Release clearly indicates that both parties were fully advised by counsel during the negotiations process and prior to signing the document.

5. **A showing the agreement is in the public interest**. The penalties agreed to in the Settlement and Release are reasonable and sufficient in response to the unbecoming conduct alleged and it is in the public's interest to approve said penalties to avoid the need for a costly and expensive hearing.

6. **If the charged party is a teaching staff member, a showing the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate**. Ms. Elias is a teaching staff member; she has been fully advised by her counsel of the Commissioner's duty to refer tenure determinations resulting in a loss of position to the State Board.

7. **A settlement agreement shall not propose terms that would restrict access to information or records deemed public by law or result in misrepresentation of the reason for an employee's separation from service**. This Settlement and Release does not restrict any access to information or records.

8. **If tenure charges have been certified to the Commissioner by a district board of education, any proposed settlement shall indicate, by signature of the board attorney or inclusion of a district board of education resolution**. A resolution passed by the PBOE in enclosed herein.
authorizing settlement, that the district board of education has consented to the terms of the settlement.

9. **A proposed withdrawal or settlement of tenure charges shall be submitted to the Commissioner prior to transmittal of such charges to the arbitrator; thereafter, it shall be submitted to the arbitrator**. Upon approval of the enclosed Settlement and Release, the parties will forward the document to the arbitrator in this matter who will issue a Consent Award.

Thus, based upon compliance with all standards and administrative code requirements, the parties respectfully request the Commissioner's approval of the enclosed Settlement and Release in the above matter.

We look forward to hearing from you. Thank you for your assistance in this matter.

Very truly yours,

s/Benjamin B. Brenner
BENJAMIN B. BRENNER, ESQ.

BBB/klw
cc: James J. Carroll, III, Esq.
Mark Delcher
Dr. Clarence Alston
Elisha Thompkins
Robert Merenich, Esq.

MUTUAL RELEASE AND SETTLEMENT AGREEMENT

This Mutual Release and settlement agreement is made on this 27th day of July in the year 2017. The Release is given by PLEASANTVILLE BOARD OF EDUCATION, 801 Mill Road, City of Pleasantville, Atlantic County, New Jersey 08232, (hereinafter "PBOE") and LATAYNA ELIAS (hereinafter referred to as "Respondent"), employee of the City of Pleasantville School District, and her counsel, Robert Merenich, Esquire, 767 Shore Road P.O. Box 296, Linwood, N.J. 08221 (hereinafter collectively referred to as "the Parties").

WHEREAS, Respondent is currently and has been employed by the PBOE for 15 years; and

WHEREAS, certain allegation of conduct unbecoming have been asserted by the PBOE against Respondent who denies same; and

WHEREAS, the parties believe it is in their mutual best interest to resolve their differenced in accordance with the terms and conditions of this Agreement.

NOW, THEREFORE, without either party admitting liability or fault and in consideration of the covenants, representations and warranties contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. EMPLOYEE ASSISTANCE PROGRAM. Within ten days of the effective date of this Agreement, Respondent shall contact and make an appointment with the Employee Assistance Provider (EAP) for an evaluation. Respondent shall comply with any recommendations or treatment as indicated by the EAP report and/or evaluation. Said report and/or evaluation shall remain confidential and is to be released only to persons required by law and no discretionary persons shall receive access to or copy of the EAP report.

2. TRANSFER. Respondent shall be transferred from the middle school to another teaching assignment at the discretion of the administration.

3. ACCOMMODATION. Respondent shall be provided a stool to remain in her classroom as an accommodation for her recognized disability that she suffers on-going tendonitis and bone spurs in her foot which causes her difficulty to stand for more than half an hour at a time.

4. PROFESSIONAL DEVELOPMENT. Respondent agrees to undergo whatever specific professional development is requested by the Principal at her new teaching assignment.

5. PAY AUDIT. The PBOE agrees to conduct an audit of Respondent's payroll from September 2016 through May 2017 to determine if any discrepancies exist. Said audit shall be conducted within a reasonable time as will any payment, if found to be due. Respondent will be provided a copy of the audit upon its completion. If there is any dispute concerning the results of the audit, the matter shall be grieved through the PEA as a contractual matter.

6. LETTER OF REPRIMAND. A letter of reprimand for conduct unbecoming for actions taken during the 2016-2017 school year will be placed in Respondent's personnel file and shall remain in her file for one year at which time Respondent can petition the Superintendent for its removal. Said request shall be granted freely, provided no subsequent disciplinary actions are sustained against Respondent.

7. SUSPENSION WITHOUT PAY. Respondent shall be suspended without pay for a total of twenty (20) days which shall begin effective May 17, 2017.

8. WAIVER OF CLAIMS – With the exception of any dispute arising from paragraph 5 above (pay audit) and a tuition reimbursement issue from an AVID course in July 2016 which are excepted, in exchange for the covenants contained in this Agreement, Elias does for herself and her dependents, heirs, executives, administrators, predecessors, successors, and assignees, agree, intending to be legally bound, to hereby release and forever discharge the "Released Parties" (as defined *infra*) from and all "Released Claims" as defined *infra*) from the beginning of time up to and including the effective date of this Agreement. The PBOE for itself, officers, agents, executives, administrators, board members, successors, and assignees, agree, intending to be legally bound, to hereby release and forever discharge the "Release Parties" (as defined *infra*) from and all "Released Claims" as defined *infra*) from the beginning of time up to and including the effective date of this Agreement.

a. "Released Parties" as used in this Agreement shall mean (1) the PBOE, (2) the Pleasantville School District, (3) the PBOE's past, current and future employees, (4) the PBOE's officers, directors, agents, attorneys, consultants, affiliates, and other representatives, (5) the PBOE's insurers, (6) the PBOE's vendors and entities under contract with the PBOE, (7) the PBOE's heirs, successors and assignees, (8) all of the aforementioned individuals in both their official and individual capacities, (9) the State of New Jersey and the New Jersey Department of Education, (10) any other person and/or entity whom/which might be claimed jointly and/or severally liable with any of the aforementioned entities and/or individuals, (11) Elias and/or her dependents, heirs, executives, administrators, predecessors, successors, and assignees in their official and individual capacities.

b. "Released Claims" as used in this Agreement shall mean any and all tenure charges, liability, claims, demands, causes of action, suits at law, or in equity, covenants, charges, debts, dues, costs, any sums of money, attorney's fees, accounts, bills, reckonings, extents, judgments, and rights, whether known or unknown, whether accrued or unaccrued, whether contingent or non-contingent, whether or not capable of proof regardless of the theory of recovery, and whether common law or statutory in nature that occurred at any time in the past up until the date of signing of this agreement.

c. Respondent and the PBOE acknowledge and agree that neither party nor any person or entity action on behalf of either party will file any type of tenure charge, complaint, charge, claim, and/or cause of action, or cause or permit any complaint, charge, claim, and/or cause of action, to be filed, against the other or any Released Party involving any matter whatsoever which occurred in the past up to the date of execution of this Agreement.

d. The parties acknowledge and agree that if either party brings any type of tenure charge, complaint, charge, claim and/or cause of action in any administrative and/or judicial forum against the other, involving any matter whatsoever which occurred in the past up to the date of execution of this Agreement, that party will be in breach of this Agreement and will immediately withdrawal any type of complaint, charge, claim and/or cause of action.

e. To the extent that either party has already filed any tenure charges, complaint, charge, claim and/or cause of action in any administrative and/or judicial forum, that party shall immediately withdraw complaint, charge, claim and/or cause of action in any administrative and/or judicial forum documenting the same. Said withdrawing party must adhere to all procedural and substantive rules to accomplish withdrawal of the Tenure Charges. To the extent that any administrative and/or judicial agency fails or refuses to permit the filing party to withdraw the tenure charges, complaint, charge, claim and/or cause of action in any administrative and/or judicial forum, the filing party shall advise the other party in writing and the filing party shall refuse to cooperate with any investigation and/or proceeding regarding the complaint, charge, claim and/or cause of action in any administrative and/or judicial forum if the law permits. Should the filing party receive any damages or compensation whatsoever as a result of having brought a complaint, charge, claim and/or cause of action in any administrative and/or judicial forum, the filing party shall immediately remit said damages or compensation to the other party.

f. Excluded from "Release Claims" are any claims that cannot be waived by law between employer and employee.

10. CONSULTATION WITH LEGAL COUNSEL – Both parties acknowledge and agree that they had the opportunity to review this Agreement with legal counsel of their own choosing and that each party is satisfied with the advice they received.

11. BREACH – If either party fails and/or refuses to comply with any obligation she/it has pursuant to this Agreement, regardless of the reason for said failure and/or

refusal to comply, that party shall be in breach of this Agreement and the other party may seek any remedy they are entitled to by law

12. KNOWING AND VOLUNTARY – Elias acknowledges and agrees that she is freely and voluntarily agreed to all the terms and conditions contained in this Agreement after consulting with legal counsel. Elias further acknowledges and reperesents that she is under no disability or impairment that would prevent her from understanding this Agreement or from knowingly and voluntarily entering into this Agreement.

13. EFFECTIVE DATE – This Agreement shall become effective upon both of when the Agreement has been fully executed by both Respondent and the PBOE and/or the PBOE's representative.

14. ENTIRE AGREEMENT. This Agreement contains and constitutes the entire understanding and agreement between the Parties hereto respecting the subject matter hereof and supersedes and cancels all previous negotiations, representations, agreements, commitments, and writings in connection herewith. The Parties hereto expressly acknowledge that in entering this Agreement, they have had the opportunity to consult with counsel of their choice, that they have not relied upon any representation made by or on behalf of the other Party, and that any such representations are not enforceable except to the extent set forth in writing in this Agreement.

15. CONSTRUCTION. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New Jersey, without reference to the applicable conflicts of law principles and rules. This Agreement shall be construed according to its plain language, and not strictly for or against any party hereto.

16. ENFORCEMENT. In the event of any litigation arising from breach of this agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs incurred including staff time, court costs, attorneys' fees, and all other related expenses incurred in such litigation

17. NO TRANSFER/ASSIGNMENT. The Parties represent that they have not assigned or transferred, or purported to assign or transfer, to any person or entity any claim against one another or any portion of, or interest in, any claim against one another.

18. NO ORAL REPRESENTATIONS. The Parties represent and acknowledge that, in executing this Agreement, they do not rely, and have not relied, upon any oral representation or statement made by the Parties or their agents, representatives, or attorneys with regard to the subject matter, basis, or effect of this Agreement or otherwise.

19. SEVERABILITY. Should any provision of this Agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms, or provisions shall not be affected thereby, and said illegal or invalid part, term, or provision shall be deemed not to be part of this Agreement.

20. AGREEMENT NOT EVIDENTIARY – This Agreement is not intended to be used and shall not be used as evidence in any action or proceeding, other than as evidence of the parties' compromise as set forth herein or to enforce the terms of this Agreement.

21. HEADINGS – Any headings contained herein are for reference purposes only and shall not be in any way affect the meaning or interpretation of this Agreement.

IN WITNESS WHEREOF, all Parties, intending to be legally bound by the foregoing terms, have voluntarily and knowingly set their hands and seals to this Agreement as of the date written above.

PLEASANTVILLE BOARD OF EDUCATION:

Dr. Clarence Alston, Superintendent — **Date:** 8/15/17

Latayna Elias — **Date:** 7/27/17

Latanya

Robert Merenich — **Date:** 7/27/17

Robert Merenich, Esq.
Attorney for Latayna Elias

LATANYA

Resolution

BE IT RESOLVED BY THE BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE ("PBOE"), IN THE COUNTY OF ATLANTIC, NEW JERSEY, AS FOLLOWS:

WHEREAS, Tenure charges were certified against Latanya Elias, along with a Statement of Evidence, executed by the Interim Superintendent Dennis J. Anderson and approved by the PBOE;

WHEREAS, the PBOE and Ms. Elias and her counsel, have amicably settled the charges as evidenced in the attached document entitled, "Settlement and Release;"

WHEREAS, said settlement has satisfied all standards and requirements outlined in the New Jersey Administrative code and caselaw;

THEREFORE BE IT RESOLVED, that the Pleasantville Board of Education, State of New Jersey, authorizes that it approved the attached Settlement and Release in the matter of In Re Tenure Charges against Latanya Elias, Agency Ref. No. 91-5/17, Dkt. No. 69-4/17.

August 15, 2017 _____

Date

_____

President of the Pleasantville Board of Education

255-17

STATE OF NEW JERSEY COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE	::	DOE DOCKET NO. 119-4/16
between	::	
SCHOOL DISTRICT OF THE CITY OF BURLINGTON, BURLINGTON COUNTY	::	
Petitioner,	::	**CONSENT AWARD CLARIFYING BACK PAY ON REMAND FROM THE SUPERIOR COURT OF NEW JERSEY**
-and-	::	
PENNY KEOUGH,	::	
Respondent	::	

BEFORE: Michael J. Pecklers, Esquire, Arbitrator

DATE OF HEARING: August 9, 2017

DATE OF CONSENT AWARD: August 22, 2017

APPEARANCES:

For the Petitioner:

Alicia D. Hoffmeyer, Esquire, COMEGNO LAW GROUP, P.C.

For the Respondent:

Alan H. Schorr, Esquire, SCHORR & ASSOCIATES

WHEREAS, an AWARD in the instant matter was entered by the undersigned on December 15, 2016; and

WHEREAS, on March 13, 2017, Respondent filed a Verified Complaint and Order to Show Cause in the Superior Court of New Jersey seeking *inter alia* to vacate the AWARD; and

WHEREAS, on June 1, 2017, Judge Smith affirmed the AWARD but **REMANDED** the case to the undersigned for a CLARIFICATION with regard to the correct calculation of back pay; and

WHEREAS, on June 9, 2017, the Commissioner of Education, Bureau of Controversies and Disputes forwarded the same to me; and

WHEREAS, following a June 13th correspondence requesting the respective calculations as well as a copy of the Superior Court audiotape, the parties requested additional time for the purpose of engaging in settlement discussions over the back pay issue leading to the DOE issuing an extension for the submission of my AWARD until August 24, 2017; and

WHEREAS, after listening to the audiotape, a conference call was convened with the advocates on August 9, 2017, at which time guidance and settlement directives were discussed with the parties; and

WHEREAS, the dispute has been resolved via the attached August 21, 2017 ORDER ON REMAND CLARIFYING BACK PAY, which is incorporated by reference herein; therefore,

BE IT RESOLVED, that the recommendation is made to the DOE that the ORDER resolving the matter be adopted, as it complies with the *Cardonick* criteria set forth at N.J.A.C. 6A:3-5.6, if applicable.

Dated: August 22, 2017
NORTH BERGEN, N.J.

MICHAEL J. PECKLERS, ESQ.
ARBITRATOR

STATE OF NEW JERSEY
SS}
COUNTY OF HUDSON

ON THIS 22ND DAY OF AUGUST, 2017, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.,** TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

OFFICIAL SEAL
ANGELICA SANTOMAURO
NOTARY PUBLIC - NEW JERSEY
My Comm. Expires July 29, 2019

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057
(856) 234-4114 (main #)
(856) 234-5161 (fax #)
Attorneys for Defendant, City of Burlington School District Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST PENNY KEOUGH, CITY OF BURLINGTON SCHOOL DISTRICT BOARD OF EDUCATION	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY DOE Docket No.: 119-4/16 **ORDER ON REMAND CLARIFYING BACK PAY**

WHEREAS, the City of Burlington School District Board of Education (hereinafter "Board") filed tenure charges against Penny Keough; and

WHEREAS, after three days of arbitration, and the submission of closing briefs by counsel for both parties, Arbitrator Michael Pecklers rendered an Award and Opinion in the above matter on December 15, 2016; and

WHEREAS, on March 13, 2017, Ms. Keough filed a Verified Complaint and Order to Show Cause seeking to vacate Arbitrator Pecklers' finding of unbecoming conduct, and seeking enforcement of Arbitrator Pecklers' award of back pay, claiming the Board failed to comply with the back pay award; and

WHEREAS, the Board moved to dismiss Ms. Keough's Order to Show Cause, contending that the back pay had been paid; and

WHEREAS, after oral argument on the Board's motion to dismiss, on May 10, 2017, Judge Smith affirmed the Award and Opinion; and

WHEREAS, due to the parties' differing interpretations of the portion of the Award and Opinion that provided for back pay, Judge Smith remanded the matter back to Arbitration for clarification of the portion of the Award and Opinion addressing back pay; and

WHEREAS, upon remand, counsel for the respective parties engaged in negotiations to resolve the back pay issue by consent, in the interest of avoiding the uncertainty and expense of further litigation; and

WHEREAS, notwithstanding the Parties' continued disagreement on the appropriate calculation of the back pay, and with the assistance of Arbitrator Pecklers, the parties have reached a negotiated resolution on back pay, and hereby agree as follows:

1. A nontaxable refund check shall be issued to Ms. Keough in the amount of $9,611.27, representing a refund of certain offsets deducted from the back pay award. Payment shall be made within thirty days of receipt of a fully executed order.

2. Both parties agree and acknowledge that their respective agreement to, and compliance with, the terms herein shall not be construed as an admission of any kind by either party.

3. In consideration for the terms contained herein, Ms. Keough waives her right to amend her Superior Court complaint, filed under docket BUR-L-987-16, to include a charge of retaliation arising out of the original back pay calculations. Ms. Keough, however, reserves her right to refer to the Board's original calculations as part of an amended claim of constructive discharge under docket BUR-L-987-16.

4. By agreeing to the terms herein, the Parties are both waiving their right to appeal this Order, and shall submit a copy of this Order to Judge Smith within ~~seven~~ (7) days of the date herein, and request the Court enter a final order of disposition under docket BUR-L-676-17.

Arbitrator, Michael J. Pecklers, Esquire

Dated: 8/21/17

Alan H. Schorr, Esquire
Attorney for Respondent, Penny Keough

8/21/17

Alicia D. Hoffmeyer, Esquire
Attorney for Petitioner,
City of Burlington Board of Education

ALFONSO MASTROFILIPO, JR.,

PETITIONER,

V.

BERGEN COUNTY OFFICE OF EDUCATION, INTERIM EXECUTIVE COUNTY SUPERINTENDENT NORAH PECK, AND BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner asserted that he had been deprived, illegally or without authority, from his seat on the Board of Education of the Borough of Lodi (Board) following an election held on November 8, 2016. Petitioner currently holds a seat on the same Board, but only for a temporary one-year term to fill an unrelated vacancy; he sought a determination that another vacancy should not be filled by the Bergen County Office of Education, Interim Executive County Superintendent (County Superintendent), and that any seat he holds should be deemed to be a position with a three-year term. The Bergen County Office of Education and the County Superintendent filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact in this matter, and the matter is ripe for summary decision; an election was held in November 2016 to fill three seats on the Board for terms of three years each; ten candidates ran for the three Board seats; petitioner received the fourth largest number of votes, and therefore was not deemed to be a successful candidate; however, an additional Board position became available in the month prior to the election due to a resignation, and – after the election – the Board announced that it would accept applications for that Board seat; petitioner applied for and was selected to serve in this vacant position, which had one year left of a three year term; one day before petitioner was sworn in to serve in the vacant one-year Board position, one of the three members-elect to the three-year Board seats – Vincent J. Russo – was disqualified based on a criminal history background check; petitioner sought an order establishing himself as the rightful successor to this vacant three-year Board seat, and also requested an order prohibiting the County Superintendent from filling the vacancy; Title 18A establishes a clear mechanism for filling vacancies on school boards; in the instant case, the parties disagree as to whether the County Superintendent is authorized to fill the vacancy because petitioner claims that the member-elect who was disqualified cannot be deemed a "member" of the Board. The ALJ concluded, *inter alia*, that: post-election, Russo would come under the definition of a "member"; petitioner's challenge to the authority of the County Superintendent to fill the vacancy left by Russo's disqualification can be decided as a matter of law; it is the responsibility of the County Superintendent to fill the vacancy, and Title 18A only provides the authority to fill it as a temporary one-year post. Accordingly, the ALJ granted the Bergen County Office of Education and County Superintendent's motion for summary decision, and ordered that the appeal be dismissed with prejudice.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision was adopted as the final decision in this matter and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 31, 2017

257-17

OAL DKT. NO. EDU 2764-17
AGENCY DKT. NO. 37-2/17

ALFONSO MASTROFILIPO, JR.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BERGEN COUNTY OFFICE OF EDUCATION, INTERIM EXECUTIVE COUNTY SUPERINTENDENT NORAH PECK, AND BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon a comprehensive review of the record, the Commissioner concurs with the Administrative Law Judge's (ALJ) determination that – for the reasons thoroughly expressed in the Initial Decision – the motion for summary decision filed by respondents, Bergen County Office of Education and the Interim Executive County Superintendent Norah Peck, should be granted. Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/31/17
Date of Mailing: 8/31/17

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 02764-17
AGENCY DKT. NO. 37-2/17

ALFONSO MASTROFILIPO, JR.,

Petitioner,

v.

BERGEN COUNTY OFFICE OF EDUCATION, INTERIM – EXECUTIVE COUNTY SUPERINTENDENT NORAH PECK, AND BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN,

Respondents.

Alfonso Mastrofilipo, Jr., petitioner pro se

Lauren A. Jensen, Deputy Attorney General, for respondents Bergen County Office of Education and Interim-Executive County Superintendent Norah Peck (Christiphor S. Porrino, Attorney General of New Jersey, attorneys)

Jaclyn M. Morgese, Esq., for nominal respondent Board of Education of the Borough of Lodi (Sciarrillo Cornell, attorneys)

Record Closed: June 16, 2017 Decided: July 20, 2017

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

Petitioner Alfonso Mastrofilipo, Jr. (petitioner) asserts that he has been deprived illegally or without authority from his seat on the Board of Education of the Borough of Lodi (Board) following the election held on November 8, 2016. As more fully detailed below, petitioner presently holds a seat on that Board but only for a temporary one-year term to fill an unrelated vacancy. He filed a Petition of Appeal as well as a Petition for Emergent Relief, individually as a citizen and not as a current temporary Board member, in order to obtain a determination that another vacancy should not be filled by the Bergen County Office of Education or the Interim-Executive County Superintendent for Bergen County (collectively referred to as "DOE Respondents") and that any seat he holds should be deemed to be a position to a three-year term. Petitioner denominated the Board as a nominal respondent, seeking relief principally against the DOE Respondents in this forum.

PROCEDURAL HISTORY

On February 24, 2017, petitioner filed both his Petition for Emergent Relief with the Commissioner of Education and his merits Petition. On February 27, 2017, this matter was transmitted to the Office of Administrative Law (OAL) by the Bureau of Controversies and Disputes for a hearing on the requested emergent relief. The matter was assigned to the undersigned on March 2, 2017, and oral argument was heard on March 6, 2017, at 1:30 p.m. The DOE Respondents submitted a legal brief on the emergency application under cover of March 6, 2017. The Board as nominal respondent asserted that it would abide by whatever decision is reached herein, although it also specified its agreement with the position of the DOE Respondents. After a long discussion off the record, oral argument was conducted on the record, facts were stipulated as not in dispute, and the record was left open for one day for the Deputy to submit a final reply due to the late service in open court of a final response by the petitioner. I entered an Order on March 7, 2017, denying the requested emergent relief.

On June 2, 2017, the DOE Respondents filed a Notice of Motion for Summary Decision on the merits of petitioner's appeal, with supporting Certification of Lauren A. Jenson, D.A.G. Petitioner filed his opposition to the motion on or about June 16, 2017, consistent with the stipulated filing date. The matter is now ripe for determination. For the reasons set forth herein, and also largely discussed in the Order on Emergent Relief, incorporated herein, I hold that the DOE Respondents' Motion for Summary Decision must be granted.

STATEMENT OF UNDISPUTED FACTS

On November 8, 2016, an election was held to fill three seats on the Board for three-year terms. There were ten candidates on the ballot, eight of whom were new office-seekers and two of whom were incumbents. Petitioner was one of the new candidates. After the election returns were tabulated and announced, it was determined that petitioner came in fourth place. Accordingly, he was not deemed to be a successful candidate or member-elect. However, in the month just prior to the election, another then-current member of the Board, Joseph J. Licata, resigned because he had moved his personal residence out of the school district.

Following this election, the three highest recipients of votes were subject to statutory examination of their qualifications, including criminal background checks, pursuant to N.J.S.A. 18A:12-1.2(a). Also following the election, the Board announced that it would be accepting applications for the vacant seat left by Licata. Petitioner applied on or before that deadline of November 16, 2016. After the interview process was completed, petitioner was advised that he had been selected for the Licata seat on or about December 14, 2016.

On or about December 20, 2016, member-elect Vincent J. Russo and the Board were notified by the New Jersey Department of Education that his background review had turned up a disqualifying criminal offense. Petitioner was sworn in to fill the Licata vacant seat on December 21, 2016, just one day after Russo was disqualified from serving. The first organizational meeting of the Board was held on January 4, 2017.

On January 17, 2017, petitioner filed a civil action in the Superior Court of New Jersey, Bergen County, Chancery Division, against the same parties named herein. He sought equitable relief in the form of designation as the successor member-elect to the seat contested in the November 8, 2016, election and now open due to the disqualification of Russo. That lawsuit was dismissed without prejudice by the Honorable Menelas W. Toskos, J.S.C., on February 22, 2017, "for the reasons set forth on the record" after oral argument.[1] That Order also stayed any action by ECS Peck until March 1, 2017. As set forth above, petitioner filed his Petition and Emergent Petition with the Department on February 24, 2017, and same was decided by the undersigned on March 7, 2017.

LEGAL DISCUSSION

It is well established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law."

There are two aspects to petitioner's appeal, and both of them require legal construction on the basis of the undisputed facts. First, petitioner requests an order mandating that only the Board can fill the seat left empty by Russo's disqualification, which is to say, that ECS Peck should be prohibited from filling the vacancy. Second, petitioner wants an order establishing himself as the rightful successor to Russo's seat as a full three-year term on the Board. As to the latter, petitioner is of the opinion that he is the rightful occupant of the seat as a result of being the third highest qualified candidate who sought the public's endorsement through a duly-held election. With

[1] The Deputy represented at the argument on the emergent matter that the court case was dismissed because it raised school law issues under Title 18A over which the Commissioner has primary jurisdiction. Petitioner stated his disagreement with that characterization during this oral argument and said that Judge Toskos was advised instead by the Deputy that ESC Peck had authority to appoint petitioner to a three-year term on the Board. Since the Order on Emergent Relief and as part of this motion for summary decision, I have reviewed those transcribed Superior Court proceedings. It is clear to me that Judge Toskos ruled that she did not have jurisdiction over Title 18A disputes and that it was unlikely that any forum would be ordering that petitioner be deemed to have a three-year position.

respect to the former, petitioner thinks it is unseemly to have a citizen appointed to the Board by ECS Peck when neither she nor the applicant might have the knowledge and interest to discuss matters of great and specific importance to the Board. Ultimately, the issue comes down to whether petitioner must run again next November in order to continue on the Board.

Title 18A establishes a clear mechanism for filling vacancies and it is because those appointments circumvent the election system that they are statutorily limited to a one-year term. Title 18A makes provision for the filling of any vacancy on a board through several means, depending on the circumstances that caused the vacancy to occur.

> Vacancies in the membership of the board shall be filled as follows:
>
> a. By the county superintendent, if the vacancy is caused by the absence of candidates for election to the school board or by the removal of a member because of lack of qualifications, or is not filled within 65 days following its occurrence;
>
> * * *
>
> f. By a majority vote of the remaining members of the board after the vacancy occurs in all other cases.
>
> Each member so appointed shall serve until the organizational meeting following the next annual election unless the member is appointed to fill a vacancy occurring within the 60 days immediately preceding such election if the annual election is held in April, or occurring after the third Monday in July if the election is held in November, to fill a term extending beyond such election, in which case the member shall serve until the organizational meeting following the second annual election next succeeding the occurrence of the vacancy, and any vacancy for the remainder of the term shall be filled at the annual election or the second annual election next succeeding the occurrence of the vacancy, as the case may be.
>
> [N.J.S.A. 18A:12-15]

There are additional sub-parts, not relevant herein, that establish other means if an election results in a tie, etc.

Here, the parties disagree as to whether the DOE Respondents are authorized to fill the vacancy because petitioner claims that Russo cannot be deemed to be a "member." I **CONCLUDE** that post-election, Russo would come within the definition of a "member." The argument posited by petitioner is that Russo could not be a member removed for lack of qualifications because he had not yet been sworn in onto the Board. I agree with respondents that he is mis-reading the statutory provisions and that the above-cited portion must be read in tandem with the following:

> Each member of any board of education, within 30 days of election or appointment to that board, shall undergo a criminal history background investigation for the purpose of ensuring that the member is not disqualified from membership due to a conviction of a crime or offense listed in N.J.S.18A:12-1.
>
> [N.J.S.A. 18A:12-1.2(a)]

This provision is specifically part of the subtitle that addresses qualifications or the lack thereof of members elected to or already sitting on a board of education. The fact that a successful electoral candidate becomes a member and yet is still required to submit to a background check by the Department "within 30 days of election" is specific and clear, notwithstanding that an oath of office has not yet been administered. Accord N.J.S.A. 18A:12-2.1, which sets forth that a "member" takes an oath "before entering upon the duties of his office." While the Legislature could have made a distinction between a "member-elect" and a "member," it determined not to do so.

Based upon the above legal discussion and analysis, I **CONCLUDE** the petitioner's challenge to the authority of the DOE Respondents to fill the vacancy left by Russo's disqualification can be decided as a matter of law and must result in the granting of the respondents' motion for summary decision. I **CONCLUDE** that it is the DOE Respondents who ultimately must fill the Russo vacancy and that Title 18A only provides the authority to fill it as a temporary one-year post. Petitioner cannot obtain the ultimate relief he seeks from the Office of Administrative Law and the Department of

Education, namely, to be deemed as filling a three-year seat on the Board. While authority to fill the three-year position could have been granted under the school laws by the Legislature to the Department, the Legislature opted not to write the law that way. I am obligated to apply the law as written. "Because the regulation of elections is exclusively a legislative matter, courts, even when they question the wisdom of legislation, must respect the legislative scheme. Sharrock v. Keansburg, 15 N.J. Super. 11, 16-17 (App. Div. 1951)." In re Mun. Election Held, 139 N.J. 553, 558 (1995).

Contrary to petitioner's assertions, it appears that no forum has the power to simply declare that petitioner will henceforth have a three-year position. Even if irregularities in the election process were discovered and proven in a timely manner, Title 18A (and hence under the authority of the Commissioner) still controls over those circumstances, albeit it mirrors Title 19 in how any special election must be conducted:

> By special election if there is a failure to elect a member at the annual school election due to improper election procedures. Such special election shall be restricted to those persons who were candidates at such annual school election, shall be held within 60 days of such annual school election, and shall be conducted in accordance with the procedures for annual and special school elections set forth in Title 19 of the Revised Statutes[.]
>
> [N.J.S.A. 18A:12-15(d)]

ORDER

Accordingly, and for the reasons articulated above, it is **ORDERED** that the motion of respondents Bergen County Office of Education and Interim-Executive County Superintendent Norah Peck for an Order Granting Summary Decision is hereby **GRANTED**. It is further **ORDERED** that the appeal of petitioner Alfonso Mastrofilipo, Jr., for relief under Title 18A is hereby dismissed with prejudice consistent with the reasons set forth above.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 20, 2017
DATE

Gail M Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency: July 20, 2017

Date Mailed to Parties: July 21, 2017

Laura Pardes
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

256-17

R.V., on behalf of minor children, D.V. and S.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* petition appealing the determination of the respondent Board that his children, D.V. and S.T., were not domiciled in the City of Clifton, and therefore not entitled to a free public education in the Clifton school district. Petitioner enrolled his two children in Clifton in September 2016, using an address on Rowland Avenue and a sworn statement that he resided there, as he is not the homeowner at the address. The Board contended that petitioner had been unable to provide required documentation of his residency at the Rowland Avenue house, and an investigation failed to find the family living at that address. The Board sought tuition reimbursement for the period of D.V. and S.T.'s ineligible attendance.

The ALJ found, *inter alia*, that: the respondent Board's residency inspector presented credible testimony in support of the Board's claim for tuition; the results of the investigation supported the finding that petitioner and his children are not domiciled in the Clifton school district, and the house at the address used for enrollment has been in foreclosure since September 2016; petitioner was unable to provide even one document to prove his residency on Rowland Avenue in Clifton; and where the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant *N.J.A.C.* 6A:22-6.2(a). The ALJ concluded that petitioner was not a domiciliary in Clifton for the period from September 4, 2016 to June 19, 2017, and accordingly – pursuant to *N.J.S.A.* 18A:38-1(b) – the respondent Board is entitled to reimbursement from petitioner in the total amount of $ 21,232.30 for the period of his children's ineligible attendance.

Upon review, the Commissioner concurred with the ALJ's finding that petitioner failed to sustain his burden of establishing that he was domiciled in Clifton during the 2016-2017 school year. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and petitioner was directed to reimburse the Board in the amount of $ 21,232.30. The petition was dismissed with prejudice.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 31, 2017

256-17

OAL DKT. NO. EDU 06142-17
AGENCY DKT. NO. 49-3/17

R.V., on behalf of minor children, D.V. and S.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain his burden of establishing that he was a domiciliary of Clifton during the 2016-2017 school year. The Commissioner further concurs with the ALJ's conclusion that D.V. and S.T. were, therefore, not entitled to a free public education in the District's schools during this time.

Pursuant to *N.J.S.A.* 18A:38-1(b), the Board is entitled to tuition reimbursement in the amount of $21,232.30 ($10,679.68 at $65.12 per day for 164 days for D.V., and $10,552.62 at $63.57 per day for 166 days for S.T.) for the time period between September 6, 2016 and June 19, 2017, during which time D.V. and S.T. were ineligible to attend school in the District, as detailed in the ALJ's Initial Decision.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the total amount of $21,232.30 for

[1] The Commissioner was not provided with a transcript of the July 17, 2017 hearing at the OAL.

tuition costs incurred during the time period that D.V. and S.T. were ineligible to attend school in Clifton. The petition of appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.[2]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/31/17

Date of Mailing: 8/31/17

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06142-17
AGENCY DKT. NO. 49-3/17

R.V. ON BEHALF OF MINOR CHILDREN,
D.V. & S.T.,
Petitioners,
v.
CITY OF CLIFTON BOARD OF EDUCATION,
Respondent.

R.V., petitioner, appearing pro se

Bradley D. Tishman, Esq. for respondent (Cleary Giacobbe Alfieri Jacobs, LLC)

Record Closed: July 17, 2017 Decided: July 19, 2017

BEFORE: **JOANN LASALA CANDIDO**, ALAJ

STATEMENT OF THE CASE

Respondent, Board of Education of the City of Clifton, seeks reimbursement of tuition from petitioner, R.V. parent of D.V and S.T. for the 2016-2017 school year,

asserting that petitioner and his children were not domiciled within the Clifton School District.

PROCEDURAL HISTORY

On March 20, 2017, petitioner, R.V., filed a residency appeal on behalf of his two children, D.V. and S.T., grades two and kindergarten, respectively. On May 3, 2017, the Clifton Board of Education (BOE or respondent) filed an Answer with the State Department of Education (DOE) seeking reimbursement from petitioner for the costs of tuition incurred by the attendance of his two minor children in the BOE's school district from the onset of the enrollment.

The matter was transmitted to the Office of Administrative Law (OAL) on May 3, 2017, for hearing as a contested case.

On due notice to all parties, the hearing was scheduled and heard on July 17, 2017.

ISSUE

The issue in this matter is whether minor children D.V. and S.T. are eligible to attend respondent's public schools free of charge in accordance with N.J.S.A. 18A:38-1 and, if not, whether respondent's requests for tuition reimbursement for the 2016-2017 school year should be granted.

FINDINGS OF FACT

Petitioner enrolled his two children in the Clifton school district in September 2016 with an address of 227 Rowland Avenue by a sworn statement since he is not the homeowner at that address.

The district conducts a residency investigation of each sworn statement submitted by the parent to ensure the safety of the children.

Clifton BOE investigator John Burke was assigned to investigate R.V.'s sworn statement that his children were domiciled at 227 Rowland Avenue.

On October 21, 2016, respondent notified R.V. that he was required to bring in a mortgage statement and two additional proofs of residency such as a utility or cable bill or a bank statement. R.V. was unable to produce such documentation with his name on them.

On November 17, 2016, at 8:25 a.m., Burke responded to the Rowland Avenue address and no one answered the door. He returned on November 20, 2016 at 4:15 p.m. and again no one answered the door.

Burke returned to the residence on November 25, 2016 at 12:15 p.m. and the occupant Mr. Chetram answered the door and told Burke he did not know anyone by R.V.'s name.

On December 3, 2016, Mr. Chetram was at the residence and informed Burke that his daughter, R.C. resides with him and no one else.

Burke returned to the residence on November 28 and 29, 2016 and no one answered the door.

On January 3, 2017, respondent notified R.V. that the BOE determined he and his children were not domiciled at 227 Rowland Avenue.

On January 31, 2017, petitioner submitted another sworn statement and provided the district with a lease agreement, bank statement and utility bill, none of which has his name on them.

Burke returned to the residence on four separate occasions in February 2017 and observed a notice posted in the window that read home was winterized effective January 6, 2017 and the hot water heater/boiler was drained. He also observed the property was snow covered with no footprints or tracks. Burke was able to look through a window and there was no furniture.

On February 27, 2017, respondent scheduled a meeting with Burke and petitioner at the 227 Rowland Avenue address. Petitioner failed to show to the appointment.

On March 17, 2017, the respondent sent the investigator to the 227 Rowland Avenue address.

By letter dated April 17, 2017 respondent's Superintendent of Schools sent correspondence to the Department of Education asserting the following **FACTS**:

> "Please be advised that on March 17, 2017 we have once again sent our domicile investigation to ---- Avenue, Clifton, NJ, the address Mr. V claims he lives at with his two children. The house located at this address is vacant and has been in foreclosure since September 12, 2016. Also, there are notices on the door that state the water was turned off on January 6, 2017. In addition, an appointment was made to meet with Mr. V at the above address on February 27, 2017 and he failed to show.
>
> Mr. V has been made aware of these findings and has refused to inform us of his current address. Also, Mr. V has told our Registration Department that it is none of our business where he currently lives. To date, we have no address where Mr. V. and his children reside. "

The tuition for D.V. is $65.12 per day for 164 days at a total of $10,679.68. The tuition for S.T. is $63.57 per day for 166 days at a total of $10,552.62.

LEGAL ANALYSIS

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J 238, 250 (1955). The domicile of an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

In support of its claim for tuition, respondent produced residency inspector John Burke, who credibly testified in its behalf. He stated that the results of the investigation supported the finding that petitioner and his children are not domiciled in district. Petitioner was not able to provide even one document that has his address as 227 Rowland Avenue.

The Board asserts that it is entitled to be reimbursed for tuition for the period of ineligible enrollment in 2016-2017. Where, as here, the evidence does not support the

claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

> If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

N.J.S.A. 18A: 38-1(b) likewise requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioner was not a domiciliary in the Clifton School District for the days sought and that respondent is entitled to reimbursement for the costs of audited tuition in the amount of $10,679.68 for D.V. and $10,552.62 for S.T.

DECISION AND ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that petitioner and his children were not residents and domiciliary in Clifton, New Jersey, and were not domiciled within its school district during the period of September 4, 2016 through on or about June 19, 2017 is hereby **AFFIRMED**. It is further **ORDERED** that respondent is entitled to reimbursement from petitioner for the cost of audited tuition in the amount of $10,679.68 for D.V. and $10,552.62 for S.T.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 19, 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

July 19, 2017

Date Mailed to Parties: July 21, 2017
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

LIST OF EXHIBITS

For Petitioner:

None

For Respondent:

R-1 John Burke investigation report

R-2 Request for Residency Investigation

R-3 Request for Residency Investigation

R-4 Residency Certification of Parent/Guardian and sworn statement

R-5 Provisional Enrollment

R-6 Letter to R.V. from Department of Counseling and Student Services

R-7 Residency Certification of Parent/Guardian and sworn statement

R-8 Residential Lease Agreement

R-9 Progressive, PSE&G and TD Bank cover pages for Vishwamitra Chetram

R-10 First Savings Credit Card for Vishwamitra Chetram

R-11 Attendance sheets for D.V. and S.T.

R-12 Letter to R.V. from Department of Counseling and Student Services

R-13 Letter to R.V. from Department of Counseling and Student Services

R-14 Tuition calculated rates for regular programs

R-15 S.T. personal data

R-16 D.V. personal data

R-17 Letter from superintendent to Kathleen Duncan

R-18 Letter from Department of Counseling and Student Services to Kathleen Duncan

R-19 Return to sender addressed to R.V.

R-20 Return to sender addressed to R.V.

259-17

J.R., on behalf of minor children, J.R. and D.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* petition appealing the determination of the respondent Board that her children, J.R. and D.R., were not domiciled in West Orange, and therefore not entitled to a free public education in the West Orange school district. Petitioner contended that she and the children live in West Orange with J.R.'s parents, and are therefore officially domiciled within the Board's school district. The Board alleged that a residency investigation had shown that J.R. and the children are residing at an address in the city of Newark. The Board sought tuition reimbursement for the period of J.R. and D.R.'s ineligible attendance.

The ALJ found, *inter alia*, that: the testimony provided by the Board's witnesses was credible, while that of petitioner was not; pursuant to *N.J.A.C.* 6A:22-3.1(a)(1), a student is a resident of a school district if her parent or guardian has a permanent home in the district; the domicile of an unemancipated child is that of her parent or guardian; in the instant case, J.R. contested the Board's decision that J.R. and D.R. were not properly domiciled in West Orange; the testimony of the Board's residency inspector and the results of the investigation were credible and indicated that J.R. and her children were domiciled out-of-district in Newark, but continued to attend school in West Orange during the 2015-2016 school year; and the total cost of tuition for J.R. and D.R. in West Orange schools for the 2015-2016 school year was $11,410.10. The ALJ concluded that the petitioner was not a domiciliary of West Orange for the 2016-2017 school year and her children were therefore ineligible to attend West Orange public schools; accordingly, the respondent Board is entitled to reimbursement of tuition in the amount of $11,410.10.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed with prejudice.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 31, 2017

259-17
OAL DKT. NO. EDU 03966-16
AGENCY DKT. NO. 47-2/16

J.R., on behalf of minor children, J.R. and D.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain her burden of establishing that she was a domiciliary of West Orange during the 2015-2016 school year. The Commissioner further concurs with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in the District's schools during this time.

Pursuant to *N.J.S.A.* 18A:38-1(b), the Board is entitled to tuition reimbursement in the amount of $11,410.10 ($5,705.05 per child – $85.15 per day for 67 days – for J.R. and D.R.) for the time period between November 4, 2015 and March 1, 2016, during which J.R. and D.R. were ineligible to attend school in the District, as detailed in the ALJ's Initial Decision.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the total amount of $11,410.10 for

[1] The Commissioner was not provided with a transcript of the June 20, 2017 hearing at the OAL.

tuition costs incurred during the time period that J.R. and D.R. were ineligible to attend school in West Orange. The petition of appeal is hereby dismissed with prejudice

IT IS SO ORDERED.[2]

Kimberley S. Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/31/17

Date of Mailing: 8/31/17

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03966-16
AGENCY DKT. NO. 47-2/16

J.R. ON BEHALF OF MINOR CHILDREN, J.R. and D.R.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

J.R., petitioner, pro se

Frances L. Febres, Esq., for respondent (Cleary, Giacobbe, Alfieri & Jacobs, attorneys)

Record Closed: June 30, 2017 Decided: July 24, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

Petitioner, J.R., is the mother of J.D.R. and D.R. (minor children), who is challenging the determination made by the Board of Education of the Township of West

Orange School District, Essex County (the Board/District) that the mother and the children were not domiciled in the District. The District filed a counterclaim seeking payment of tuition for the number of days that the minor children attended school in the District while not domiciled there.

PROCEDURAL HISTORY

On February 4, 2016, the District notified the petitioner that her minor children (J.D.R. and D.R.) were ineligible to attend the schools of the District due to non-residency and voted to remove the students from the West Orange School District. (R-16.) A hearing was held on February 2, 2016, and the Board recommended that the minor children be removed from enrollment in the District. Petitioner appealed that decision and the Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. There was an apparent delay in processing due to the file not being located. The case was assigned to the undersigned on April 24, 2017. A telephone prehearing conference was held on May 10, 2017. A hearing was held on June 30, 2017, and the record closed on that same day.

FACTUAL DISCUSSION

J.R. is the parent/mother of the minor children. J.R. registered her minor children in the West Orange School District for the 2015-2016 school year, stating she was a renter in West Orange. (R-1.) For the 2015-2016 school year, J.D.R. was enrolled in kindergarten in the District (R-2) and D.R. was enrolled in third grade. The Board completed a residency investigation; thereafter, conducted a residency hearing on February 2, 2016. Respondent filed its notice of final determination of ineligibility on February 4, 2016, determining that the minor children do not reside in the District. As a consequence, the mother of the minor children appealed that determination. The tuition rate of reimbursement as filed with the State by the District for the 2015-2016 school year was $85.15 per day.

The preceding statements are not in dispute as they are from the records and testimony of the parties and are hereby **FOUND** as **FACT**.

TESTIMONY

For Petitioner

J.R. is the mother of the minor children who are a third grader (D.R.) and a kindergartener (J.D.R.) at schools located in the District. She testified that she lives with her parents in West Orange, New Jersey, with her two minor children. J.R.'s driver's license has the address, 200 Watchung Avenue, West Orange, New Jersey, displayed on it and was accepted as evidence as well as a letter from her parents to the effect that J.R. resides with them in West Orange and accepted as evidence. (R-4; R-6; R-7.)

The real estate located in West Orange is owned by J.R.'s parents. J.R. testified that she stays at the Newark address (233 South 11th Street) in order to stay with a very good friend of hers on many nights, including all of the nights cited in the Zarro investigation report. (R-13a.) J.R. confirmed that she had her name on a mailbox on the house located at 233 South 11th Street, Newark, for the purpose of her friend avoiding a cable deposit charge and having J.R.'s name on the cable bill. J.R. alleges that her friend pays the cable bill even though it is in her name.

On cross-examination, J.R. acknowledged the pictures submitted by the respondent showed that she and her minor children leaving the Newark address and that her car was parked in front of the Newark address on the dates set forth in the Zarro investigation report. J.R. also confirmed that her name, alone, was on the mailbox at the Newark address and that her friend's name was not displayed at that address. J.R. also admitted that it would have been far more convenient to take her minor children to school from the West Orange address and not Newark and thus residing in Newark was not a decision made for purposes of convenience.

For Respondent

Michael Zarro (Zarro) works for the District as a Residency Officer. Prior to October 27, 2015, personnel received a school work assignment from J.D.R. in Newark. (R-13b.) As a result, he started a residency investigation on petitioner for the West Orange and Newark addresses. (R-13a.) The investigation consisted of a large number of occasions of surveillance as reflected in exhibit R-13a. The investigative report stated in part the following and was confirmed by his testimony:

. . .

2. On October 27, 2015, I observed the two students getting dropped off at Washington School at 8:00AM for the breakfast program. The students were dropped off in a black Nissan Versa (V45-xxx).
3. On November 4, November 11, November 16, November 24, December 2, December 8, 2015, January 4, 2106 (sp.) at 7:30AM, surveillance was conducted at 200 Watchung Ave. The students or Mrs. [R]**** were not observed exiting this location. Students were reported in attendance at Washington School.
4. On January 7, 2016, at 7:00AM the said vehicle was located on So. 11th St., Newark, NJ. At 7:40AM, the two students and Ms. [R]***** were observed exiting 233 So. 11th St., and entered the said vehicle and drove to Washington School.
5. On January 8, January 11, (photo of vehicle in front of 233 So. 11th St. enclosed) January 12 (photo of the name [R]**** on mailbox at 233 So. 11th St. enclosed), January 13, January 14, January 15, (photo of the two students and Ms. [R]**** exiting 233 So[.] 11th St. enclosed), January 19, January 20 and January 21, 2015 between 7:30AM and 7:55AM, the two students and Ms. [R]***** were observed exiting 233 So[.] 11th St[.], Newark and entered the said vehicle. The hearing letter was given to Ms. [R]**** on January 21, 2016 as she was exiting the said address.
6. On January 21, 2016 at 11:20AM, Ms. [R]**** contacted the office to request a hearing. She started to leave the hearing letter at 200 Watchung Ave. West Orange.

Zarro also testified that the minor children attended the entire school year (180 days) for the 2015-2016 school year and the tuition rate for the 2015-2016 school year was $85.15 per day. Zarro also testified that J.R.'s minor children attended 109 days in the 2015-2016 school year when they were not residing in West Orange. Based on these figures, Zarro testified that each student incurred tuition in the amount of $9,281.35 or a total of $18,562.70.

Respondent, via Zarro or any other witnesses, was unable to present any evidence showing that the minor students did not reside in West Orange from October 27, 2015, until November 4, 2015. Any credible evidence began on November 4, 2015, and ends on March 1, 2016. Accordingly, the number of school days for this period is as follows:

November 2015	11 days
December 2015	17 days
January 2016	19 days
February 2016	19 days
March 2016	1 day
Total Days:	67 days per student

FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of

an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

After hearing the testimony and reviewing the evidence, I make the following additional **FINDINGS OF FACT**:

For the 2015-2016 school year, the minor children of J.R., were enrolled in the third grade and kindergarten in the District. After the District received a school work assignment from J.D.R., which stated that she lived in Newark, the Board completed a residency investigation and conducted a residency hearing on February 2, 2016. The results of the hearing were that the mother of the minor children claimed to be domiciled in West Orange, Essex County, along with her minor children. However, the Board found that J.R., the mother of the minor children, and the minor children were not domiciled in West Orange. The mother and the minor children instead were domiciled at 233 South 11th Street, Newark, New Jersey beginning November 4, 2015, until March 1, 2016, when J.R. re-registered her children in West Orange, residing at an address in West Orange. The tuition rate as determined in West Orange for reimbursement as filed with the State for the 2015-2016 school year was $85.15 per day.

The testimony of respondent's witness was especially credible and persuasive. He did not embellish his investigative findings and, in fact, conceded the point that there was no evidence regarding J.R.'s residence from October 27, 2015, and that his investigation began on November 4, 2015.

Conversely, the petitioner's testimony was not credible in the manner in which it was given. J.R.'s own testimony assisted the respondent in proving the facts of the case by a preponderance of the evidence by admitting the number of days she and her

children resided in Newark, New Jersey, while her children attended school in West Orange. Her explanation regarding her name on the mailbox on the Newark house lacked credibility. In addition, simply the sheer number of days, including consecutive days, certainly weigh to support the respondent's case. This detracted from any modicum of credibility.

Therefore, I **FIND** that J.R. and her minor children, J.D.R. and D.R., were domiciled outside the District and instead were domiciled in Newark, New Jersey from November 4, 2015, until March 1, 2016. Accordingly, I **FIND** that both minor children became ineligible to attend school in the District for those days in the 2015-2016 school year. I **FURTHER FIND**, by a preponderance of the credible evidence, that respondent filed a counterclaim seeking tuition for the days the minor students attended the District and were ineligible for the 2015-2016 school year. As such, the District must establish the cost of tuition and the number of days the minor students attended the District's schools when they were ineligible to do so. Testimony was uncontroverted and therefore, I **FIND** that the per-pupil cost for a student to attend school in the district for the 2015-2016 school year was $85.15 per day equaling $5,705.05 per minor student or a total of $11,410.01 total school days for the time frame of November 4, 2015, until March 1, 2016, for both minor children.

CONCLUSIONS OF LAW

At issue is whether the minor children were entitled to a free education under N.J.S.A. 18A:38-1, which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See V.R. ex rel. A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom., Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education).

A person who meets age requirements and is domiciled within a school district may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). A person may have

many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). A child's domicile is normally that of his or her parents. Ibid. The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999).

The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

The record reflects that the minor children attended school within the District for the 2015-2016 school year while domiciled outside of the District. Accordingly, I **CONCLUDE** that the minor children were not entitled to a free public education in the District from November 4, 2015, until March 1, 2016. N.J.S.A. 18A:38-1(b)(1) provides that when the evidence does not support the claim of the resident, the resident shall be assessed tuition "for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per-pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced." The uncontested record reflects that the actual cost of the minor children's (two children) attendance in-district was $85.15 per day equaling $11,410.10 for the ineligible time frame. Accordingly, I **CONCLUDE** that the District is entitled to be reimbursed for tuition by the petitioner for her two children in the amount of $11,410.10. I further **CONCLUDE** that petitioner's appeal should be dismissed.

ORDER

It is, therefore, **ORDERED** that petitioner pay respondent, Board of Education of the Township of West Orange School District, Essex County, tuition in the total amount

of $11,410.10 for unauthorized attendance in the District schools for the periods stated above. It is further **ORDERED** that the District's determination that the minor children were ineligible to attend school while domiciled outside the District is hereby **AFFIRMED**. Petitioner's appeal is **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 24, 2017
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: July 24, 2017

Date Mailed to Parties: JUL 25 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

jb

APPENDIX

WITNESSES

For Petitioner:

J.R.

For Respondent:

Michael Zarro, Residency Officer

EXHIBITS

For Petitioner:

None

For Respondent:

R-1	3-Guardian1 Information
R-2	New Student Registration Information
R-3	Certificate of Residency: Renter
R-4	Statement of Landlord
R-5	Certificate of Live Birth
R-6	J.R.'s Driver License
R-7	Letter from J.R.'s parents to "To Whom It May Concern" dated May 21, 2012
R-8	E-Z Pass Statements for (3/7/12-5/6/12)
R-9	Pay Statement for J.R from Allegro School
R-10	Midland Mortgage statement and tax statement for West Orange property owned by J.R.'s parents
R-11	New Jersey American Water bill and Verizon bill for West Orange property owned by J.R.'s parents
R-12	Attendance follow-up form

R-13(a-f)	Investigation Report by Michael Zarro, dated February 2, 2016 with attachments
R-14	Letter from Jeffrey Rutzky, Superintendent, to J.R. dated January 21, 2016
R-15	Letter from Jeffrey Rutzky, Superintendent, to J.R. dated January 27, 2016
R-16	Letter from Jeffrey Rutzky, Superintendent, to J.R. dated February 4, 2016

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NOLAN PANZICA,	:	
PETITIONER,	:	
v.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – who had been employed as a school maintenance worker in the Rockaway Borough school district – argued that the decision of the New Jersey Department of Education, Criminal History Review Unit (Department), to disqualify him from employment following a drug conviction violated his procedural due process rights. Petitioner contended that he was not provided with proper notice and an opportunity to be heard, and requested that his disqualification be vacated for 90 days to allow him to challenge the criminal plea entered in Municipal Court. The Department filed a motion to dismiss in lieu of an answer.

The ALJ found, *inter alia,* that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner was arrested in September 2016 and charged with possession of marijuana and intent to use drug paraphernalia; the Rockaway school district was notified of his arrest a week later, and petitioner then met with Rockaway's superintendent of schools, where he was presented with a document containing information about the arrest; petitioner then informed the District and the union representatives present at the meeting about his drug arrest; Panzica entered a guilty plea to one count of possession of drug paraphernalia with intent to use in December 2016; petitioner thereafter received a letter from the Department notifying him that he was permanently disqualified from employment in New Jersey public schools due to his criminal conviction; petitioner does not deny the criminal conviction that resulted in his disqualification, but rather requests a "do-over" in Municipal Court, claiming that he was not informed by anyone nor advised in any document from the Department or the District that a drug paraphernalia conviction would result in disqualification from his employment; however, petitioner failed to cite any regulation or case law for his argument that the District had a duty to inform him of the consequences of a drug conviction; the disqualification statute, *N.J.S.A.* 18A:6-7.1(b), is a public record; and petitioner admitted that he did not avail himself of the statute's requirements before he entered his guilty plea in Municipal Court. The ALJ concluded that petitioner's argument that his procedural due process rights and his right to be heard were violated is without merit. Accordingly, the Department's motion for summary decision was granted.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 31, 2017

OAL DKT. NO. EDU 3103-17
AGENCY DKT. NO. 17-1/17

NOLAN PANZICA,	:	
PETITIONER,	:	
v.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Nolan Panzica, and the Criminal History Review Unit's reply thereto.

In his exceptions, the petitioner reiterates the arguments that were made below contending that the Administrative Law Judge (ALJ) erroneously determined that the petition should be dismissed. The petitioner contends that in reaching his decision, the ALJ applied the incorrect standard to his right to challenge his disqualification from employment within a public school. The petitioner stresses that under *N.J.S.A.* 18A:6-7.3, his employer – the Rockaway Borough School District (District) – had an obligation to provide him with notice, after he was arrested, that a conviction for possession of drug paraphernalia would result in the dismissal from his position.[1] Petitioner contends that the District's failure to adhere to the requirements of *N.J.S.A.* 18A:6-7.3 violated his rights and damaged his ability to defend himself against dismissal

[1] It is undisputed that the petitioner entered a guilty plea in the Jefferson Township Municipal Court to one count of possession of drug paraphernalia with intent to use; and that the petitioner did not challenge the accuracy of his conviction after being afforded the opportunity to do so by the Criminal History Review Unit.

from his position. Further, the Initial Decision incorrectly determined that the petitioner was presumed to know the law.

Upon the review of the record, the Commissioner is in accord with the ALJ's conclusion – for the reasons set forth in the Initial Decision – that the Criminal History Review Unit properly disqualified the petitioner from public school employment based on his conviction for possession of drug paraphernalia. The Commissioner is also in accord with the ALJ's determination that the District was not required to notify the petitioner of the consequences of a drug conviction. Despite the petitioner's assertion to the contrary, the arguments made by the petitioner were thoroughly considered and discussed by the ALJ in rendering the specific determinations outlined in the Initial Decision. Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 8/31/17

Date of Mailing: 8/31/17

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 03103-17
AGENCY DKT. NO. 17-1/17

NOLAN M. PANZICA,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION CRIMINAL HISTORY REVIEW UNIT,
Respondent.

Judson L. Hand, Esq., for petitioner (Law Offices of Alan L. Zegas, attorneys)

James M. Esposito, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorneys)

Record Closed: April 7, 2017 Decided: April 25, 2017

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Nolan Panzica (Panzica), seeks a determination that the respondent, New Jersey Department of Education Criminal History Review Unit (Department), erred in disqualifying him from employment due to a drug conviction, where Panzica did not

know that a drug conviction would lead to a disqualification from employment. Specifically, Panzica argues that the Department's decision violated his procedural due process, as the Department did not provide him with proper "notice" and an opportunity to "be heard." Panzica requests that his disqualification be vacated for 90 days to allow him to challenge the criminal plea entered in the Municipal Court.

Panzica filed his Petition with the Department on January 26, 2017[1]. On March 1, 2017, the Department filed a motion to dismiss in lieu of an answer, pursuant to N.J.S.A. 6A:3-1.10 [2]. On March 28, 2017, Panzica filed an opposition to the Department's motion for summary decision, and on April 7, 2017, the Department filed its reply to Panzica's response to the motion.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on March 6, 2017, as a contested case. N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to –13. Thereafter, on March 28, 2017, Panzica filed his opposition to the motion for summary decision, and on April 7, 2017, the Department file their reply to Panzica's response.

FINDINGS OF FACT

The facts in this case are undisputed. Based upon the briefs, certifications and documents filed by the parties, I **FIND** the following to be the **FACTS** of this case:

On September 23, 2016, Panzica was arrested and charged in Jefferson Township with possession of one count of less than 50 grams of marijuana and one count of possession with intent to use drug paraphernalia. A week later the Rockaway Borough

[1] On or about December 29, 2016, Panzica filed a letter with the Department, challenging the Department's decision, along with Panzica's Certification, Exhibits and form of Order. By letter dated January 12, 2017, the Department instructed Panzica that his filing was not in compliance with N.J.A.C. 6A: 3-1.4, and that he had until January 23, 2017 to refile accordingly. Thereafter, on January 23, 2017, Panzica filed his Petition in conformance with the rules.

[2] The Department had initially filed a Motion to Dismiss in Lieu of an Answer with the Commissioner of Education under N.J.A.C. 6A:3-1.10. The Department requested in its motion that once the matter was transferred to the Office of Administrative Law (OAL), that the Department's motion be converted to a summary decision motion under N.J.A.C. 1:1:12.5.

School District (District), where Panzica is employed as a school maintenance worker, was notified of his arrest. Panzica then met with Superintendent Mark Schwartz; Rockaway Borough Education Association (Union) presidents, Jeri Hurley (Hurley) and Carol Culthier (Culthier), also attended the meeting. At this meeting, Panzica was presented with a "document" containing information about the arrest, and he informed the District and his Union of his drug arrest.

On or about December 1, 2016, Panzica entered a guilty plea in the Jefferson Township Municipal Court to one count of possession of drug paraphernalia with intent to use. By letter dated December 2, 2016, the New Jersey State Department of Education (DOE) notified Panzica that he was permanently disqualified from employment in New Jersey public schools due to his criminal conviction. The DOE's notice informed Panzica that he had "30 days from the date of this written notice of disqualification" to challenge the accuracy of the criminal conviction. This was the first-time Panzica was informed that a criminal conviction would lead to a permanent disqualification from employment in New Jersey Public Schools.

LEGAL ANALYSIS AND CONCLUSIONS

A. Summary Decision Standard

Under N.J.A.C. 1:1-12.5(b) a "motion for summary decision shall be served with briefs and with or without supporting affidavits." N.J.A.C. 1:1-12.5(b). A summary decision may be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Ibid.

A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-529 (1995). The Supreme Court of New Jersey has adopted a standard that requires judges to "engage in

an analytical process to decide whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533.

"When a motion for summary decision is made, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding . . .." N.J.A.C. 1:1-12.5(b). A court should deny a motion for summary decision when the party opposing the motion has produced evidence that creates a genuine issue as to any material fact challenged. Brill, supra, 142 N.J. at 528-29. When making a summary decision, the "judge's function is not himself [or herself] to weigh the evidence." Id. at 540.

The Petition filed by Panzica, along with his certification, attests that he pleaded guilty to one count of a drug paraphernalia charge; that he informed the District of his arrest and criminal charge and he requested a 90-day stay to "challenge" the plea agreement entered in the Municipal Court. Panzica's attestation as contained in the Petition are admissions of fact and therefore do not give rise to any material issue of material fact challenged. Panzica challenges his procedural due process rights and right to be heard, which is a question of law.

B. The Employee Disqualification Statute:

A school, or school system under the supervision of the Department of Education and board of education which cares for, or is involved in the education of children under the age of 18 shall not employ for pay or contract for the paid services of any custodian, school maintenance worker, or any other person serving in a position which involves regular contact with pupils unless the employer has first determined consistent with the requirements and standards of this act, that no criminal history record information exists on file in the Federal Bureau of Investigation, Identification Division, or the State Bureau of Identification which would disqualify that individual from being employed or utilized in such capacity or position (N.J.S.A. 18A:6-7.1)

An individual, shall be permanently disqualified from employment or service in a public school district, if the individual's criminal history record check reveals a record of conviction for any crime involving, "drug paraphernalia" as defined pursuant to N.J.S..A. 2C:36-1 et seq. (N.J.S.A. 18A:6-7.1(b).

An individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act without an opportunity to challenge the accuracy of the disqualifying criminal history record (N.J.S.A. 18A:6-7(e).

Panzica does not deny the criminal conviction that resulted in his disqualification from employment. In addition, Panzica does not challenge the "accuracy" of his criminal conviction. Panzica requests an opportunity for a do-over in the Municipal Court. Panzica claims that he was not "informed" by anyone nor "advised" in any document from the DOE or the District, that a drug paraphernalia conviction would result in disqualification from his employment at the District. However, Panzica fails to cite any regulation or case law for his argument that the District has a duty to inform him of the consequences of a drug conviction. The statute, which regulates Panzica's disqualification from employment, N.J.S.A. 18A:6-7.1(b), is a public record and is made available for all to read. Panzica admits that he did not avail himself of the statute's requirements before he entered his guilty plea in the Municipal Court, and now blames the DOE and the District for his error.

Panzica is also mistaken when he argues that his procedural due process was violated before he was disqualified from his public employment at the District. The statute provides that an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act without an opportunity to challenge the accuracy of the disqualifying criminal history record (N.J.S.A. 18A:6-7(e). Said opportunity was provided to Panzica in the DOE's notice of December 2, 2016, which allowed Panzica "30 days" from the date of the notice or disqualification to "challenge the accuracy" of his criminal history record. Panzica has not submitted any proof challenging the criminal conviction, but instead chose to challenge the disqualification process instead.

Accordingly, the Department's motion for summary decision in lieu of an answer to dismiss the Petition is **GRANTED**.

ORDER

It is hereby **ORDERED** that the Department's motion for summary decision in lieu of an answer to dismiss the Petition is **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 25, 2017
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: April 25, 2017

Date Mailed to Parties:
lr APR 26 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

263-17

In the Matter of the **TENURE** Hearing	)	
	)	
of	)	
	)	**OPINION and AWARD**
ORLEANS SARMIENTO	)	
"Respondent"	)	
	)	
and	)	AGENCY DOCKET NO. 79-4/17
	)	
SCHOOL DISTRICT OF THE TOWNSHIP OF SADDLE BROOK	)	
"Petitioner"	)	
	)	

By letter dated May 17, 2017, M. Kathleen Duncan, Director of Bureau of Controversies and Disputes, determined that the charges were reviewed and "deemed sufficient, if true, to warrant dismissal or reduction in salary." Therefore, in accordance with the Teacher Effectiveness and Accountability for Children of New Jersey Act, ("TEACHNJ Act" or "Act") P.L. 2012, Chapter 26 signed into law by Governor Chris Christie on August 6, 2012 the undersigned was appointed as Arbitrator on May 18, 2017 of the dispute described herein.

The hearings were held on June 27, July 10, 17 and 18, 2017 at the Board of Education office, Saddle Brook, New Jersey. Both parties were afforded full opportunity to present all the necessary proofs and evidence. A verbatim transcript was made and all witnesses were sworn. Briefs were received as agreed.

BEFORE: Mattye M. Gandel, Arbitrator

APPEARING FOR PETITIONER:

Jessika Kleen, Esq.
Janelle Winters, Esq.
Machado Law Group

APPEARING FOR RESPONDENT:

Ty Hyderally, Esq.
Francine Foner, Esq.
Hyderally & Associates P.C.

BACKGROUND:

The matter arose as a result of tenure charges filed against Respondent, Orleans Sarmiento. On April 12, 2017 the Board of Education (Petitioner/District/Board/Administration) determined, by a majority vote of the whole, that there was probable cause to support the tenure charges filed on March 16, 2017 against Respondent for Conduct Unbecoming and Other Just Cause.

The sequence of events was as follows:

- November 1, 2016 Respondent called to a meeting with Administration
- November 4, 2016 Respondent suspended
- March 3, 2017 Respondent's attorney wrote a letter advising the District that Respondent intended to file a complaint against the District
- March 13, 2017 District notified Respondent that it intended to serve Respondent with tenure charges
- March 16, 2017 Interim Superintendent Anthony Riscica presented to the Board the tenure charges with eight (8) interviews, although the verbiage stated that there were ten (10) students interviewed
- March 17, 2017 Letter to Respondent and her attorney advising them that they have fifteen (15) days to respond in opposition to the charges
- April 12, 2017 Board met and determined by a majority vote that there was probable cause to credit the evidence in support of the tenure charges filed on March 16, 2017
- April 24, 2017 Board sent Department of Education certified tenure charges.

POSITIONS OF THE PARTIES:

The Petitioner's position is that Respondent had a responsibility to retain her cell phone as she knew there would probably be litigation, knew that her cell phone would be part of the tenure charges, which directly involved the text messages she sent student JB,[1] and knew that without the phone the District was precluded from questioning her relating to the phone and challenging Respondent's unsubstantiated

and self-serving claim that the phone was utilized to enter attendance, grades and to conduct lessons. Rather, Respondent disposed of key evidence just a few weeks prior to the first hearing in this matter and two months after receiving notice of this litigation. Respondent's destruction of evidence is prejudicial and should not be permitted and an inference in Petitioner's favor should be granted.

Further, it is Petitioner's position that Respondent violated the Family Educational Rights and Privacy Act (FERPA) and Board policy regarding the handling of student records; that the policy only permits access to student records for school district personnel who have "assigned educational responsibility of the pupil;" that she was not assigned educational responsibilities for these two students, MC and JV, and that despite the fact that they were not on her roster, she accessed their student records in clear violation of FERPA, state law and Board policy. For this her increment was withheld for the 2015-2016 school year.

It is the District's position that Respondent engaged in an inappropriate and harmful text conversation with a minor student; that Respondent, as a teacher, is held to a higher standard of behavior and that she failed to conduct herself according to that standard. She violated Board policy 3281 when she engaged in a series of personal text messages of an inappropriate nature with student JB. Further, it was not until the arbitration hearing that Respondent admitted using curse words, advising the student how to avoid and contest administrative discipline and denigrating the administration and indicated for the first time that she regretted using such language. While she

[1] All students are referred to only by their initials.

claimed to have no prior knowledge of the incident in which JB was involved, the text demonstrated otherwise. If she had no knowledge of the situation, as she admitted, she had no right to make a judgment regarding JB's discipline.

Respondent claimed at the hearing to regret most of her statements to JB but cited the impact on her personally as the reason she would not behave in such a manner again, rather than acknowledging that such statements were outright inappropriate and potentially harmful to JB. She claimed her responses to JB showed concern for her mental health but admitted she never told administration about her concerns. It is Petitioner's position that should Respondent feel certain conduct is necessary to assist a student in the future, she will act accordingly, even if it violates Board policy and the law.

Additionally, Respondent continued in her improper behavior as a Teen PEP/Health co-advisor and head coach of the volleyball team. The District asserts that she complained to her students that administration was punishing her for helping students; that administration was out to get her; that she was given the smallest classroom in the school as punishment; that she asked a student for a recommendation for a therapist because she was suffering from anxiety and depression; that she cried in front of students; that she failed to report an allegation of bullying and that she told students that an AIDs Day field trip was denied, when it was not even submitted for approval. All these incidents require Respondent's dismissal.

Moreover, Respondent failed since May of 2016 to demonstrate any authentic remorse for her conduct and, until the date of her testimony, she failed to ever express

remorse even to her own Union representative. It is Petitioner's position that Respondent was not truthful in her testimony, continued to claim that her comments in the text to JB was in her best interest and has refused to accept real responsibility and to acknowledge the gravity of Respondent's conduct.

As regards the TeenPEP curriculum, while there were ways that Respondent could have shared incidents or feelings with the students, her choice of topics including denigrating administration, advising students that she was depressed and sharing her personal sexual history to make them feel they can talk to her where inappropriate.

It is the District's position that there was no disparate treatment or retaliation in this matter; that there was no evidence that Respondent is being treated differently than any other employee; that Sandra Frazier, volleyball coach with Respondent, was disciplined for texting an adult during teaching time and that although other employees may have texted student athletes, there is no testimony that these employees contacted students in an impermissible way.

Further, Respondent's employment history is not dispositive. Her conduct herein is sufficiently flagrant and constitutes a series of incidents that justifies her termination, despite her history.

Finally, Respondent was not credible and had her testimony had numerous inconsistencies, unsubstantiated claims and was not truthful regarding her knowledge of JB's discipline. In contrast, the testimony of the District's testimony was credible and was not contradicted.

Therefore, Petitioner asks this Arbitrator to determine that Respondent is unfit to discharge her duties as an educational professional and is not fit to be entrusted with the care and custody of children; that Petitioner has proven by a fair preponderance of the evidence that Respondent will continue to both educationally and emotionally endanger District students; that the tenure charges be sustained and that Respondent be dismissed from her employment with the District.

Respondent's position is that "conduct unbecoming" is defined as conduct "which has a tendency to destroy public respect of government employees and confidence in the operation of public services" and that even if the purported conduct occurred, it still falls short of "conduct unbecoming." Further, Petitioner does not allege that Respondent engaged in any communications with a student that were of an inappropriate personal or sexual nature and does not allege that she favored players, only that some players perceived that. Petitioner's allegation that Respondent cried and that she shared personal experiences and expressed emotions should not serve as a basis for tenure charges as crying is human and a valuable lesson and as sharing emotions was required by the TeenPEP program. While the District alleges that Respondent encouraged JB to file an Harassment Intimidation Bulling (HIB) charge, she never did but same would not constitute a basis for tenure charges because under the Anti-Bullying Bill of Rights Act (N.J.S.A. 18A:37-13 *et seq.*), teachers have a duty to assist students who believe they are being bullied.

Further, it is Respondent's position that a review of the interviews conducted by the Administration reveals a lack of credible evidence to support the allegations of

Respondent's interaction with students. There was no evidence that Respondent engaged in any personal communications with players or students and, in fact, there was no clear policy prohibiting coaches from texting players but rather coaches were instructed to exchange contact information with players. Further, Respondent did not use her cell phone during class but when she left the room to get supplies or go to the bathroom she might have taken a call or received a text. When she used her cell in class it was to access TeenPEP curriculum, to post homework on Remind 101, to take attendance or to input grades because there were two teachers in the classroom but only one computer. Regarding communicating with players, there was no evidence to support that any communications were inappropriate or unrelated to volleyball matters or that Respondent exchanged any text messages with individual players. Some players complained that Respondent showed favoritism but others, including Respondent's assistant coach, testified to the exact opposite, that Respondent treated players inclusively, that she was well-liked and a fair coach and that she provided them with a very positive team experience.

Respondent asserts that there is virtually no support in the record that she cried on multiple occasions and was overemotional and even if it occurred, crying and showing emotion is no basis for tenure charges and if she cried during TeenPEP sessions, that is part of the sharing experience as testified to by Evelyn Moon, Project Manager for the Center for Supportive Schools. Moreover, teachers, who had worked with Respondent for ten years, a former superintendent and a former volleyball player, testified that they never observed anything inappropriate in Respondent's interaction with students. Finally, as to

the allegations by some students regarding Respondents complaining about her employment, the overwhelming testimony did not support that allegation and, in any event, whatever was said at the TeenPEP sessions was supposed to be confidential. Petitioner has failed to sustain its burden of proof regarding allegations that Respondent was overly emotional, that she engaged in any behavior that made students uncomfortable or that she complained about her employment and administrative staff.

It is Respondent's position that the real issue is whether the text message with student JB constituted conduct unbecoming. Several factors should be taken into account to determine conduct unbecoming including the nature and gravity of the offenses, evidence as to provocation, harm the teacher's conduct had on the proper administration of the school, the teaching record and ability of the teacher and the disciplinary record and the impact of the penalty on the teacher's career. Respondent contends that when each of these factors is examined, it must be concluded that Respondent's actions do not constitute conduct unbecoming and, therefore, the tenure charges should be dismissed and the penalty should be other than termination.

Additionally, Respondent asserts that previous tenure cases suggest that progressive discipline should be imposed before resorting to the harshest penalty and cited several much more egregious cases wherein progressive discipline was applied. In this District, there was testimony that when teachers have been caught texting in class, they were only given a write up for inappropriate conduct. Therefore, considering that Respondent has served her school with distinction over a lengthy career with an

unblemished and distinguished record and considering the nature of the alleged wrongdoing, she deserves the application of progressive discipline.

It is Respondent's position that though she may have had a lapse in judgment, her conduct does not rise to the level of conduct warranting termination. Respondent cited many prior arbitration decisions involving much more serious misconduct wherein the charges were upheld but dismissal was not the appropriate remedy.

Finally, Respondent asserts that dismissal of the charges is warranted based on procedural errors. The Board failed to provide written notification of its determination to Respondent within three (3) working days of its determination. The Board failed to provide a Certificate of Determination in the proper format and the charges were certified to by Riscica, who had no direct knowledge or participation in the investigation.

Therefore, Respondent asks this Arbitrator to reinstate her to her position and made whole for all losses in pay, seniority, benefits and all emoluments and to expunge her record of all disciplinary actions related to this matter. Alternatively, if suspension is warranted, Respondent asks this Arbitrator to impose the appropriate suspension of 120 days or less, which Respondent has served.

OPINION:

Respondent was charged with violating three specific Board Policies, which Petitioner claimed proved "conduct unbecoming." In fact, both parties cited the definition of conduct unbecoming in a similar manner as a tendency to destroy public respect for government employees, conduct that offends publicly accepted standards of

decency, destroys confidence in the operation of public services and conduct which adversely affects morale or efficiency for a public entity.

Board Policy and Regulation 3281, Inappropriate Staff Conduct, (Tab 1, P-14)[2] which stated in relevant part that

> The Board of Education recognizes its responsibility to protect the health, safety and welfare of all pupils within this school district. Furthermore, the Board recognizes there exists a professional responsibility for all school staff to protect a pupil's health, safety and welfare. The Board strongly believes that school staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district.
>
> In support of this Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.
>
> . . .
>
> School staff's conduct . . . shall be appropriate at all times. School staff shall not make inappropriate comments to pupils . . shall not engage in inappropriate language. . . shall not engage in inappropriate conduct toward or with pupils. School staff shall not engage or seek to be in the presence of a pupil beyond the staff member's professional responsibilities.
>
> . . .
>
> Inappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Therefore, school staff members are advised to be concerned with such conduct which may include, but is not limited to, communications and/or publications using e-mails, text-messaging, social networking sites, or any other medium that is directed and/or available to publics or for public display.
>
> . . .
>
> School personnel, . . . are required to report to their immediate supervisor or Building Principal any possible violation of this Policy. . . .

Board Policy 3282, Use of Social Networking Sites (Tab 2, P-15) stated in pertinent part that

> . . .

[2] "T" or "Tab" refers to the Board's document in its book of exhibits and "P" refers to the Arbitrator's identification of Petitioner's exhibit.

When using personal social networking and/or media sites, school staff members:

1. Should not make statements that would violate any of the district's policies, including its policies concerning discrimination or harassment;
2. Must uphold the district's value of respect for the individual and avoid making defamatory statements about the school district, employees, pupils, or their families;

Board Policy 3283, Electronic Communications Between Teaching Staff Members and Students (Tab 3, P-16) states in pertinent part that

> . . . the Board of Education adopts this Policy to provide guidance and direction to teaching staff members to prevent improper electronic communications between teaching staff members and students. The Commissioner of Education and arbitrators, appointed by the Commissioner, have determined inappropriate conduct may determine a teaching staff member unfit to discharge the duties and functions of their position. Improper electronic communications by teaching staff members may be determined to be inappropriate conduct.
>
> . . .
>
> Inappropriate content of an electronic communication between a teaching staff member and a student includes, but is not limited to:
>
> . . .
>
> 4. Communications which include the use of profanities, obscene language
>
> . . .
>
> 6. Communications requesting or trying to establish a personal relationship with a student beyond the teaching staff member's professional responsibilities;
>
> . . .
>
> The following acceptable protocols for all electronic communications between a teaching staff member and a student shall be followed:
>
> . . .
>
> 3a. Text messaging communications between a teaching staff member and an individual student are prohibited.
>
> . . .

The record established that staff members receive training in Board Policies and that Respondent received the Staff Handbook for the 2016-1017 school year (T 17, P-

3), which lists all the Policies including the three Policies Petitioner claimed Respondent violated. On page 3 of the Handbook, Bates stamped P 00249, it stated:

> **Policies Acknowledgement Form** – Please complete the Google Form linked below to acknowledge that you have read these policies no later than, Friday, September 9th.

Respondent acknowledged at the hearing that she was aware of these policies and stated that, as a teaching professional, it was her responsibility to know and understand the laws, rules and policies of the District. Further, when the Board implements these policies, it fulfills its obligation to its staff and students. The Board has a right and responsibility to promulgate reasonable polices so that the schools function smoothly and so that staff understands their employment expectations. In this day and age of social media explosion and ready access to cell phones and other electronic devices, the Board needs to keep the students and staff safe and has a right to expect that staff members will act professionally and responsibly when interacting with students.

The matter herein involved an exchange of text messages between Respondent, a Special Education teacher and Volleyball Coach, sent from her personal cell phone, September 28 through October 5, 2016, and student, JB, who did not testify. During its investigation, the Board determined that some of these messages were sent when Respondent was supposed to be teaching or prepping for other classes. Respondent's Daily Schedule for the 2016-2017 school year, (P-2, T-5), indicated that Period 2 extended from 8:56 a.m. to 9:45 a.m., Period 4 was from 10:40 to 11:29 a.m. and Period 7 was from 1:16 to 2:05 p.m.

When comparing the times on the text message (P-1, T-4) with the periods of the day, (P-2, T-5) it was concluded that on Thursday, September 29, Respondent was texting JB at 10:47 a.m. during Period 4, Respondent's Prep period, when she was supposed to be preparing for other classes; that on Friday, September 30 at 1:48 p.m. Respondent was texting JB during Period 7 when she was assisting special education students in Biology and that on Tuesday, October 4 at 9:09 a.m. and on Wednesday, October 5 at 9:11 a.m., Respondent was texting JB during Period 2 when she was assisting special education students in Biology. Further, it was undisputed that professional development days are part of the work day and that teachers are paid for that time. Therefore, it must be concluded that Respondent was texting a student during instructional time or time when she was supposed to be preparing for other classes.

Respondent was called to a meeting on November 1, 2016 with Interim Superintendent Anthony Riscica, High School Principal John W. Lawlor, and Union President Kimberly Salma at which time Principal Lawlor told Respondent that the Board had knowledge of the existence of a text message, (P-1, T-4), which it asserted violated the above three Board Policies. Further, by letter dated November 4, 2016, (P-17, T-6) Respondent was advised that she was suspended from her teaching and coaching responsibilities while the District completed a full review of the text messages between her and the student and Mrs. V's[3] concerns about the TeenPEP program.

[3] Ms. V is the parent who testified that she found the text message on her computer, was concerned and brought it to the attention of Administration along with her concerns about Respondent and the TeenPEP program. There was a legitimate concern as to whether the text messages were fond on Ms. V's computer because of the cracked glass marks on the text exhibit (P-1, T-4).

This Arbitrator signed a subpoena directing Respondent to submit her cell phone, which was used to text student JB, and the record of her phone records. In response, Respondent provided an eBay receipt indicating that Respondent sold her phone in early May 2017. Further, while this Arbitrator agreed that the initial subpoena for cell phone records was overly broad, the final subpoena was tailored to cover a limited time period prior to Respondent's suspension for phone and text data. Though multiple attempts were made to obtain texts usage from her cell phone or cell data usage for the year prior to the filing of tenure charges, the phone company notified Respondent that it could only go back ninety (90) to capture the information requested through a subpoena. Therefore, no text date was present at the hearing.

Petitioner asserted that it was prejudiced by the fact that the cell phone was not produced based on a claim of spoliation of evidence. This Arbitrator must agree that the timing when Respondent sold her phone was very concerning. She knew that tenure charges were filed on April 24, 2017 and she had hired an attorney in March 2017. Further, she clearly knew that her cell phone, along with the actual text, (P-1, Tab 4), were the central pieces of evidence in this matter. Therefore, in the opinion of this Arbitrator, Respondent had a responsibility to retain her cell phone until the proceedings were concluded. She did not and this Arbitrator can draw a negative inference from her actions. If she had nothing to hide, she would have wanted to present evidence that supported her assertion of not improperly using her cell phone except in this one instance with student JB. While the District has the burden of proof,

Respondent improperly prevented Petitioner from presenting all the relevant evidence against her.

As part of its investigation, the Riscica directed Lawlor and Middle School Assistant Principal Brenda Coffey to interview students regarding their interactions with Respondent as a teacher and coach. According to Lawlor, he randomly selected ten students from the roster of the TeenPEP class and the volleyball team and interviewed them along with Coffey during the first week of January 2017. The students answered questions from Lawlor and Coffey as identified in the record of the hearing as (P-4, T-7) through (P-11, T-14).[4] In addition to responding to questions from Lawlor and Coffey, Lawlor testified that the students were asked to write a statement based on his/her interactions with Respondent. Further, Coffey confirmed that the students were asked to write in their own words any additional information they would like to share. Further, seven of these eight students testified at the hearing.[5] This Arbitrator was convinced that in fact the investigators told the students as testified to by Lawlor and Coffey to write whatever supplemental information they wanted to share.

[4] Of the ten students that the District interviewed, it submitted these eight as part of the tenure charges against Respondent. However, two other interviews, R-9 and R-10, were not included in the tenure charges given to the Board for its consideration. While Riscica testified that he "believed" that all ten interviews were given to the Board prior to it certifying tenure charges, there was no proof of that happening and, in fact, the tenure charges, Joint Exhibit J-2, filed on April 24, 2017 only included eight interviews.

[5] JB's interview (P-10, T-13) and R-7, a statement by JB, which was not admitted into evidence, were not reviewed or taken into consideration in this decision because she did not testify. Each party was not able to question JB regarding these documents. Without JB's direct testimony this Arbitrator determined that these documents, which went to the very heart of this matter, were rank hearsay and not admissible even under the lenient hearsay rules applied in arbitration.

A careful review of these statements led this Arbitrator to conclude that the students made complimentary as well as critical statements about Respondent. Several recurring themes were

No individual texting, only group texting for games
Cries a lot/ in class and at practice
Did not tell us how to sneak out of school
Has favorites. "Either she really likes you or you are not there."
No private lunch/dinners with Respondent
Let's emotions get in the way. Opinionated
Did not say administration out to get her
Did not pressure kids to share secrets
Said administration out to get her
Said she was punished for helping students
Feels empty without her

Two additional students were interviewed, R-9 and R-10, which Lawlor testified he included with the other eight when he presented the interviews to Riscica. However, when Riscica submitted the packet of information to the Board to determine whether tenure charges were appropriate, these two interviews were not included. There was no definitive testimony as to whether they were ever given to the Board but clearly they were not included in the tenure charges, Joint Exhibit J-2.

The themes in R-9 and R-10 were

No private text messages, only group texts
Makes you feel comfortable
No negative talk about administration
Crying but just "normal stuff"
Never heard administration out to get her
R-10 acknowledged that she was not around a lot because worked after school but when there, never felt uncomfortable and never saw Respondent inappropriate.

While R-9 and R-10 were more positive regarding Respondent than those submitted with the tenure charges, there should have been no reason for Riscica to not

have included them in the tenure charges given to the Board. The Superintendent had a responsibility to give the Board a complete picture of the investigation and the reasons that tenure charges were contemplated.

However, the main reason according to Riscica that Respondent was brought up on tenure charges was because of the exchange of texts between Respondent and JB (P-1, T-4). When Riscica was asked if all Respondent's evaluations and observations were positive would it have changed his mind on filing tenure charges, he responded, "Absolutely not. Because it was the content of the text message . . ." He explained that a teacher should not have been commenting on an HIB investigation. However, in the opinion of this Arbitrator, even if the text was the overriding concern, certainly a fair investigation would have to include examining an employee's complete employment record.

All adult witnesses for both Petitioner and Respondent agreed that they would not curse in front of students, would not make a judgment on a HIB matter without having knowledge of that investigation and would not think that a student being bullied was petty or bullshit. In the instant matter, it was clearly the content of the text and not the fact that Respondent was texting a student that caused the Administration to file tenure charges.

Student JB initiated the text and, as stated above, all but one of the texts was exchanged during times when Respondent should have been teaching or preparing for another class.[6] All witnesses agreed that it is not appropriate to text a student during

[6] Respondent asserted that she had breaks during the professional development class and went to the bathroom during class, went to make copies during class, which would have given her the opportunity to

times when a teacher is supposed to be engaged in some form of educating students. Further, Lawler testified that staff is encouraged to use the Remind 101 app, which is a group text, to prevent one-on-one communications between students and staff. The record did establish that teachers and students have exchanged texts but the topics cannot be of a personal nature. Further, even when Respondent texted individual members of the volleyball team, it was established that those texts related to practice, scheduling and other team matters, which was agreed was completely appropriate.[7]

However, texting a student over a seven-day period from September 28 through October 5, 2016 during class time about subjects not related to school work but rather related to the student's discipline and actions by Administration was completely inappropriate. Respondent tried to explain that she interacted with JB the way she did because she was concerned about her mental health; that JB was an at-risk teenager and that she was trying to be supportive. However, if Respondent was so concerned about the student's well being, she should have alerted Administration sometime over those seven days. She did not contact administration and did not contact JB's mother during the period of the text exchange but rather took the matter into her own hands. While Respondent testified that she would act differently if this situation occurred in the future, her judgment was faulty.

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text. However, this was all speculation and simply excuses for her behavior. She submitted no proof that she was actually engaged in those activities when these text messages were exchanged.

[7] Clearly coaches were directed to exchange contact information with players as stated in the Coaches Handbook, R-6.

Of further concern to this Arbitrator was Respondent's repeated testimony that when she read these texts the only knowledge she had was what was contained in these messages. However, this Arbitrator was not convinced.

Based on JB's statement that she was suspended because she "called her (another student) a name" Respondent made a judgment that the discipline was bullshit and admitted that she made that comment without knowing the details of the interaction between JB and that other student. Further, Respondent was judging the way this Administration was handling the situation when she commented about how her husband would have handled the matter. Additionally, she texted that

> I would have asked him to see the camera footage and how can a camera show you called someone a name.

From this one comment two things were clear. First, there had to have been some conversation by text or in person after she texted "Are you kidding me???" and before she wrote "I would have asked him to see the camera . . ." because otherwise it makes no sense. JB did not tell her in the text in evidence that there was a camera shot of the event. Respondent must have known from another conversation. Second, her testimony that the only knowledge she had of the investigation was what was contained in the text was clearly not accurate.

Further, that Respondent was texting a student and getting involved in her discipline and questioning Administration's actions was unacceptable. Respondent acknowledged that she knew the rules and policies, which stated in relevant part that

> Inappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Therefore, school staff members are advised to be concerned with such

> conduct which may include, but is not limited to, communications and/or publications using e-mails, text-messaging,
>
> Improper electronic communications by teaching staff members may be determined to be inappropriate conduct.
>
> Text messaging communications between a teaching staff member and an individual student are prohibited.

By any reading of these policies, it was clear that Respondent's conduct was inappropriate and violated the policies.

Respondent was hired for the 2001-2002 school year and was granted tenure in September 2004. The record established that Respondent's personnel file, R-1, contained observations and evaluations since she was hired but this Arbitrator focused on those observations/evaluations after she was awarded tenure beginning in the 2004-05 school year through the 2015-2016 school year. Additionally, Respondent's Coaches Evaluation, R-2 and Commendation TeenPEP, R-5, were also entered into the record of the hearing in support of Respondent.

It was clear that for some unexplained reason, there were no annual performance reviews for four of the years after Respondent became tenured, (2005-6, 2006-7, 2010-2011 and 2012-2013) and that there was only one observation per year from when Respondent was tenured through the 2012-2013 school year. Riscica testified that there should be a minimum of two observations per year on a tenured teacher.

Riscica testified that he believed that he reviewed Respondent's personnel file at some point but that he did not recall if some evaluations were missing. However, he stated that did not conduct any investigation to find the missing evaluations, he did not

ask anyone to find out why the evaluations were missing and did not give the Board any evaluations/observations to consider when they were reviewing tenure charges. Once again, a careful review of an employee's personnel record as part of a thorough investigation is a very important factor when determining the proper level of discipline.

Similar to the fact that Respondent sold her cell phone shortly before these hearings took place, which this Arbitrator questioned, there is a concern that several of Respondent's evaluations/observations were not submitted for this hearing and there was no effort made to locate them. Both actions, one by Respondent and one by Petitioner, hampered the full investigation of this matter.

From the documents submitted, this Arbitrator must conclude that Respondent was rated highly successful or successful in the years prior to the implementation of TEACHNJ. Further, for the 2013-2015 school year she received effective ratings and in 2015-2016 she was rated highly effective. Additionally, of the observations submitted, she was rated satisfactory to highly satisfactorily. The only negative comment appeared in the 2011-2012 evaluation, which stated that she was advised to go "through the chain of command to address concerns."

R-2 was the Coaches' Evaluation for which Respondent received mostly 5's in 2005 (outstanding) and mostly 3's and some 4's (average to good) in years 2006-2010. Beginning in the fall of 2012, the format changed and Respondent was rated "Meets Performance Standards" through the fall of 2015, the last evaluation included in R-2.

R-5 was a memo to Respondent from Lawlor dated November 13, 2015 in which he commends her for the TeenPEP program. "TeenPEP is a success because of you."

Therefore, it must be concluded that Respondent, a sixteen-year employee, was considered a good teacher and coach and her personnel record should have been considered when the Administration was determining a level of discipline to impose and that information should have been shared with the Board.[8]

Finally, a complimentary email regarding volleyball coaches, R-13; Respondent as Coach of the Year from the New Jersey Interscholastic Conference (NJIC), R-14 and plaque stating that this District was awarded the NJIC Meadowlands Division Volleyball Champions 2016, R-15, should have been reviewed as part of Respondent's personnel file.

One of the key elements in determining whether an employee is treated fairly and whether the employer acted appropriately is whether there was a fair and full investigation into the facts before a decision is made. In the instant matter, there were factors that concerned this Arbitrator.

For example, Respondent was never given a copy of the text in question though she and her Union representative, Salma, asked for it at the initial meeting on November 1, 2016 and at other times. Respondent's unrefuted testimony was that the

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[8] Respondent received discipline in the form of a withholding of an increment because of a violation of FERPA in March of 2016. However, while this incident was not part of the tenure charges, it was undisputed, and admitted by Respondent, that she accessed two students' records, who were not on her class rosters as students that she was responsible for. Board Policy 8330 states in pertinent part that

> Certified school district personnel who have assigned educational responsibility for the pupil shall have access to the general pupil record. .

As Respondent was not "assigned educational responsibility" for these students at the time she accessed their records, she was not authorized to access their records. Therefore, the only factor considered by this Arbitrator regarding the FERPA matter was that Respondent received discipline in the form an increment withholding for violating FERPA and Board Policy and the discipline is considered part of her employment history.

While Respondent initially stated that she had never received a reprimand, a warning or a suspension before these tenure charges were filed, she acknowledged on cross-examination that in May 2016 her

first time she saw a copy of the text was when she received the tenure charges in April 2017. Respondent had a right as early as November 1, 2016 to see the basis for being called into a disciplinary meeting and subsequently being suspended.

Additionally, as the Board was concerned about Respondent's behavior and interaction with students, part of a thorough investigation would have been to interview all persons who would have knowledge about Respondent's behavior. This would include teachers she co-taught with and her assistant volleyball coach. Riscica contended that he did not direct Lawlor to interview co-teachers because this was an issue between teachers and students and not between teachers and teachers. However, this Arbitrator cannot agree with that reasoning. If one is seeking information about Respondent's behavior in the classroom or on the volleyball field, it would have been perfectly reasonable to interview co-teachers and her assistant coach. These professionals would be the best people to evaluate what they observed on a daily basis and a credibility assessment could have been made as to their statements.

Further, Riscica testified that he did not ask Lawlor or Coffey to interview Respondent after the students' responses were reviewed to get her reaction and her side of the story. Riscica's position was that at the November 1, 2016 meeting he gave Respondent the opportunity to return at a later date with any other information she might have regarding this matter and that she never came to him. However, in the opinion of this Arbitrator, Respondent had a right to have known the evidence against her before she received the tenure charges and, to compile a full and complete

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annual increment was withheld due to what the Board determined was a violation of the laws and policies governing student records. Clearly, this is a form of discipline.

investigation, it was the Administration's responsibility to call Respondent in again after all the information was gathered to have fuller knowledge of her position.

Another factor was the selection of the students to interview. Respondent questioned how these ten (10) students were chosen from the forty-six (46) who were on the volleyball team and who participated in TeenPEP. Riscica testified that he did not tell Lawlor how many students to interview but Lawlor stated that he selected these ten students randomly from these programs. However, this Arbitrator noted that some of these students had curious connections to this incident. For example, the record established that one of the interviewees was Mrs. V's daughter, another was the child of a person who works for the District, another student did not make the varsity team and another was the student with whom Respondent texted in this matter. Therefore, at least 4 out of 10 students interviewed had a direct connection to this incident and might have had some biases against Respondent. While Lawlor testified that he randomly selected the participants, this Arbitrator was skeptical.

Additionally, when asked why two of the students' interviews were not included in the tenure charges presented to the Board, Riscica stated that "there's nothing there to support our case." However, when presenting a full and complete investigation to the Board, Administration should have given the Board all the facts so that it could have made a reasoned decision based on all the information learned during the investigation, favorable or unfavorable to the Administration's conclusion.

Therefore, this Arbitrator must conclude that the Board did not fulfill its responsibility to conduct a fair and through investigation, did not interview all

participants who would have had knowledge of Respondent's behavior in the class, did not give Respondent a copy of the text in question, did not contact Respondent after the investigation was completed as Riscica stated in his November 4, 2016 suspension letter to Respondent, did not select the students to be interviewed in a fair and impartial manner and did not supply the Board with all the interviews conducted or the evaluations/observations of Respondent with the tenure charges.

The final issue of concern for the Administration[9] regarded TeenPEP (Prevention Education Program)[10] and Respondent's involvement as co-teacher/advisor of the program. Lawlor testified that he recruited Respondent as he believed she would be effective. The record established that Lawlor commended Respondent in November 2015, R-5, for the success of the program. Specifically, Lawlor wrote that

> You went above and beyond by sacrificing time with your families to attend professional development and the retreat with students. Your efforts have paid off. The success of this program is a tribute to your commitment and organization skills. You have quickly established a rapport with students to provide an environment where they are comfortable to discuss these sensitive issues. TeenPEP is a success because of you.

Several of the students who were interviewed as part of this investigation participated in this program and made comments about Respondent's behavior during the classes and during the retreats. While she was complimented she was also criticized for being overly emotional, crying and for vocalizing her own anxieties, fears and secrets.

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[9] While the Board claimed in its brief that Respondent violated HIB by not reporting the alleged bullying against student MS, this was not part of the tenure charges and, therefore, is not before this Arbitrator for consideration.

An overview of the program, R-3, states that

> TeenPEP is a comprehensive sexual health program that utilizes peer-to-peer education to increase students' knowledge, attitudes, skills, and behaviors associated with healthy decision-making.

Additionally,

> Teen PEP is implemented in high schools as a course for-credit . . . Carefully selected junior and/or senior students are enrolled in the TeenPEP course and provided with educational training that addresses a range of topics related to sexual health. The peer educators, in turn, conduct a series of structured workshops with groups of younger peers . . .

A concise and detailed explanation of TeenPEP was testified to by Moon, the technical assistant assigned to this District. Respondent, along with Frazier, her co-advisor, received extensive training in how to run the program. Moon stated that the first year of the program, the District hit all the benchmarks and was certified and, according to Moon, Respondent and Frazier, "were behaving and creating an atmosphere where the program could run with fidelity."

Moon had observed Respondent in the classroom in the fall of 2015, at a workshop in November 2015, at family night in the spring of 2016 and made one other observation of Respondent. Additionally, Moon observed Respondent during six days of training for a total of 35 to 37 professional development hours and testified that during all her observations Respondent behaved appropriately and that she never received a complaint from students or from anyone in Administration and that Respondent provided an environment where students were comfortable discussing sensitive issues. In fact, an email attached to R-5 from Moon complimented the advisors and Lawlor for

[10] TeenPEP is a partnership between the NJ Department of Health, Center for Supportive Schools and a teen health organization in Princeton called HiTOPS.

the "wonderful job you are all doing." As related to Respondent, Moon stated that "Orleans really set the tone for the 9th graders, which I think made them, overall, a better audience."

Having listened to the testimony regarding this program and reviewed the program material, it was clear to this Arbitrator that this is a very sensitive program to successfully navigate. Two advisors are selected by the Administration and are trained by staff from the Center for Supportive Schools. Then members of the junior and senior classes are identified to participate and are trained in the program, which consists of retreats and classroom exercises. Subsequently, these students work with the freshman class as part of the health program in a peer-to-peer sexual health program. Sex education is a very sensitive, complicated and difficult course to teach and as Moon stated, "we advise them (the advisors) to participate authentically and . . . to use your best judgment." Of course, the advisors are to follow Board policies and are advisors, not peers with the students.

Advisors and participants are encouraged to open up and talk about their personal experiences without being forced to reveal anything they did not want to reveal knowing that there is a level of confidentiality when participating in this program. For example, the document entitled "Sharing at the 3-Day Retreat," part of R-4, the Advisor Resource, manual states that

> Sharing is one of the exercises we'll be doing at the retreat. It's a great opportunity for us to get to know each other better. Part of operating an effective group is mutual trust. One way to develop this trust is by allowing ourselves to open up to each other in a non-judgmental environment. . .
> . . . Maybe you've suffered a loss that was life changing. Maybe you took

> a journey that will forever alter your life. Maybe you are struggling with an aspect of your life and are willing to share that struggle with others.

Advisors and participants are given license to encourage bonding experiences, which if not handled properly can lead to difficult situations and in the wrong hands can make students feel uncomfortable resulting in a negative experience. Further, though there was a family night as part of the training, who attended and how much did they realize the impact on the students? In the instant matter, students came away with different experiences as reflected in their interviews.

However, when reviewing all the documents and testimony regarding the TeenPEP program, it is hard to make a judgment about Respondent's behavior in the program. Did Respondent share too much, did she cry too much? That depends on the situation and who was participating. Participants who were interviewed had varying opinions on how Respondent behaved. On the one hand, it was clear that participants were encouraged to open up and express their emotions, which was a goal of the program, but on the other hand, there is a delicate balance of sharing too much and sharing certain kinds of experiences. Certainly, there was no evidence to convince this Arbitrator that tenure charges should have been filed against Respondent regarding TeenPEP but would suggest that both advisors receive additional training to assure that they are being consistent with the program as envisioned by Moon and the Center for Supportive Schools and not stepping over that line of being inappropriate.

In conclusion, this Arbitrator has reviewed and carefully weighed all the evidence and arguments presented at the hearing and through briefs by both parties even though many facets were not referred to in the Opinion. Considering all the facts, this Arbitrator

must decide that that the Board did not prove by a preponderance of the evidence that Respondent's behavior rose to the level of "conduct unbecoming" to warrant removing her tenure. However, there was more than sufficient evidence in the record to convince this Arbitrator that Respondent was completely inappropriate in her interaction with student JB even without ever hearing JB's testimony.

The text messages, acknowledged by Respondent as to their accuracy, stand on their own in support of the Administration's conclusion that Respondent stepped over the line regarding language, comments about Administration and advice to JB. However, given Respondent's long employment with one discipline on her record and good to very good evaluations and while she shall retain her tenure and her position in the District, a lengthy suspension is the appropriate penalty. Respondent recognized that her behavior was unacceptable and that, as she stated, she will never engage in this type of behavior in the future.

In consonance with the proof and upon the foregoing, the undersigned Arbitrator hereby finds, decides, determines and renders the following:

A W A R D

1. The Board of Education did not prove that tenure charges of "conduct unbecoming" should be sustained for Respondent's behavior. However, a one-hundred twenty-day (120) suspension, with time served, and salary loss shall be imposed.

2. Given that Respondent was paid the entire time she was suspended, she shall reimburse the Board of Education for the one-hundred twenty-day (120) day suspension.

3. Respondent shall be reinstated to her former positions in the District with no loss of seniority or benefits.

Mattye M. Gandel

Mattye M. Gandel

Dated: August 31, 2017

State of New Jersey)
:SS
County of Essex)

On the 31st day of August before me personally came and appeared Mattye M. Gandel, to me known and known to me to be the person described herein who executed the foregoing instrument and she acknowledged to me that she executed the same.

Notary Public

LILIANA E. GUTIERREZ
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires July 30, 2019

266-17

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IN THE MATTER OF SAMUEL LEBREAULT, PERTH AMBOY BOARD OF EDUCATION.	OFFICE OF ADMINISTRATIVE LAW Agency Docket No: C16-12 OAL Dkt. No.: EEC 13629-2012N **CONSENT ORDER FOR SETTLEMENT WITH SAMUEL LEBRAULT**

WHEREAS, Petitioner, New Jersey Department of Education, School Ethics Commission ("SEC") and Respondent, Samuel Lebrault ("Respondent") have mutually agreed to settle the above-captioned matter, with CHRISTOPHER S. PORRINO, ATTORNEY GENERAL OF NEW JERSEY, by Geoffrey N. Stark, D.A.G., appearing on behalf of the SEC, and Rita F. Barone, Esq., appearing on behalf of Respondent; and

WHEREAS, matter EEC 13629-2012N arose from the SEC's decision of September 25, 2012, finding probable cause to credit the allegations that Respondent violated N.J.S.A. 18A:12-24(b);

and N.J.S.A. 18A:12-24.1, (d), (e), and (h); and

WHEREAS, the settlement of this matter shall not constitute precedent or be considered an admission of any conduct beyond that specifically described herein, or in the attached affidavit of Respondent.

NOW, THEREFORE, the parties hereto agree to settle the above-captioned matter upon the following terms:

1. Respondent acknowledges that the conduct described in the attached affidavit, incorporated herein by reference, constitutes a violation of N.J.S.A. 18A:12-24.1(d), and N.J.S.A. 18A:12.24.1(e).

2. The parties agree that the SEC will recommend that the Commissioner Order the penalty of a censure.

3. The Commissioner agrees that she will adopt the SEC's recommendation and Order the penalty of a censure for the conduct described in the attached affidavit.

4. By accepting the penalty of a censure, Respondent agrees to waive any and all hearings to which he is entitled pursuant to N.J.S.A. 18A:12-29 and N.J.A.C. 6A:28-10.7, and Respondent further agrees that he will not oppose the censure.

5. The parties agree that this Consent Order fully resolves all issues between them arising from the SEC's September 25, 2012, decision finding probable cause.

Signatures on the Following Page

Rita F. Barone, Esq.
Attorney for Respondent

Date: 8/25/17

Geoffrey N. Stark, D.A.G.
Attorney for Petitioner

Date: 8/31/17

It is hereby ordered that respondent be censured for the conduct described in the attached affidavit.

Kimberley Harrington
New Jersey Commissioner of Education

Date: 9/8/17

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CONTROVERSIES & DISPUTES

2017 SEP -6 A 11: 18

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IN THE MATTER OF SAMUEL LEBREAULT, PERTH AMBOY BOARD OF EDUCATION.	OFFICE OF ADMINISTRATIVE LAW Agency Docket No: C16-12 OAL Dkt. No.: EEC 13629-2012N **AFFIDAVIT OF SAMUEL LEBREAULT**

SAMUEL LEBREAULT, of full age, being duly sworn upon his oath, deposes and says:

1. I was President of the Board of Education of the City of Perth Amboy ("Board") during the 2011-2012 school year.

2. On May 9, 2012, I attended a meeting of the AFT with Board Vice President Kenneth Puccio and discussed with the union the Board's concerns with then-superintendent Dr. Janine Caffrey. The purpose of my attending the meeting with Board Vice President Kenneth Puccio was to discuss the continuing status of Dr. Caffrey's employment as superintendent of schools

in Perth Amboy.

3. I acknowledge that my conduct, set forth above in paragraph two, violated N.J.S.A. 18A:12-24.1(d), and N.J.S.A. 18A:12-24.1(e).

4. I agree to accept a penalty of censure for my conduct as set forth in paragraphs two.

5. I acknowledge that in signing this affidavit I have secured the advice of an attorney and I understand the terms of this agreement.

Samuel Lebreault

Samuel Lebreault

Sworn and Subscribed
before me this 25th day
of August, 2017.

R. La Bruna
Attorney at Law of the State of N.J.

267-17SEC

AGENCY DKT. NOS. 151-7/17 AND 3-8/17A

IN THE MATTER OF FRANK RAIA,	:	
HOBOKEN DUAL LANGUAGE	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, HUDSON COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner on July 11, 2017, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately completed training after the issuance of its March 28, 2017 Order to Show Cause, but prior to the Commission's April 25, 2017 meeting; therefore, the Commission recommends a penalty of reprimand. Respondent did not file exceptions to the recommended penalty, but – pursuant to *N.J.A.C.* 6A:4 – filed an appeal of the Commission's underlying finding of violation on August 9, 2017. Respondent withdrew his appeal on August 30, 2017.

Upon review, the Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 9/11/17
Date of Mailing: 9/12/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF FRANK RAIA	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***HOBOKEN DUAL LANGUAGE CHARTER SCHOOL,* HUDSON COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T16-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on March 28, 2017, and mailed on March 29, 2017 via regular and certified mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a).

In the OTSC mailed on March 29, 2017, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) require every charter school trustee to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a trustee of a charter school located in the City of Hoboken, County of Hudson. As a result of his position as a charter school trustee, and in accordance with the statute and regulations cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online and, in this way, any charter school trustee may complete it at any time, from anywhere. By June 30, 2016, Respondent was required to complete the Governance 4 training program.

On January 5, 2017, NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes* regarding scheduled on-site mandated training. More

specifically, on July 25, 2016, Respondent was registered to take Governance 4 and an e-mail with the link to take the offered training was sent to Respondent's e-mail address. On October 19, 2016, an additional e-mail notice was sent to all charter school trustees who had not yet completed training, including Respondent. In addition, an on-site training was provided at NJSBA's Workshop on Thursday, October 27, 2016. On November 30, 2016, NJSBA sent a letter to Respondent again advising of non-compliance with the mandatory training requirement, and a link to the online training was, once again, provided to Respondent. NJSBA also sent a reminder communication to Respondent's Charter Lead on November 30, 2016. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding his failure to complete the mandated training requirement. More specifically, in January, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by June 30, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Charter Lead, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated March 3, 2017 via regular and electronic mail, advising him that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter detailed instructions for how Respondent could complete training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on March 29, 2017.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement, and also filed a response to the Commission's OTSC. Importantly, Respondent did not deny that he did not complete training in a timely fashion.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Acting Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Acting Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Acting Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Acting Commissioner, written exceptions regarding the recommended penalty to the Acting Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Acting Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Acting Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Acting Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: June 28, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A. Whalen, Director

IN THE MATTER OF FRANK RAIA	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***HOBOKEN DUAL LANGUAGE CHARTER SCHOOL*, HUDSON COUNTY**	:	
	:	**DOCKET NO.: T16-16**

WHEREAS, Frank Raia (Respondent) is a Charter School Trustee of the Hoboken Dual Language Charter School; and

WHEREAS, as a Charter School Trustee, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete his Governance 4 training program by June 30, 2016; and

WHEREAS, at its meeting on March 28, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2016 as required by N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a); and

WHEREAS, after having been served with the OTSC, Respondent completed his training requirement, and also filed a response to the Commission's OTSC that did not dispute that he did not complete training in a timely fashion; and

WHEREAS, at its meeting on April 25, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33, N.J.A.C. 6A:28-4.1, and N.J.A.C. 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

WHEREAS, at its meeting on April 25, 2017, the Commission recommended that the Acting Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on June 27, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 27, 2017.

Kathryn A Whalen

Kathryn A. Whalen, Director

268-17

AGENCY DKT. NO. 181-7/17

IN THE MATTER OF LORI PERLOFF,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF WEST WILDWOOD,	:	DECISION
CAPE MAY COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission) – finding that respondent violated the School Ethics Act for failure to timely complete training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed her training after the issuance of the Commission's April 26, 2017 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 9/11/17

Date of Mailing: 9/13/17

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF LORI PERLOFF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***WEST WILDWOOD BOARD OF EDUCATION*, CAPE MAY COUNTY**	:	
	:	**DOCKET NO.: T29-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on April 25, 2017, and mailed on April 26, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1.

In the OTSC mailed on April 26, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, and N.J.A.C. 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of a board of education located in the City of West Wildwood, County of Cape May. As a result of her position as a board of education member, and in accordance with the statute and regulation cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by December 31, 2016.

On February 28, 2017, NJSBA provided the Commission with the names of those board members who failed to complete mandated training by December 31, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA. More specifically, an e-mail was sent to all board members, including Respondent, on October 13, 2016, and to all business administrators on October 14, 2016, reminding them of the annual training requirement and the December 31, 2016, deadline. On

January 25, 2017, a notice was sent to the West Wildwood School District business administrator advising that, as of that date, Respondent had not completed training. Finally, on January 30, 2017, NJSBA sent a letter to Respondent advising her that she still had not completed Governance 4. In addition to these communications, multiple communications about mandated training were sent to NJSBA's members through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, on March 6, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by December 31, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated April 5, 2017, via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions for completing the training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on April 26, 2017.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by December 31, 2016.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on June 27, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a

violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: July 26, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on July 25, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF LORI PERLOFF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***WEST WILDWOOD BOARD OF EDUCATION*, CAPE MAY COUNTY**	:	
	:	
	:	**DOCKET NO.: T29-16**

WHEREAS, Lori Perloff, Respondent, is a board member on the West Wildwood Board of Education; and

WHEREAS, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 4 training program by December 31, 2016; and

WHEREAS, at its meeting on April 25, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by December 31, 2016 as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1; and

WHEREAS, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by December 31, 2016; and

WHEREAS, at its meeting on June 27, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on June 27, 2017, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on July 25, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on July 25, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

269-17

AGENCY DKT. NO. 180-7/17

IN THE MATTER OF LATEE WALTON-MCCLEOD, :
BOARD OF EDUCATION OF THE TOWNSHIP OF : COMMISSIONER OF EDUCATION
FRANKLIN, SOMERSET COUNTY. : DECISION
:

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission) – finding that respondent violated the School Ethics Act for failure to timely complete training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that respondent ultimately completed her training after the issuance of the Commission's April 26, 2017 Order to Show Cause. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to timely honor an obligation placed upon board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 9/11/17
Date of Mailing: 9/13/17

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF LATEE WALTON-McCLEOD	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***FRANKLIN TOWNSHIP BOARD OF EDUCATION,* SOMERSET COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T33-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on April 25, 2017, and mailed on April 26, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1.

In the OTSC mailed on April 26, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, and N.J.A.C. 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of a board of education located in the City of Somerset, County of Somerset. As a result of her position as a board of education member, and in accordance with the statute and regulation cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by December 31, 2016.

On February 28, 2017, NJSBA provided the Commission with the names of those board members who failed to complete mandated training by December 31, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA. More specifically, an e-mail was sent to all board members, including Respondent, on October 12, 2016, and to all business administrators on October 14, 2016, reminding them of the annual training requirement and the December 31, 2016, deadline. On

January 25, 2017, a notice was sent to the Franklin Township School District business administrator advising that, as of that date, Respondent had not completed training. Finally, on January 30, 2017, NJSBA sent a letter to Respondent advising her that she still had not completed Governance 2. In addition to these communications, multiple communications about mandated training were sent to NJSBA's members through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, on March 6, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by December 31, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated April 5, 2017, via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions for completing the training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on April 26, 2017.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by December 31, 2016.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on June 27, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a

violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: July 26, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on July 25, 2017.

Kathryn A Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF LATEE WALTON-McCLEOD	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***FRANKLIN TOWNSHIP BOARD OF EDUCATION*, SOMERSET COUNTY**	:	
	:	**DOCKET NO.: T33-16**

WHEREAS, Latee Walton-McCleod, Respondent, is a board member on the Franklin Township Board of Education; and

WHEREAS, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 2 training program by December 31, 2016; and

WHEREAS, at its meeting on April 25, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by December 31, 2016 as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1; and

WHEREAS, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by December 31, 2016; and

WHEREAS, at its meeting on June 27, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on June 27, 2017, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on July 25, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on July 25, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

AGENCY DKT. NO. 184-7/17

IN THE MATTER OF HEIDI SHALLOP, :	
BOARD OF EDUCATION OF THE BOROUGH OF :	COMMISSIONER OF EDUCATION
SOUTH BOUND BROOK, SOMERSET COUNTY. :	DECISION
:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner on July 28, 2017, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission recommended that the respondent receive a suspension of 30 days for violating the School Ethics Act. If the respondent fails to complete the online training program by the end of the 30 day period, the Commission recommends that the respondent be removed from her position. Respondent did not file exceptions, nor has she submitted proof that she completed the online training program. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon school officials by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. Accordingly, the respondent is suspended from her position as a school official for 30 days from the date of this decision and is hereby ordered to complete the requisite online training program within 30 days. If the respondent does not complete the online training program within 30 days from the date of

this decision, the respondent shall be removed from her position as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 9/11/17

Date of Mailing: 9/13/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF HEIDI SHALLOP	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***SOUTH BOUND BROOK BOARD OF EDUCATION*, SOMERSET COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T31-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on April 25, 2017, and mailed on April 26, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1.

In the OTSC mailed on April 26, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, and N.J.A.C. 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of a board of education located in the City of South Bound Brook, County of Somerset. As a result of her position as a board of education member, and in accordance with the statute and regulation cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by December 31, 2016.

On February 28, 2017, NJSBA provided the Commission with the names of those board members who failed to complete mandated training by December 31, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA. More specifically, an e-mail was sent to all board members, including Respondent, on October 13, 2016, and to all business administrators on October 14, 2016, reminding them of the annual training requirement and the December 31, 2016, deadline. On

January 25, 2017, a notice was sent to the South Bound Brook School District business administrator advising that, as of that date, Respondent had not completed training. Finally, on January 30, 2017, NJSBA sent a letter to Respondent advising her that she still had not completed Governance 4. In addition to these communications, multiple communications about mandated training were sent to NJSBA's members through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, on March 6, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by December 31, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated April 5, 2017, via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions for completing the training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on April 26, 2017.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by December 31, 2016, and also failed to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on June 27, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **suspension for thirty (30) days**, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education. If Respondent fails to complete training within the period of her thirty (30) day suspension, the Commission recommends that Respondent be **removed from office on the thirty-first (31st) day**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: July 26, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on July 25, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

IN THE MATTER OF HEIDI SHALLOP	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***SOUTH BOUND BROOK BOARD OF EDUCATION*, SOMERSET COUNTY**	:	
	:	**DOCKET NO.: T31-16**

WHEREAS, Heidi Shallop, Respondent, is a board member on the South Bound Brook Board of Education; and

WHEREAS, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 4 training program by December 31, 2016; and

WHEREAS, at its meeting on April 25, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by December 31, 2016 as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1; and

WHEREAS, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by December 31, 2016, and also failed to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1; and

WHEREAS, at its meeting on June 27, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on June 27, 2017, the Commission recommended that the Commissioner of Education impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education; and

WHEREAS, if at the conclusion of the thirty (30) day suspension, Respondent still has not completed her mandatory training requirement, the Commission recommends that she be removed from office on the thirty-first (31st) day; and

WHEREAS, at its meeting on July 25, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on July 25, 2017.

Kathryn A Whalen

Kathryn A. Whalen, Director

271-17

AGENCY DKT. NO. 186-7/17

IN THE MATTER OF THERESA OWENS,	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF WILLINGBORO, BURLINGTON COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner on July 28, 2017, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission recommended that the respondent receive a suspension of 30 days for violating the School Ethics Act. If the respondent fails to complete the online training program by the end of the 30 day period, the Commission recommends that the respondent be removed from her position. Respondent did not file exceptions, nor has she submitted proof that she completed the online training program. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon school officials by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. Accordingly, the respondent is suspended from her position as a school official for 30 days from the date of this decision and is hereby ordered to complete the requisite online training program within 30 days. If the respondent does not complete the online training program within 30 days from the date of

this decision, the respondent shall be removed from her position as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 9/11/17

Date of Mailing: 9/13/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF THERESA OWENS	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	
	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
WILLINGBORO BOARD OF EDUCATION, **BURLINGTON COUNTY**	:	
	:	
	:	**DOCKET NO.: T25-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on April 25, 2017, and mailed on April 26, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1.

In the OTSC mailed on April 26, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, and N.J.A.C. 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of a board of education located in the City of Willingboro, County of Burlington. As a result of her position as a board of education member, and in accordance with the statute and regulation cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by December 31, 2016.

On February 28, 2017, NJSBA provided the Commission with the names of those board members who failed to complete mandated training by December 31, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA. More specifically, an e-mail was sent to all board members, including Respondent, on October 13, 2016, and to all business administrators on October 14, 2016, reminding them of the annual training requirement and the December 31, 2016, deadline. On

January 25, 2017, a notice was sent to the Willingboro School District business administrator advising that, as of that date, Respondent had not completed training. Finally, on January 30, 2017, NJSBA sent a letter to Respondent advising her that she still had not completed Governance 4. In addition to these communications, multiple communications about mandated training were sent to NJSBA's members through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, on March 6, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by December 31, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated April 5, 2017, via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions for completing the training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on April 26, 2017.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by December 31, 2016, and also failed to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on June 27, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **suspension for thirty (30) days**, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education. If Respondent fails to complete training within the period of her thirty (30) day suspension, the Commission recommends that Respondent be **removed from office on the thirty-first (31st) day**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: July 26, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on July 25, 2017.

Kathryn A. Whalen, Director

IN THE MATTER OF THERESA OWENS	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***WILLINGBORO BOARD OF EDUCATION*, BURLINGTON COUNTY**	:	
	:	**DOCKET NO.: T25-16**

WHEREAS, Theresa Owens, Respondent, is a board member on the Willingboro Board of Education; and

WHEREAS, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 4 training program by December 31, 2016; and

WHEREAS, at its meeting on April 25, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by December 31, 2016 as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1; and

WHEREAS, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by December 31, 2016, and also failed to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1; and

WHEREAS, at its meeting on June 27, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on June 27, 2017, the Commission recommended that the Commissioner of Education impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education; and

WHEREAS, if at the conclusion of the thirty (30) day suspension, Respondent still has not completed her mandatory training requirement, the Commission recommends that she be removed from office on the thirty-first (31st) day; and

WHEREAS, at its meeting on July 25, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on July 25, 2017.

Kathryn A. Whalen, Director

272-17

AGENCY DKT. NO. 185-7/17

IN THE MATTER OF MARIA REGAN, BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH HACKENSACK, BERGEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely complete school board member training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded to the Commissioner on July 28, 2017, pursuant to *N.J.S.A.* 18A:12-29, for the Commissioner's final determination on the recommended penalty. The Commission recommended that the respondent receive a suspension of 30 days for violating the School Ethics Act. If the respondent fails to complete the online training program by the end of the 30 day period, the Commission recommends that the respondent be removed from her position. Respondent did not file exceptions, nor has she submitted proof that she completed the online training program. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon school officials by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. Accordingly, the respondent is suspended from her position as a school official for 30 days from the date of this decision and is hereby ordered to complete the requisite online training program within 30 days. If the respondent does not complete the online training program within 30 days from the date of

this decision, the respondent shall be removed from her position as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley S. Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 9/11/17
Date of Mailing: 9/13/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF MARIA REGAN	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
***SOUTH HACKENSACK BOARD OF EDUCATION*, BERGEN COUNTY**	:	**DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
	:	**DOCKET NO.: T24-16**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on April 25, 2017, and mailed on April 26, 2017 via regular and electronic mail, directing Respondent, a "board member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find Respondent in violation of the Act, for failing to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1.

In the OTSC mailed on April 26, 2017, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. N.J.S.A. 18A:12-33, and N.J.A.C. 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of a board of education located in the City of South Hackensack, County of Bergen. As a result of her position as a board of education member, and in accordance with the statute and regulation cited above, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by December 31, 2016.

On February 28, 2017, NJSBA provided the Commission with the names of those board members who failed to complete mandated training by December 31, 2016, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA. More specifically, an e-mail was sent to all board members, including Respondent, on October 13, 2016, and to all business administrators on October 14, 2016, reminding them of the annual training requirement and the December 31, 2016, deadline. On

January 25, 2017, a notice was sent to the South Hackensack business administrator advising that, as of that date, Respondent had not completed training. Finally, on January 30, 2017, NJSBA sent a letter to Respondent advising her that she still had not completed Governance 4. In addition to these communications, multiple communications about mandated training were sent to NJSBA's members through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communication efforts undertaken by the NJSBA, Respondent's County Office of Education (County) also communicated with the Respondent regarding her failure to complete the mandated training requirement. More specifically, on March 6, 2017, the Commission's staff notified the County that the NJSBA had identified Respondent as a school official who failed to complete training by December 31, 2016. As a result, the County sent correspondence to Respondent, with a copy to the Business Administrator, advising that Respondent remained delinquent in completing training. Notwithstanding this correspondence from the County, Respondent did not complete training as directed.

As a final warning, the Commission sent a letter to Respondent dated April 5, 2017, via regular and electronic mail, advising her that the Commission requires completion of the training to avoid the issuance of an OTSC for non-compliance. This final warning letter provided instructions for completing the training. Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was mailed to Respondent on April 26, 2017.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2016, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by December 31, 2016, and also failed to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1.

DECISION/PENALTY RECOMMENDATION

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of N.J.S.A. 18A:12-33. Based on the record as set forth above, at its meeting on June 27, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **suspension for thirty (30) days**, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education. If Respondent fails to complete training within the period of her thirty (30) day suspension, the Commission recommends that Respondent be **removed from office on the thirty-first (31st) day**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4:1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: July 26, 2017

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on July 25, 2017.

Kathryn A. Whalen, Director

IN THE MATTER OF MARIA REGAN	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO COMPLETE MANDATORY TRAINING REQUIREMENT IN A TIMELY MANNER**
***SOUTH HACKENSACK BOARD OF EDUCATION,* BERGEN COUNTY**	:	
	:	
	:	**DOCKET NO.: T24-16**

WHEREAS, Maria Regan, Respondent, is a board member on the South Hackensack Board of Education; and

WHEREAS, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

WHEREAS, Respondent failed to complete her Governance 4 training program by December 31, 2016; and

WHEREAS, at its meeting on April 25, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by December 31, 2016 as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1; and

WHEREAS, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by December 31, 2016, and also failed to complete training as required by N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1; and

WHEREAS, at its meeting on June 27, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-33 and N.J.A.C. 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

WHEREAS, at its meeting on June 27, 2017, the Commission recommended that the Commissioner of Education impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education; and

WHEREAS, if at the conclusion of the thirty (30) day suspension, Respondent still has not completed her mandatory training requirement, the Commission recommends that she be removed from office on the thirty-first (31st) day; and

WHEREAS, at its meeting on July 25, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on July 25, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

273-17

OAL DKT. NO. 17846-16
(EDU 00085-16 ON REMAND)
AGENCY DKT. NO. 352-11/15

DAVID PERRY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record, proposed settlement agreement and release (Agreement) and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner notes that she has no jurisdiction over the following provision in Paragraph 2 of the Agreement: "[t]he settlement proceeds are for pensionable income." The Commissioner, therefore, approves the settlement terms within her purview and otherwise adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 9/11/17

Date of Mailing: 9/13/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 17846-16

AGENCY DKT. NO. 352-11-15

(ON REMAND)

OAL DKT. NO. EDU 00085-16

AGENCY DKT. NO. 352-11/15

DAVID PERRY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, P.C., attorneys)

Patrick F. Carrigg, Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang and Casey, attorneys)

Record Closed: June 16, 2017 Decided: July 25, 2017

BEFORE **DEAN J. BUONO**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 28, 2016, as a remanded matter from OAL DKT. NO. EDU 00085-16 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 25, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 7.26.17

Date Mailed to Parties: 7.26.17

/vj

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereinafter "**Agreement**", "**Settlement**" and/or "**Release**") is being entered into among and between DR. DAVID PERRY (hereinafter "**Dr. Perry**" or "**Releasor**") and HAMILTON TOWNSHIP BOARD OF EDUCATION shall hereinafter collectively be referred to as the "**Releasees**". Dr. Perry and Releasees shall hereinafter collectively be referred to as the "**Parties**".

WHEREAS, Dr. Perry was previously employed by HAMILTON TOWNSHIP BOARD OF EDUCATION in the position of Varsity Boys' Basketball Coach at Steinert High School, (hereinafter "**Employment Contract**"); and

WHEREAS, HAMILTON TOWNSHIP BOARD OF EDUCATION, did not renew Dr. Perry in the position of Head Coach of the Varsity Boys' Basketball at Steinert High School for the 2015-16 school year (hereinafter "**Action**"); and

WHEREAS, Dr. Perry initiated litigation against HAMILTON TOWNSHIP BOARD OF EDUCATION, alleging that the non-renewal of his employment as Head Coach of the Varsity Boys' Basketball Position was in violation of the Open Public Meetings Act and was done for arbitrary and capricious reasons; and

WHEREAS, the Parties wish to resolve the litigation initiated by Dr. Perry in the interest of the public without the need for further litigation, and all of Dr. Perry's claims and potential claims against Releasees, hereby stipulate to settle same, subject to the terms and conditions set forth herein; and

WHEREAS, the meaning, effect and terms of this Agreement have been fully explained to Dr. Perry, who understands that this Agreement settles, bars, and waives any and all claims that he could possibly have against Releasees as of the date of this Agreement;

NOW, THEREFORE, in consideration of the mutual promises, covenants, agreements and representations contained herein, the legal sufficiency of which is acknowledged by the Parties, and intending to be legally bound hereby, the Parties agree as follows:

1. Settlement and General Release of Dr. Perry's Claims. In consideration for Releasees promises and representations made herein, Dr. Perry, individually and on behalf of his heirs, representatives, immediate family members (including, but not limited to, his spouse and children), agents, successors and assigns, hereby releases Releasees, board members of the HAMILTON TOWNSHIP BOARD OF EDUCATION, subsidiaries, shareholders, directors, officers, employees, agents, attorneys, insurers, affiliates, predecessors, successors, assigns, heirs, and all persons acting by, through, under or in concert with any of them (hereinafter collectively referred to as "**Released Parties**"), from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses, and from any claims of any nature whatsoever, known or unknown, which Dr. Perry now has, claims to have, owns, holds or which Dr. Perry at any time heretofore had, held, or claimed to have based on events occurring through the date of execution of this Agreement, to the fullest extent allowed by law. This release includes, without limitation, claims arising under 42 U.S.C. § 1981, Title VII of the Civil Rights

Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family Medical Leave Act, the National Labor Relations Act, the Employee Retirement Income Security Act (save for claims related to vested benefits, which are exempted from this release), the Equal Pay Act, the New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Act, as well as any other federal, state, local, or municipal statute, ordinance or regulation that prohibits improper discrimination, harassment or retaliation in the workplace or otherwise relates to or regulates employment relationships. In addition, this Release extends to and covers claims for tortious conduct or breach of express or implied contract, including wrongful discharge, breach of covenant of good faith and fair dealing, intentional or negligent infliction of emotional distress, breach of contract or implied contract, negligence, misrepresentation, fraud, detrimental reliance, promissory estoppel, defamation, invasion of privacy, conspiracy, breach of laws governing safety in the workplace, loss of consortium, or any claims under federal, state, and local statutory and common law relating in any manner whatsoever to his employment with HAMILTON TOWNSHIP BOARD OF EDUCATION or the non-renewal of that employment relationship in the position of Head Coach of Varsity Boys' Basketball at Steinert High School. Dr. Perry represents and warrants that he has not sold, assigned, transferred, conveyed or otherwise disposed of any claim, demand or cause of action, including any claim for attorneys' fees, against Releasees that relate to the matters stated above.

2. Payment. Releasees, or their agent, shall remit a check to Dr. Perry, or his attorney, in the amount of one year's coaching stipend for the position of Head Coach of Varsity Boys' Basketball as set forth in the Collective Bargaining Agreement between the Hamilton Township Education Association and Hamilton Township Board of Education as applicable to the 2015-16 school year in full payment for this Release, inclusive of attorney's fees. The settlement proceeds are for pensionable income. The settlement amount shall be reduced by all lawful deductions.

3. No Admissions. The Parties agree that this Settlement, including the Releasees approval of same, does not constitute an admission of liability or wrongdoing by either party.

4. Liens. It is further understood that as a condition of this Settlement, all claims and/or liens, past, current and/or future arising out of this Settlement or asserted against the proceeds of this Settlement are to be satisfied by Releasor and/or his attorneys, including but not limited to any Child Support Judgment liens, Medicare or Medicaid claims and/or liens, Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including, but not limited to, claims based on subrogation or any other legal or equitable theory. Releasor therefore agrees, upon prompt presentation of any such claims and/or liens, to defend Releasees against any such claims and/or liens, and to indemnify and hold Releasees harmless against any judgment entered against Releasees based on such claims and/or liens, including the payment of any fines, charges and/or attorney's fees incurred as a result of any such lien. Failure to satisfy any such lien shall be considered a breach of this Agreement and Releasor and his attorney(s) agree to pay all costs, interest and attorney's fees relative to any such lien.

DR. PERRY FURTHER UNDERSTANDS, ACKNOWLEDGES AND AGREES THAT THIS AGREEMENT CONTAINS A GENERAL RELEASE OF CLAIMS AS TO ALL RELEASED PARTIES, AND THAT THIS AGREEMENT SETTLES, BARS, AND WAIVES ANY AND ALL CLAIMS THAT HE HAS OR COULD POSSIBLY HAVE AGAINST THE RELEASED PARTIES THROUGH THE DATE OF THIS AGREEMENT.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties agree to the terms of this Agreement.

RELEASOR

EDUCATION

Dr. David Perry

Dr. David Perry

HAMILTON TOWNSHIP BOARD OF

Pamela Kelly, Board President

Patrick F. Carrigg, Esq.
Board Attorney

DANIELLE D. KNAPP
A Notary Public of New Jersey
My Commission Expires May 4, 2020

6-9-17

RECEIVED
2016 DEC 30 P 3:10
STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereinafter "**Agreement**", "**Settlement**" and/or "**Release**") is being entered into among and between DR. DAVID PERRY (hereinafter "**Dr. Perry**" or "**Releasor**") and HAMILTON TOWNSHIP BOARD OF EDUCATION shall hereinafter collectively be referred to as the "**Releasees**". Dr. Perry and Releasees shall hereinafter collectively be referred to as the "**Parties**".

WHEREAS, Dr. Perry was previously employed by HAMILTON TOWNSHIP BOARD OF EDUCATION in the position of Varsity Boys' Basketball Coach at Steinert High School, (hereinafter "**Employment Contract**"); and

WHEREAS, HAMILTON TOWNSHIP BOARD OF EDUCATION, did not renew Dr. Perry in the position of Head Coach of the Varsity Boys' Basketball at Steinert High School for the 2015-16 school year (hereinafter "**Action**"); and

WHEREAS, Dr. Perry initiated litigation against HAMILTON TOWNSHIP BOARD OF EDUCATION, alleging that the non-renewal of his employment as Head Coach of the Varsity Boys' Basketball Position was in violation of the Open Public Meetings Act and was done for arbitrary and capricious reasons; and

WHEREAS, the Parties wish to resolve the litigation initiated by Dr. Perry in the interest of the public without the need for further litigation, and all of Dr. Perry's claims and potential claims against Releasees, hereby stipulate to settle same, subject to the terms and conditions set forth herein; and

WHEREAS, the meaning, effect and terms of this Agreement have been fully explained to Dr. Perry, who understands that this Agreement settles, bars, and waives any and all claims that he could possibly have against Releasees as of the date of this Agreement;

NOW, THEREFORE, in consideration of the mutual promises, covenants, agreements and representations contained herein, the legal sufficiency of which is acknowledged by the Parties, and intending to be legally bound hereby, the Parties agree as follows:

1. Settlement and General Release of Dr. Perry's Claims. In consideration for Releasees promises and representations made herein, Dr. Perry, individually and on behalf of his heirs, representatives, immediate family members (including, but not limited to, his spouse and children), agents, successors and assigns, hereby releases Releasees, board members of the HAMILTON TOWNSHIP BOARD OF EDUCATION, subsidiaries, shareholders, directors, officers, employees, agents, attorneys, insurers, affiliates, predecessors, successors, assigns, heirs, and all persons acting by, through, under or in concert with any of them (hereinafter collectively referred to as "**Released Parties**"), from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses, and from any claims of any nature whatsoever, known or unknown, which Dr. Perry now has, claims to have, owns, holds or which Dr. Perry at any time heretofore had, held, or claimed to have based on events occurring through the date of execution of this Agreement, to the fullest extent allowed by law. This release includes, without limitation, claims arising under 42 U.S.C. § 1981, Title VII of the Civil Rights

Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family Medical Leave Act, the National Labor Relations Act, the Employee Retirement Income Security Act (save for claims related to vested benefits, which are exempted from this release), the Equal Pay Act, the New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Act, as well as any other federal, state, local, or municipal statute, ordinance or regulation that prohibits improper discrimination, harassment or retaliation in the workplace or otherwise relates to or regulates employment relationships. In addition, this Release extends to and covers claims for tortious conduct or breach of express or implied contract, including wrongful discharge, breach of covenant of good faith and fair dealing, intentional or negligent infliction of emotional distress, breach of contract or implied contract, negligence, misrepresentation, fraud, detrimental reliance, promissory estoppel, defamation, invasion of privacy, conspiracy, breach of laws governing safety in the workplace, loss of consortium, or any claims under federal, state, and local statutory and common law relating in any manner whatsoever to his employment with HAMILTON TOWNSHIP BOARD OF EDUCATION or the non-renewal of that employment relationship in the position of Head Coach of Varsity Boys' Basketball at Steinert High School. Dr. Perry represents and warrants that he has not sold, assigned, transferred, conveyed or otherwise disposed of any claim, demand or cause of action, including any claim for attorneys' fees, against Releasees that relate to the matters stated above.

2. Payment. Releasees, or their agent, shall remit a check to Dr. Perry, or his attorney, in the amount of one year's coaching stipend for the position of Head Coach of Varsity Boys' Basketball as set forth in the Collective Bargaining Agreement between the Hamilton Township Education Association and Hamilton Township Board of Education as applicable to the 2015-16 school year in full payment for this Release, inclusive of attorney's fees. The settlement proceeds are for pensionable income. The settlement amount shall be reduced by all lawful deductions.

3. No Admissions. The Parties agree that this Settlement, including the Releasees approval of same, does not constitute an admission of liability or wrongdoing by either party.

4. Liens. It is further understood that as a condition of this Settlement, all claims and/or liens, past, current and/or future arising out of this Settlement or asserted against the proceeds of this Settlement are to be satisfied by Releasor and/or his attorneys, including but not limited to any Child Support Judgment liens, Medicare or Medicaid claims and/or liens, Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including, but not limited to, claims based on subrogation or any other legal or equitable theory. Releasor therefore agrees, upon prompt presentation of any such claims and/or liens, to defend Releasees against any such claims and/or liens, and to indemnify and hold Releasees harmless against any judgment entered against Releasees based on such claims and/or liens, including the payment of any fines, charges and/or attorney's fees incurred as a result of any such lien. Failure to satisfy any such lien shall be considered a breach of this Agreement and Releasor and his attorney(s) agree to pay all costs, interest and attorney's fees relative to any such lien.

5. Confidentiality. This Agreement shall be treated as confidential and shall not be disclosed to anyone other than the Parties, their accountants and their counsel. Upon any inquiry into the status of this case, all Parties to this Agreement shall state, "The Matter has resolved." To the extent that the Board must comply with a lawful request for a copy of this Release, the Parties agree that the Board's disclosure of this Release shall not violate this Agreement.

6. Public Interest Served. The within Settlement will serve the public interest, eliminating additional litigation costs.

7. No Other Legal Action by Dr. Perry. Dr. Perry confirms that he does not have any charge, complaint or action pending in any forum or form against any of the Released Parties as of the date hereof. Further, Dr. Perry covenants and agrees not to bring any charge, complaint, action, suit, or administrative proceeding in any forum before any federal, state, or local administrative agency or in any federal, state or local court against any of the Releasees, including members HAMILTON TOWNSHIP BOARD OF EDUCATION's board of trustees, for any actions that could or did arise or accrue prior to and including the date of this Agreement. This covenant extends to, but is not limited to, proceedings to negate, modify or reform this Agreement, though nothing in this paragraph is intended to limit Dr. Perry from instituting legal action for the sole purpose of enforcing Releasees' obligations to him under this Agreement. Dr. Perry understands that, by signing this Agreement, he waives any rights he may have to recover money or other relief in any lawsuit or proceeding he brings, or that is brought on his behalf, by any agency or third party against any of the Releasees based on events arising out of or relating to his employment with HAMILTON TOWNSHIP BOARD OF EDUCATION through the date of this Agreement. Except where otherwise permitted under this paragraph, Dr. Perry agrees that any action he may file against any of the Released Parties based on events that transpired on or before the effective date hereof shall be dismissed with prejudice upon presentation of this Agreement.

8. Assent to Terms. The parties hereby acknowledge that they have entered into this Agreement with a full understanding of their rights and obligations and that they were fully informed of the implications of this Agreement by their respective attorneys, and they do so without duress, of their own free will and volition.

9. Non-Disparagement. Dr. Perry and his immediate family agree not to make, publicly or privately, through any media or medium (including, without limitation, comments on social networking sites), any disparaging or derogatory remarks or otherwise make statements that could injure the business or reputation of any of the Released Parties and\or the Board Members of the Released Parties relative to this Agreement or related to the Board Members' votes upon the Superintendent's recommendation to appoint him to the Head Coach of Varsity Boys' Basketball occurring on August 26, 2015. The Board, including the Board Members and the central administration, agree not to make, publicly or privately, through any media or medium (including, without limitation, comments on social networking sites), any disparaging or derogatory remarks or otherwise make statements that could injure the business or reputation of any of the Released Parties and\or the Board Members of the Released Parties relative to this Agreement or related to the Board Members' votes upon the Superintendent's recommendation to appoint him to the Head Coach of Varsity Boys' Basketball occurring on August 26, 2015.

10. Entire Agreement. This Agreement sets forth the entire agreement between Dr. Perry and Releasees. Dr. Perry acknowledges and agrees that Releasees have not made any promises to him other than those set forth in this Agreement. This Agreement may be modified only upon an express written agreement between the Parties. Because counsel for Dr. Perry had a full opportunity to review this Agreement with him before he signed it, the language of this Agreement shall in all cases be construed as a whole, according to its fair meaning and not strictly for or against any of the Parties.

11. Disputes. The validity, performance, construction, and effect of this Agreement shall be governed by the substantive laws of the United States and the State of New Jersey. The Superior Court of New Jersey, Mercer County, shall have jurisdiction to implement and enforce this Agreement and its terms.

12. Severability. The invalidity or unenforceability of any provision of this Agreement, whether in whole or in part, shall not in any way affect the validity or enforceability of any other provision contained herein.

13. Counterparts; Exchange by Electronic Means. This Agreement may be executed in counterparts, which shall be taken together as the entire agreement of the Parties hereto. This Agreement may also be exchanged by the Parties via electronic mail for the purposes of securing signatures and will be fully enforceable as an original document.

14. Settlement of Contested Case Pursuant to N.J.A.C. 6A:3–1.13(d). By signature of the Board Attorney, the Board hereby represents that it consented to settlement of this matter by vote of a majority of a quorum during the public session of a properly held meeting of the Board.

DR. PERRY ACKNOWLEDGES THAT HE HAS READ THIS AGREEMENT, UNDERSTANDS IT AND IS ENTERING INTO IT KNOWINGLY AND VOLUNTARILY AND NOT AS A RESULT OF ANY PRESSURE, COERCION OR DURESS.

DR. PERRY AGREES THAT HE HAS HAD A REASONABLE AND SUFFICIENT TIME AND OPPORTUNITY TO CONSULT WITH COUNSEL, AND THAT HE HAS FULLY DISCUSSED AND REVIEWED THE TERMS CONTAINED IN THIS AGREEMENT WITH COUNSEL PRIOR TO EXECUTING IT, OR FREELY CHOSEN NOT TO DO SO.

[THIS SPACE INTENTIONALLY LEFT BLANK]

DR. PERRY FURTHER UNDERSTANDS, ACKNOWLEDGES AND AGREES THAT THIS AGREEMENT CONTAINS A GENERAL RELEASE OF CLAIMS AS TO ALL RELEASED PARTIES, AND THAT THIS AGREEMENT SETTLES, BARS, AND WAIVES ANY AND ALL CLAIMS THAT HE HAS OR COULD POSSIBLY HAVE AGAINST THE RELEASED PARTIES THROUGH THE DATE OF THIS AGREEMENT.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties agree to the terms of this Agreement.

RELEASOR

FOR DAVID PERRY

HAMILTON TOWNSHIP BOARD OF EDUCATION

Patrick F. Carrigg, Esq.
Board Attorney

276-17LM

276-17

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Commissioner

September 7, 2017

Sabino Valdes, *pro se*
[redacted]
Paramus, New Jersey 07653

Susan Lavelle, Esq.,
1814 Kennedy Blvd.
Union City, New Jersey 07087

Re: *In the Matter of the Tenure Hearing of Sabino Valdes, Board of Education of the City of Union, Hudson County, Agency Dkt. No. 328-9/00.*

Dear Parties:

I have reviewed the materials filed in connection with Sabino Valdes' Motion for Reconsideration of the Commissioner's June 29, 2017 decision, denying Mr. Valdes' third motion to reopen the tenure charges filed against him by the Union City Board of Education.

In filing this motion for reconsideration, Mr. Valdes has chosen to disregard the Commissioner's basis for denying Mr. Valdes' third motion to reopen in the June 29, 2017 decision:

> Pursuant to New Jersey Court Rule 2:9-1(a), "the supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of petition for certification is filed." As Mr. Valdes has filed a Notice of Appeal with the Appellate Division relating to his second request to reopen the tenure matter, the Commissioner does not have jurisdiction to consider Mr. Valdes' duplicate motion to reopen.

The Appellate Division has indicated that the trial court does not have jurisdiction pending appeal to entertain a motion for reconsideration. *Kiernan v. Kiernan*, 355 *N.J. Super.* 89, 92 (App. Div. 2002). As Mr. Valdes's appeal relating to his second request to reopen the tenure matter is pending before the Appellate Division, the Commissioner does not have jurisdiction to consider Mr. Valdes' duplicate motion to reopen. Consequently, the Commissioner also does not have jurisdiction to entertain Mr. Valdes' present motion for reconsideration.

Notwithstanding the plain lack of jurisdiction in this matter – as set forth in the June 29, 2017 decision – there is no rationale for reconsidering the Commissioner's denial of Mr. Valdes' third motion to reopen the above-captioned matter.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)(2), a motion for reconsideration shall be considered based upon the following:

i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

Mr. Valdes moves for reconsideration on the basis that the Commissioner *mistook* his third motion to reopen this matter as a motion to reopen the tenure charges. Mr. Valdes clarifies in his moving papers that he did not seek to reopen the tenure matter; rather, he sought to reopen the "hearing" in the matter "to review and decline to adopt a void Interlocutory Order entered by an Administrative Judge." Without engaging in a trivial discussion of semantics, the Commissioner clarifies that characterizing the third motion to reopen as a motion to "re-open the hearing" in the matter does not change the fact that the hearing was to adjudicate the underlying tenure charges, and a motion to "re-open the hearing" means reopening the above-captioned tenure matter.[1]

It is clear that Mr. Valdes' disagreement is with the outcome of the Commissioner's June 29, 2017 decision, and with the analysis upon which it is based – neither of which constitute "mistake" for purposes of seeking reconsideration. The remainder of Mr. Valdes' contentions in this present motion are an obdurate repetition of his unsubstantiated arguments from previous filings.

Accordingly, the motion for reconsideration is hereby DISMISSED for lack of jurisdiction.

Sincerely,

Kimberley Harrington

Kimberley Harrington
Commissioner of Education

c: County Superintendent
State Law Library
Clerk, Appellate Division

KH/MKD/ATA

VIA REGULAR MAIL

[1] The June 29, 2017 decision sets forth in detail reasons why Mr. Valdes' third motion to re-open is without merit, and therefore, the Commissioner will not address same.

275-17

IN THE MATTER OF THE TENURE HEARING OF:

KATHLEEN MARSICO, MONMOUTH COUNTY : COMMISSIONER OF EDUCATION

VOCATIONAL SCHOOL, MONMOUTH COUNTY.: DECISION

SYNOPSIS

Petitioning Board certified tenure charges of neglect, conduct unbecoming, and other just cause against respondent – a tenured Executive Secretary under the Board's employ – and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the tenure charges following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.3(c), the allegations – which respondent has chosen not to deny – may be deemed admitted and warrant the termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured position in petitioner's school district.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 8, 2017

AGENCY DKT NO. 95-5/17

IN THE MATTER OF THE TENURE HEARING	:	
OF KATHLEEN MARSICO, MONMOUTH COUNTY	:	COMMISSIONER OF EDUCATION
VOCATIONAL SCHOOL, MONMOUTH COUNTY.	:	DECISION

For the Petitioner, Sanford D. Brown, Esq.
No appearance by or on behalf of Respondent, Kathleen Marsico.

This matter was opened before the Commissioner of Education on May 22, 2017 through tenure charges of neglect, conduct unbecoming, and other just cause, certified by Timothy M. McCorkell, Superintendent of the Monmouth County Vocational School, together with a statement of supporting evidence against respondent, Kathleen Marsico, a tenured Executive Secretary in petitioner's employ. Petitioner provided respondent with written notice of such certification at her last known address – via hand delivery – on May 20, 2017.

On May 23, 2017, the Commissioner directed respondent – via both certified and regular mail – to file an answer to the charges. This communication provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from, or on behalf of, respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicates that respondent has engaged in conduct that is unbecoming of a support staff member, including neglecting her duties, arriving to work unable to carry out her job responsibilities, failing to follow basic District procedures and protocols, insubordination, excessive absenteeism, and causing

disruption in the work environment. Documentation provided by the District reflect that respondent often neglected her duties; for instance, she failed to perform the basic administrative functions of her job, such as processing employee or employment-related paperwork. She also failed to keep track of other assigned responsibilities: she allowed check payments by parents to expire, most of which the District was unable to recover. The documentation also indicates that respondent often arrived to work disheveled, pre-occupied with personal problems unrelated to work, and unable to perform her duties. Respondent also regularly disregarded procedures for reporting her absences from work or late arrivals to work, despite having been repeatedly advised of the proper procedures by her supervisor. Respondent was out of the office for 38 days during the 2013-2014 school year, 68 days during the 2014-2015 school year, 18.5 days during the 2015-2016 school year, and 29.5 days between September and April (when she was suspended) during the 2016-2017 school year. The evidence reflects that respondent's conduct resulted in disruption in the work environment as other employees had to cover her job responsibilities, and her supervisors often had to fix the problems she created as a result of her failure to properly carry out her duties.

Deeming the allegations to be admitted – and noting that respondent has failed to respond to the charges certified against her – the Commissioner finds that petitioner's charges of neglect and conduct unbecoming have been proven, and warrant the respondent's dismissal from employment.

Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District.

IT IS SO ORDERED.*

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 9/08/17
Date of Mailing: 9/13/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

277-17

277-17
OAL DKT. NO. EDU 10336-16
AGENCY DKT. NO. 166-6/16

T.F., on behalf of minor child, T.N.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF OCEAN, CAPE MAY COUNTY,	:	
RESPONDENT.	:	

On April 28, 2017, a final agency decision was rendered in this matter, wherein the Commissioner adopted the Administrative Law Judge's finding that T.F. was not a domiciliary of Ocean City during the 2015-2016 school year and, therefore, T.N. was not entitled to a free education in the District's schools during that time. The Commissioner assessed petitioner – Theodora Fusco – $ 15,537.00 in tuition costs, to be reimbursed to the Ocean City Board of Education for T.N.'s period of ineligible attendance in the District's schools pursuant to *N.J.S.A.* 18A:38-1. The Board subsequently notified the Commissioner that petitioner had failed to reimburse respondent as directed in the final decision, and has requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Petitioner offered no reasons why the judgment against her should not be so docketed, although given an opportunity to do so by this agency.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Theodora Fusco is now subject to entry of a judgment by the court in the amount of $15,537.00, which represents the total payment ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 9/12/17
Date of Mailing: 9/12/17

State of New Jersey

Government Records Request

Receipt

Requestor Information

Anastasia P Winslow

95 Spruce Street
Princeton, NJ 08542-0854

apwinslow@aol.com
609-933-1774 ext. 9331774

Request Date: July 18, 2017

Maximum Authorized Cost: $100.00

Email

Request Number: W123027

Request Status: In Progress

Ready Date:

Custodian Contact Information

Chief of Staff

Records Custodian

100 Riverview Plaza

P.O. Box 500

Trenton, NJ 08625-0500

OPRA.CUSTODIAN@doe.state.nj.us

609-943-4599

By

Status of Your Request

Your request for government records (# W123027) from the Chief of Staff has been reviewed and is In Progress. Detailed information as to the availability of the documents you requested appear below and on following pages as necessary.

The cost and any balance due for this request is shown to the right. Any balance due must be paid in full prior to the release / mailing of the documents.

If you have any questions related to the disposition of this request please contact the Custodian of Records for the Chief of Staff. The contact information is in the column to the right. Please reference your request number in any contact or correspondence.

Cost Information

Total Cost:	$0.00
Deposit:	$0.00
Total Amount Paid:	$0.00
Balance Due:	$0.00

Document Detail

Div	Doc #	Doc Name	Redaction Req	Pages	Legal Size	Electronic Media	Other Cost

---------- No Document Detail ----------

7/18/17: Received.

Your request for government records (# W123027) is as follows:

All "Naples Act" Orders entered by the Office of Administrative Law in Special Education Matters (EDS docket numbers) in the last five years - The Naples Act can be found at NJAC 6A:14-6.5 ; these involve cases where the OAL approves private school placements for disabled children pursuant to the Naples Act, as to placement in schools that are accredited but not approved for special education.

278-17

JORGE TAIPE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured bilingual science teacher who has been employed by the respondent Board for over seventeen years – appealed a suspension without pay that began on January 20, 2017 following an accusation of inappropriate contact with a student. To date, petitioner has not been charged with or indicted for any criminal offenses, and tenure charges have not been filed against him; accordingly, petitioner argued that the Board's action of suspending him without pay is a direct violation of his tenure rights and New Jersey law. Petitioner filed a motion for summary decision requesting reinstatement to the Board's payroll and back pay for all salary withheld from the initial date of suspension.

The ALJ found, *inter alia,* that: there are no material facts at issue here, and the matter is ripe for summary decision; pursuant to *N.J.S.A.* 18A:6-8.3 and past case law, the only circumstances under which a tenured teacher may be suspended without pay are if they have been indicted for a crime, or if tenure charges have been preferred against them; it is undisputed that neither of these circumstances are present in the instant matter; the Board asserted that the suspension without pay was warranted due to "serious accusations" against petitioner, but failed to cite any authority wherein an assertion of "serious allegations" may override the applicable statutes and case law. Accordingly, the ALJ concluded that the suspension without pay was unlawful; the petitioner's motion for summary decision was granted, and the Board was ordered to reinstate petitioner to the payroll and award back pay for all salary withheld from the initial date of suspension.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision as the final decision in this matter. Accordingly, the Commissioner ordered that petitioner be reinstated to the payroll with back pay for all salary withheld during his suspension without pay.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

9/12/17

278-17

OAL DKT. NO. EDU 03908-17
AGENCY DKT. NO. 29-2/17

JORGE TAIPE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner adopts the Administrative Law Judge's recommended decision for the reasons expressed therein. Accordingly, petitioner's motion for summary decision is granted and petitioner is to be reinstated to the payroll with back pay for all salary withheld during his suspension without pay.

IT IS SO ORDERED.*

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 9/12/17
Date of Mailing: 9/12/17

*This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 03908-17
AGENCY DKT. NO. 29-2/16

JORGE TAIPE,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Nicholas Poberezhsky, Esq., attorney for Petitioner Jorge Taipe (Caruso Smith Picini, attorneys)

Heather Savage Ford, for respondent (Deputy Counsel to the Board of Education, City of Elizabeth)

Record Closed: July 14, 2017 Decided: August 2, 2017

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Petitioner is a tenured teacher with the Board of Education of the City of Elizabeth. Petitioner was accused of inappropriate contact with two minor students and

was suspended without pay effective January 20, 2017. Petitioner appeals the suspension without pay.

PROCEDURAL HISTORY

Petitioner Jorge Taipe (petitioner) filed the instant appeal with the New Jersey Commissioner of Education, received on February 14, 2017, by the Department of Controversies and disputes.

The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on March 21, 2017.

I received petitioner's Motion for Summary Decision on May 16, 2017, response on June 20, 2017 and petitioner's final response on June 23, 2017. A telephonic conference was scheduled for July 14, 2017, but was not conducted. The parties have not requested oral argument and I determine that the written submissions are sufficient to dispose of the matter.

STATEMENT OF FACTS

The following facts are not in dispute and **I FIND** them to be the facts of the case.

Petitioner has been employed as a bilingual science teacher by respondent for over seventeen years and is tenured.

Petitioner was suspended without pay on January 20, 2017, due to an allegation of inappropriate contact with two students. Petitioner was never charged criminally and tenure charges were not brought against petitioner or certified by the Commissioner of Education.

ISSUE

Petitioner only disputes the withholding of pay and not the actual suspension.

LEGAL DISCUSSION

Petitioner seeks relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

Tenure is a status in a particular position created by statute, not the agreement of the parties. Accordingly, it is a "'statutory right imposed upon a teacher's contractual employment' [that] may not be forfeited or waived." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 77 (1982) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962); citing Red Bank Educ. Ass'n v. Red Bank Bd. of Educ., 78 N.J. 122, 141 (1978)). Tenure was designed to protect employees "from dismissal 'for unfounded, flimsy or political reasons.'" Wright v. Bd. of Educ. of E. Orange, 99 N.J. 112, 118 (quoting Zimmerman, supra, 38 N.J. at 71).

N.J.S.A. 18A:6-8.3 provides that --

> [a]ny employee of officer of a board of education in this State who is suspended from employment, office or position, other than by reason of indictment, pending any investigation hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in

> the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.

As the Appellate Division has explained:

> A tenured local school employee may be suspended pending disposition of an indictment or of tenure charges that may lead to dismissal. See Romanowski v. Bd. of Ed. of Jersey City, 89 N.J.Super. 38 (App. Div. 1965) . . . A local school board employee may also be suspended if he is indicted, and N.J.S.A. 18A:6-8.3 provides that the suspension may be without pay.
>
> Thus, a tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. In all other circumstances, a suspension must be with pay.
>
> [Slater v. Bd. of Educ. of Ramapo-Indian Hills Regional High School Dist., 237 N.J.Super. 424, 426 (App. Div. 1989)]

The only circumstances under which a tenured school employee may be suspended without pay is if they have been indicted for a crime or if tenure charges have been preferred against them. In the case at bar it is undisputed that neither of these two circumstances are present. Respondent argues that the suspension without pay is warranted due to the "serious allegations" asserted by the two complaining students. Respondent fails to cite any authority wherein the assertion of "serious allegations" may override the aforementioned statutes and case law. The suspension without pay is therefore unlawful and should be overturned.

ORDER

It is hereby **ORDERED** that the Petitioner's Motion for Summary Decision be **GRANTED;** it is further **ORDERED** that petitioner is reinstated to the payroll and awarded back pay for all salary withheld from the initial date of the suspension.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/2/17
DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency:

Date Mailed to Parties: AUG 3 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

284-17

C.G., on behalf of minor child, E.J.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LAKELAND REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her son, E.J.G., seeking a determination that E.J.G. is entitled to a free public education in the Lakeland Regional High School District. The respondent Board alleged that petitioner resides in Lincoln Park, which is not a part of the Lakeland Regional High School District. The matter was transmitted to the Office of Administrative Law (OAL) and a pre-hearing conference was scheduled for March 28, 2017. Petitioner failed to appear at the scheduled hearing. The OAL sent a notice of petitioner's failure to appear to the Commissioner on March 30, 2017, and subsequently returned the file to this agency. Correspondence from petitioner explaining her failure to appear was received by the Commissioner on April 13, 2017. Subsequently, the matter was re-transmitted to the OAL for further disposition pursuant to *N.J.A.C.* 1:1-3.3(b).

The ALJ found that: a pre-hearing telephone conference was scheduled for June 6, 2017, and petitioner was timely notified of the date; when petitioner could not be reached by telephone on the scheduled date, an email was sent to petitioner requesting that she call at her earliest convenience and advising that the matter would be scheduled for hearing on August 2, 2017; petitioner was further advised that if she failed to appear on that date, her petition would be dismissed; petitioner subsequently contacted the ALJ's office and stated that she intended to withdraw her petition, and would not appear at the hearing; however, petitioner did not subsequently submit a withdrawal, and – once again – failed to appear at the hearing; no explanation was provided for petitioner's nonappearance. Accordingly, the ALJ concluded that the petitioner has abandoned this matter, and ordered that the file be returned to the transmitting agency.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 25, 2017

284-17

OAL DKT. NO. EDU 06767-17
AGENCY DKT. NO. 323-12/16

C.G., ON BEHALF OF MINOR CHILD, E.J.G.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE LAKELAND REGIONAL SCHOOL DISTRICT, PASSAIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner notes that the Administrative Law Judge (ALJ) returned this matter to the Commissioner for appropriate disposition – in accordance with *N.J.A.C.* 1:1-14.4 – because petitioner failed to appear at the August 2, 2017 OAL hearing without providing an explanation. The Commissioner finds that since petitioner failed to appear at the August 2, 2017 hearing – after having indicated to the ALJ that she intended to withdraw her petition of appeal, but failing to submit a letter to that effect – the petition of appeal shall be dismissed.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.* Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 9/25/17

Date of Mailing: 9/27/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 06767-17
AGENCY DKT. NO. 323-12/16

C.G. ON BEHALF OF MINOR CHILD E.J.G.,
Petitioner,
v.
BOARD OF EDUCATION OF THE LAKELAND REGIONAL SCHOOL DISTRICT, PASSAIC COUNTY,
Respondent.

C.G., petitioner, pro se

Marie-Laurence Fabian, Esq., for respondent (Porzio, Bromberg & Newman, P.C., attorneys)

Record Closed: August 2, 2017 Decided: August 9, 2017

BEFORE **JOAN BEDRIN MURRAY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, C.G., appealed the determination of respondent, the Board of Education of the Lakeland Regional School District (the Board), that her son, E.J.G., was ineligible

to attend Lakeland Regional High School due to his residency outside the district. The matter was transmitted to the Office of Administrative Law (OAL) as Docket No. EDU 01924-17, and filed on February 7, 2017, as a contested case. A pre-hearing telephone conference was scheduled for March 28, 2017. On said date, the matter was dismissed for petitioner's failure to appear at the appointed time. On March 30, 2017, the OAL sent a notice to the Commissioner of Education (the Commissioner), reporting petitioner's failure to appear. The file was then returned to the Agency. In April 2017, petitioner contacted the Department of Education, providing an explanation for her non-appearance at the pre-hearing conference. The Commissioner then remanded the matter to the OAL as Docket No. 06767-17, where it was filed on May 11, 2017.

FINDINGS OF FACT

The following **FACTS** are undisputed; therefore, I **FIND** that they are the **FACTS** of this case:

By notice to the parties dated June 6, 2017, a pre-hearing telephone conference was scheduled in this matter for June 26, 2017 at 3:30 p.m. The notice sent to petitioner was not returned to the OAL as undelivered. At the scheduled conference time, my assistant, Ms. Ramos, was unable to reach petitioner by telephone. Marie-Laurence Fabian, Esq., counsel for respondent, supplied Ms. Ramos with an email address for petitioner. I sent an email to petitioner asking her to call my assistant at her earliest convenience, and to advise if her address had changed to ensure that she received future mailings. In addition, petitioner was advised that the matter would be scheduled for a hearing on August 2, 2017, at 9:30 a.m. She was also advised that her petition would be dismissed if she failed to appear at that time.

On or about July 14, 2017, petitioner contacted Ms. Ramos, stating that she would not be appearing at the August 2, 2017, hearing. Further, she noted that she intended to withdraw her petition, but could not do so at the time because she had no access to a computer or a mailbox. No withdrawal was received by the OAL. On August 2, 2017, petitioner did not appear for the scheduled hearing. She has made no further contact with the OAL.

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that respondent has abandoned this matter and it should be returned to the agency.

N.J.A.C. 1:1-14.4(a) provides as follows:

> If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall . . . direct the Clerk to return the matter to the transmitting agency . . .

Here, petitioner advised the OAL that she intended to withdraw her petition, and would not be appearing for the hearing on August 2, 2017. As no withdrawal was received by the OAL, the hearing remained on the schedule for that day. Petitioner failed to appear at the scheduled proceeding, and failed to provide an explanation for her nonappearance within the allotted time for doing so. Accordingly, the Clerk should return this matter to the New Jersey Department of Education, Bureau of Controversies and Disputes.

ORDER

It is **ORDERED** that the Clerk return this matter to the New Jersey Department of Education, Bureau of Controversies and Disputes, for appropriate disposition.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 9, 2017
DATE

Joan Bedrin Murray
JOAN BEDRIN MURRAY, ALJ

Date Received at Agency: August 9, 2017

Date Mailed to Parties: AUG 10 2017

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

283-17

OAL DKT. NO. EDU 09156-17
(EDU 18002-16 ON REMAND)
AGENCY DKT. NO. 299-11/16

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF VINCENT J. VITIELLO, SCHOOL DISTRICT OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

The record, proposed settlement agreement and release, and Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed – mindful of the Commissioner's June 26, 2017 determination that the prior settlement agreement could not be approved because it was devoid of affirmation from the parties that the respondent was not employed as a teacher elsewhere during the proposed suspension period. Since the settlement agreement now contains an affidavit of respondent attesting that he has not worked as a teacher during the suspension period, the Commissioner can approve the within settlement agreement in its present form.

Accordingly, the Initial Decision recommending approval of the parties' settlement as the final decision in this matter is hereby adopted, and the matter is dismissed subject to compliance with the terms of the settlement. A copy of this decision is being forwarded to the State Board of Examiners to implement the settlement agreement.

IT IS SO ORDERED.

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 9/25/17

Date of Mailing: 9/27/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09156-17

AGENCY DKT. NO. 299-11/16

ON REMAND EDU 18002-16

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE(S) OF VINCENT J. VITIELLO, SCHOOL DISTRICT OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY.

Amanda N. Castrogiovanni, Esq., for petitioner Edison Township Board of Education (Busch Law Group, attorneys)

Vincent J. Vitiello, respondent, pro se

Record Closed: August 9, 2017 Decided: August 10, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

Petitioner, the Edison Township Board of Education (the Board), seeks the suspension of the teaching certificate of respondent Vincent J. Vitiello. The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on November 29, 2016, for hearing as a contested case under

OAL Dkt. No. EDU 18002-16. A hearing was scheduled for May 19, 2017. Prior to the hearing, the parties reached a settlement and counsel for the Board forwarded an Agreement and Release under letter dated April 28, 2017. On May 2, 2017, I issued an Initial Decision approving the settlement.

Subsequently, the Department of Education issued a decision on June 26, 2017, finding that the settlement could not be approved because an affidavit was required and remanding the matter to the OAL. The matter was remanded and filed with the OAL on June 27, 2017, under Dkt. No. EDU 09156-17. Counsel for the Board advised that the parties would be submitting an affidavit to the undersigned. Under letter dated August 8, 2017, counsel for the Board submitted the attached Affidavit of Vincent Vitiello as a supplement to the Agreement and Release filed on May 1, 2017.

Having reviewed the record and the settlement, along with the affidavit, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

8/10/17

DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: 8-11-17

Date Mailed to Parties: AUG 11 2017

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

jb

AGREEMENT AND RELEASE

RECEIVED
2017 MAY 1 P 1:19
STATE

This AGREEMENT AND RELEASE (the "Agreement") is made this 27 day of February, 2017 by and between the Edison Township Board of Education, including members, officers, agents, attorneys, administrators, employees, representatives, agents, affiliates, subsidiaries, successors, or assigns (the "Board") and Vincent Vitiello, including his agents, representatives, assigns, heirs and successors ("Mr. Vitiello") (collectively referred to as the "Parties").

WHEREAS, Vincent Vitiello ("Mr. Vitiello") was a tenured teacher employed by the Edison Township Board of Education (the "Board"); and

WHEREAS, On or about May 4, 2016, the Board passed a resolution confirming Mr. Vitiello's reappointment to the teaching position for the 2016-2017 school year; and

WHEREAS, Mr. Vitiello notified the Board on September 13, 2016 via electronic correspondence that he intended to retire effective October 5, 2016; and

WHEREAS, Peter Pittuco, Director of Personnel ("Mr. Pittuco"), informed Mr. Vitiello on September 14, 2016, via electronic correspondence, of Mr. Vitiello's contractual and statutory obligations to provide 60 days' notice; and

WHEREAS, Mr. Vitiello relinquished his position on October 5, 2016; and

WHEREAS, on or about October 21, 2016 the Board filed with the Acting Commissioner of the New Jersey Department of Education an Order to Show Cause compelling Mr. Vitiello to explain why the Commissioner should not suspend his teaching certificate for unprofessional conduct (retirement without sufficient notice), pursuant to N.J.S.A. 18A:26-10 and N.J.A.C. 6A:9-17.9; and

WHEREAS, in order to avoid the costs, expenses, delays, and uncertainties of the hearing process and/or civil litigation, the Parties hereto wish to fully and finally settle and resolve any and all claims which have been and/or could have been asserted by the Board;

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties incorporate the above recitals and agree as follows:

1. **Suspension.** Mr. Vitiello's teaching certificate shall be suspended for a period of six (6) months. The six (6) month suspension shall have a retroactive initiation date of October 5, 2016 and continue through April 5, 2017.

2. **Withdraw Pending Action.** The Board agrees to send a letter to the Honorable Michael Antoniewicz within five (5) days from receipt of a fully executed copy of the herein

Agreement, withdrawing OAL Docket number EDU 18002-2016 N, Agency Reference number 299-11-16, In The Matter of the Suspension of the Teaching Certificate(s) of Vincent J. Vitiello / School District of the Township of Edison, Middlesex County within.

3. **Compromise/No Admission of Liability**. The Parties understand, represent, and warrant that this Agreement is not an admission of wrongdoing or liability by or on the part of any Party.

4. **Release.** Mr. Vitiello hereby irrevocably and unconditionally waives, releases and forever discharges any and all claims or rights, whether known or unknown, which he has or may have against the Board, in any venue, as well as any of its members, officers, agents, attorneys, administrators, employees or representatives, related in any way to his employment with the Board or retirement therefrom, and in respect of, any and all charges, promises, actions, causes of action, covenants, contracts, controversies, agreements, complaints, claims, counterclaims, liabilities, obligations, suits, demands, grievances, arbitrations, costs, losses, sums of money, accounts, bills, judgment, executions, damages, debts and expenses, including attorneys' fees and costs, of any nature or description whatsoever, in law or in equity, asserted or unasserted, express or implied, foreseen or unforeseen, real or imaginary, suspected or unsuspected, known or unknown, liquidated or non-liquidated, of any kind or nature or description whatsoever, arising from the beginning of the world to the effective date of this Agreement, including but not limited to any claim under State or Federal law for discrimination based on age, race, gender, disability or any other actual or perceived characteristic. To the extent that Mr. Vitiello is authorized by law to file a claim or complaint with the U.S. Equal Employment Opportunity Commission or any other such institution, Mr. Vitiello additionally and specifically waives any right to receive monetary damages as a result of such claim or complaint. With respect to his waiver of any and all potential age discrimination or similar claims hereunder, Mr. Vitiello understands that he has twenty-one (21) days to consider this Agreement and shall have seven (7) days after signing the agreement to reconsider and revoke his signature, though such revocation shall relieve the Board of any duty to abide by its obligations herein.

5. **Enforceability and Severability**. The Parties agree and acknowledge that each of the provisions of this Agreement are reasonable and should be fully enforceable, and the Parties waive any right to argue, assert or allege any claim to the contrary. However, if any provision of this Agreement is determined by a Court of competent jurisdiction to be unenforceable because it is overbroad or unreasonable, the Parties agree that such provision(s) shall be modified and enforced to the maximum extent permissible. If any provision of this Agreement is held to be invalid and cannot be modified so as to make it enforceable, then such provision shall be deemed to be severed from the Agreement and the remaining provisions shall remain in full force and effect.

6. **Mutual Non-Disclosure and Non-Disparagement Agreement.** The Parties agree that the terms and existence of this Agreement shall not be disclosed to any third party,

unless required by law. Further, the Parties agree that they shall not make any disparaging remarks (verbally or in writing) to any third party (or via social media) about and/or concerning each other.

7. **Entire Agreement**. This Agreement constitutes the sole and complete agreement among the Parties with respect to the subject matters hereof.

8. **Drafting and Negotiation by Counsel**. The drafting and negotiating of this Agreement have been participated in by each of the Parties and their respective counsel and/or representatives and, for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the Parties. The Parties hereby acknowledge that they have been represented by counsel, or any other representative of their choice, throughout the Action, throughout the negotiation of this Agreement, and at the execution of this Agreement, and have read and consulted with counsel, or their chosen representative, regarding this Agreement. To the extent any party chose not to consult with counsel and/or a representative, such a decision was made knowingly and voluntarily and said party expressly agrees that they were given ample opportunity to confer with counsel and/or a representative, but chose not to, and therefore waives their right to argue, at a later date, that they did not understand the terms of this Agreement because they did not confer with counsel and/or a representative.

9. **Governing Law**. This Agreement shall be construed under, subject to, and governed by the laws of the State of New Jersey.

10. **Costs of Additional Litigation**. If the Board is forced to incur any fees to enforce the terms of this Agreement, or to recover damages pursuant to this Agreement, or to defend any actions brought by Mr. Vitiello, or by the Edison Township Education Association with the assistance of and/or participation in by Mr. Vitiello, contrary to the terms of the Agreement, the Board shall be entitled to recover, from Mr. Vitiello, all attorneys' fees and costs expended.

Vincent Vitiello

Dated: 2/10/2017

Frank Heelan
Board President
Dated: 2-27-17

Attested to by:

Dated:

Attested to by:

Daniel Michaud
Business Administrator
Dated: 2/27/17

WHEREAS, the New Jersey Constitution authorizes the Governor to call the Legislature into special session to address specific issues when it is in the public interest to do so; and

WHEREAS, in light of the need for immediate and decisive action to reform the system of school funding in New Jersey, a special session of the Legislature is obviously in the public interest;

NOW, THEREFORE,
BE IT RESOLVED: that the Edison Board of Education hereby calls upon Governor Chris Christie to call the Legislature into a special session for the purpose of enacting comprehensive school funding reform legislation; and

BE IT FURTHER
RESOLVED: that a copy of this Resolution be sent to Governor Christie, Senate President Sweeney, Assembly Speaker Prieto, the Board's local representatives in the State Legislature and the New Jersey School Boards Association Delegate Assembly, as well as be posted on the Board's website.

4. Settlement Agreement – S.A.

BE IT
RESOLVED: that upon the recommendation of the Superintendent of Schools, the Edison Board of Education hereby (1) approves the settlement agreement in the matter of J.A. and C.A. o/b/o S.A. v. Edison Twp. Bd. Of Educ., EDS 04101-2016; and (2) authorizes the Board President and the Board's administration to take all necessary and appropriate steps to carry out this action of the Board.

5. Settlement Agreement – S.H.

BE IT
RESOLVED: that upon the recommendation of the Superintendent of Schools, the Edison Board of Education hereby (1) approves the settlement agreement in the matter of J.H. and J.H.. o/b/o S.H. v. Edison Twp. Bd. Of Educ., EDS 13864-2016; and (2) authorizes the Board President and the Board's administration to take all necessary and appropriate steps to carry out this action of the Board.

6. Settlement Agreement – V.V.

BE IT
RESOLVED: that upon the recommendation of the Superintendent of Schools, the Edison Board of Education hereby (1) approves the settlement agreement I/M/O the Suspension of the Teaching Certificate(s) of V.V./School District of the Township of Edison, Middlesex County, EDU 18002-2016; and (2) authorizes the Board President and the Board's administration to take all necessary and appropriate steps to carry out this action of the Board.

AFFIDAVIT OF VINCENT VITIELLO

RECEIVED
2017 AUG -9 P 3:12
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

STATE OF NEW JERSEY:
SS:
COUNTY OF MIDDLESEX:

I, Vincent J. Vitiello, of full age and capacity, having been duly sworn by the undersigned authority, depose and say as follows:

1. I was a tenured Teacher employed by the Edison Township Board of Education (the "Board").

2. On or about May 4, 2016, I was reappointed to the position of Teacher by Board resolution for the 2016-2017 school year.

3. On or about September 13, 2016, I provided written notice of retirement to the Board indicating my retirement would be effective October 5, 2016, giving less than 60 days' notice. See Exhibit A attached (Letter of retirement).

4. I retired from my position as a Teacher with the Board to return to the public safety sector and work as a Fire Administrator. See Exhibit A.

5. Beginning on October 5, 2016 through the present I have not been employed as a teacher with the Board nor have I been employed as a teacher elsewhere.

6. I have had the opportunity to review this affidavit, as well as the additional documentation annexed hereto, prior to signing my name.

7. I swear or affirm that the contents of this affidavit are truthful and accurate to the best of my knowledge and belief.

8. I have signed this affidavit of my own free will and volition.

Vincent J. Vitiello
Vincent Vitiello

Sworn to and subscribed
Before me on this 26
Day of July, 2017

Notary Public

YEHUDA BEER
NOTARY PUBLIC OF NEW JERSEY
ID No: 50050769
My Commission Expires Dec. 7, 2021

282-17

IN THE MATTER OF THE TENURE	:	
HEARING OF REBECCA HENDERSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF LUMBERTON, BURLINGTON COUNTY.	:	

SYNOPSIS

Petitioning Board certified tenure charges of abandonment and ineffectiveness against respondent – a tenured clerk/accounting specialist under the Board's employ – and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the tenure charges following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted and warrant the termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, and dismissed the respondent from her tenured position in petitioner's school district.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

9/25/17

282-17

AGENCY DKT NO. 190-8/17

IN THE MATTER OF THE TENURE	:	
HEARING OF REBECCA HENDERSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF LUMBERTON, BURLINGTON COUNTY.	:	

For the Petitioner, Susan S. Hodges, Esq.
No appearance by or on behalf of Respondent, Rebecca Henderson

This matter was opened before the Commissioner of Education on August 17, 2017, through tenure charges of abandonment and ineffectiveness certified by Joseph Langowski, Superintendent of the School District of the Township of Lumberton, together with supporting evidence against the respondent, Rebecca Henderson, a tenured clerk/accounting specialist in the petitioner's employ. The petitioner provided respondent with written notice of such certification at the respondent's last known address, via regular and certified mail, sent on August 11, 2017.

On August 16, 2017, the Commissioner directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. The certified mail copy that was sent to the respondent was returned as unclaimed. The copy sent to the respondent via regular mail was not returned. No reply to the tenure charges was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent is a tenured clerk/accounting specialist employed by the District since March 4, 2002. Beginning June 26, 2017, the respondent failed to report to work, and did not report her absences to the District. District personnel contacted the respondent on four separate occasions, but respondent did not return any of the calls or text messages. By letter dated July 13, 2017, the District's School Business Adminstrator informed the respondent that if the District did not hear from her within three business days, the Superintendent would recommend that the Board take action concerning her employment. To date, the respondent has not contacted the District to discuss her employment status.

Deeming the allegations to be admitted – and noting that respondent has failed to respond to the charges certified against her – the Commissioner finds that petitioner's charge of abandonment has been proven, and that respondent's dismissal is warranted. Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 9/25/17

Date of Mailing: 9/27/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

279-17

VALERIE MATTES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – formerly employed by the respondent Board from 1996 to 2015 – filed a petition of appeal on February 1, 2017, claiming entitlement to payment for unused sick time under the terms of her employment contract with the Board (petitioner had previously filed a breach of contract action in Superior Court, which was dismissed for lack of jurisdiction in August 2016). Petitioner submitted an application for a deferred retirement with the New Jersey Division of Pensions and Benefits in 2013, with a deferred retirement date of March 1, 2018. Subsequently, petitioner resigned from the Board's school district in June 2015 and requested that the Board pay her for accrued sick time under her employment contract, which included a provision that states: "[u]pon retirement from the Washington Township School District, 30 days of unused sick days will be reimbursed, at a rate of $500.00 per day." The Board filed a motion to dismiss, contending that the appeal was filed beyond the 90-day time limitation set forth in *N.J.A.C.* 6A:3-1.3(i).

The ALJ found, *inter alia,* that: the petitioner's appeal was filed approximately 341 days from the date she was notified of the Board's denial of sick time payout; the date of filing was well beyond 90 days from the date petitioner received notice of the Board's final action regarding her request for payment for accrued sick leave; relaxation of the 90-day rule is not warranted under the circumstances; the fact that petitioner's action was transferred from Superior Court to the Commissioner is no defense, as the 90-day period clearly refers to the period after the respondent Board's initial denial of payment – not the period after the Superior Court dismissed the action; and petitioner may be entitled to collect sick leave payment under the terms of her employment contract upon the date of her deferred retirement. The ALJ concluded that the petition must be dismissed as out of time pursuant to *N.J.A.C.* 6A:3-1.3(i).

Upon review, the Commissioner concurred with the ALJ's determination that the petition was time barred under *N.J.A.C.* 6A:3-1.3(i), as it was clearly filed significantly beyond 90 days after the Board's July 17, 2015 decision denying the sick leave payout. In so finding, the Commissioner noted that the petition was actually filed 565 days after the Board's letter informing petitioner that her request for sick leave payment was denied, rather than the 341 days stated in the Initial Decision. Additionally, the Commissioner found that any disputes arising between the parties that might be triggered by the petitioner's deferred retirement date are not yet ripe for review. Accordingly, the Initial Decision was adopted as modified herein, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

9/12/17

279-17

OAL DKT. NO. EDU 2729-17
AGENCY DKT. NO. 21-2/17

VALERIE MATTES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Washington Township Board of Education (Board).[1]

This matter involves a claim by the petitioner, Valerie Mattes, that she is entitled to payment for unused sick time under the terms of her employment contract with the Board. In 2013, the petitioner submitted an application with the New Jersey Division of Pensions and Benefits for a deferred retirement, and currently has a deferred retirement date of March 1, 2018. The petitioner resigned from the Washington Township School District in June 2015, and requested that the Board pay her for accrued sick time under her employment contract. The employment contract with the Board contains a provision that states, "[u]pon retirement from the Washington Township School District, 30 days of unused sick days will be reimbursed, at a rate of $500.00 per day." By letter dated July 17, 2015, the Board denied the petitioner's request for the payout of her accrued sick time.

[1] On July 14, 2017, the Office of Controversies and Disputes received a copy of the petitioner's reply exceptions – dated July 7, 2017 – which were addressed to Christopher Myers, Director, Division of Appeals and Regulatory Affairs, and appear to have been sent to the Civil Service Commission. The reply exceptions were not timely filed with the Commissioner of Education, and therefore were not considered.

On March 29, 2016 the petitioner filed a complaint in New Jersey Superior Court challenging the Board's July 17, 2015 decision; the complaint was dismissed by Order dated August 26, 2016 for lack of jurisdiction. After reconsideration was also denied by the Superior Court on November 10, 2016, the plaintiff filed the current petition of appeal on February 1, 2017. The Administrative Law Judge (ALJ) found that the petition of appeal was untimely under *N.J.A.C.* 6A:3-1.3(i) because it was not filed within 90 days from the Board's July 17, 2015 decision. The ALJ also found that relaxation of the 90-day rule is not warranted in this matter.

Upon review, the Commissioner concurs with the ALJ's determination – for the reasons stated in the Initial Decision – that the petition of appeal was time barred under *N.J.A.C.* 6A:3-1.3(i). The Commissioner likewise concurs that petitioner has failed to set forth any compelling reason to relax the timely filing requirement. As was stated in the Initial Decision, the fact that an action is transferred to the Commissioner from Superior Court is not a defense against the 90-day rule.[2] Despite the fact that the Commissioner is in accord with the ALJ's finding that the petition of appeal is untimely under *N.J.A.C.* 6A:3-1.3(i), the Commissioner notes that the petition was filed 565 days after the Board's letter dated July 17, 2015, not 341 days – as is stated in the Initial Decision.[3]

In its exceptions, the Board does not argue that the petition was erroneously dismissed as untimely, but instead contends that the ALJ improperly found that the petitioner may be entitled to payment for her accrued sick time on March 1, 2018 – the date of her deferred retirement. Significantly, the ALJ did not find that the petitioner is entitled to her accumulated sick time upon her retirement on March 1, 2018, but rather stated that any right to payment for

[2] The petitioner's Superior Court complaint was filed 256 days after the Board's denial of her sick time payout.

[3] The Board's submissions to the OAL and the Commissioner also erroneously state that the petition was filed 341 days after the petitioner received notice that the Board denied her request for her sick leave payout.

unused sick time cannot be enforced until March 1, 2018. The current petition of appeal challenging the Board's decision dated July 17, 2015 was clearly untimely filed under *N.J.A.C.* 6A:3-1.3(i). Any disputes that may arise between the parties that are triggered by the petitioner's deferred retirement date of March 1, 2018 are not yet ripe for the review.

Accordingly, the Initial Decision is adopted as modified decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[4]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 9/12/17

Date of Mailing: 9/12/17

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 2729-17
AGENCY DKT. NO. 21-2/17

VALERIE J. MATTES,
Petitioner,
v.
TOWNSHIP OF WASHINGTON BOARD OF EDUCATION, GLOUCESTER COUNTY,
Respondent.

John Branigan, IV, Esq., for petitioner (Oxfeld Cohen, LLC, attorneys)

Stephen M. Bacigalupo, Esq., for respondent (Schwartz, Simon, Edelstein and Celso, LLC, attorneys)

Record Closed: May 5, 2017 Decided: June 19, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

PROCEDURAL HISTORY

On March 29, 2016, petitioner, Valerie J. Mattes, filed a breach of contract action in New Jersey Superior Court, Special Civil Part against respondent, the Washington Township Board of Education, claiming that she is entitled to payment for unused sick

time under the terms of her employment contract with the district. On July 15, 2016, respondent filed a motion for summary judgment, arguing that petitioner is not entitled to collect the accumulated sick leave and that, in any event, jurisdiction should be deferred to the Commissioner of Education. Petitioner filed a cross-motion for summary judgment on August 5, 2016, arguing that respondent was obligated to pay petitioner under the terms of the contract and that the Superior Court had proper jurisdiction over the matter. On August 26, 2016, the Honorable John H. Pursel dismissed petitioner's complaint without prejudice and ordered that the matter be transferred to the Commissioner of Education. Petitioner filed a motion for reconsideration on September 2, 2016. The motion was denied on November 10, 2016.

On January 20, 2017, petitioner filed a petition of appeal with the Commissioner. On February 21, 2017, respondent filed a motion to dismiss in lieu of answer. The matter was transferred to the Office of Administrative Law (OAL) as a contested case on February 24, 2017. On March 3, 2017, petitioner filed an opposition to respondent's motion to dismiss. I heard oral argument on May 5, 2017 and closed the record.

FACTS

Petitioner was first employed by respondent as a Technology Coordinator/Teacher in Charge from 1996 to 2008. Respondent's Opposition Brief, ¶2. Thereafter, petitioner was employed as the Board's Principal/Director of Special Services from 2008 until her separation from the school district in June 2015. Ibid. In February 2013, petitioner, a member of the TPAF, submitted an application for deferred retirement benefits to the Division of Pensions and Benefits, with a deferred retirement date of March 1, 2018. Id. at ¶3.

Petitioner thereafter entered into an employment contract with respondent for the 2014-2015 school year. Id. at ¶5. The contract included a provision addressing sick leave, which read:

> The Principal/Child Study Team Director shall be allowed twelve (12) days sick leave per year for the term of this

> Contract. Unused sick leave days shall be cumulative in accordance with the provisions of Title 18A. Upon retirement from the Washington Township School District, 30 days of unused sick time will be reimbursed, at a rate of $500.00 per day. Reimbursement for sick days shall be consistent with the law in effect at the time this Contract is signed. Such payment shall not exceed $15,000.00 . . . . [Respondent's Exh. A, pp. 2-3.]

By correspondence dated May 26, 2015, petitioner wrote to Superintendent Keith Neuhs, stating, "This letter is my official notification to you that I am retiring from Washington Township School District, effective date to be June 30, 2015." Petitioner's Exh. B. On June 8, 2015, respondent accepted petitioner's resignation. Respondent's Exh. B.

On June 12, 2015, petitioner entered into an administrator's employment contract with the Five Town Community School District in Camden, Maine. Respondent's Opposition Brief, ¶¶8-9.

On July 8, 2015, Superintendent Neuhs informed petitioner via text message that her unused sick time payout would not be released. Respondent's Exh. C. On July 10, 2015, petitioner contacted Superintendent Neuhs and requested that she receive formal written notification of respondent's decision. Ibid.

On July 17, 2015, Superintendent Neuhs responded to petitioner, advising her of the following:

> [C]onsider this letter official notification that the Washington Township School District does not feel that you have met the contractual eligibility for retirement and you are not eligible for payment of sick time. It is the position of the district that you have not met the parameters for retirement and that you decided to resign from the district in order to accept an educational position in Maine. Therefore, after careful review and consultation with Board Counsel, the District will not provide you with payment for sick time. [Respondent's Exh. D.]

LEGAL ANALYSIS

I. Motion to Dismiss Standard.

After an individual files a petition of appeal with the Department of Education, initiating a contested case pursuant to N.J.A.C. 6A:3-1.3, the respondent is required to serve an answer upon the petitioner within twenty days after receipt of the petition. N.J.A.C. 6A:3-1.5(a). In lieu of an answer, the respondent may file a motion to dismiss the petition. N.J.A.C. 6A:3-1.5(g).

Should a motion to dismiss be filed in lieu of an answer, the Commissioner may, prior to the transmittal of the pleadings to the OAL, "dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason." N.J.A.C. 6A:3-1.10. "[W]here the Commissioner does not determine to dismiss the matter pursuant to N.J.A.C. 6A:3-1.10, the Commissioner may . . . transmit the matter for hearing before the OAL . . . [, which] shall be conducted in accordance with the rules of the OAL." N.J.A.C. 6A:3-1.11.

Here, respondent argues that the instant petition of appeal must be dismissed with prejudice because it was filed beyond the 90-day time limitation set forth in N.J.A.C. 6A:3-1.3(i). Respondent's Brief, p. 4. Additionally, respondent argues that the petition must be dismissed because petitioner is not entitled to collect accumulated sick leave payment under the terms of her contract and State law. Id. at 10. Petitioner argues that she timely filed her petition with the Commissioner, noting that the petition was filed within 90 days after receiving a final order from Superior Court. Petitioner's Opposition Brief, pp. 3-5. Further, petitioner contends that respondent has breached the terms of her employment contract by withholding payment for unused sick time. Id. at 8.

As set forth in greater detail below, the petition must be dismissed as untimely because petitioner failed to file her petition with the Commissioner until approximately 341 days after being notified of respondent's denial of sick time payout. Relaxation of

the 90-day rule is not warranted under the circumstances, and the fact that the action was transferred to the Commissioner from Superior Court is no defense.

Additionally, the case must be dismissed because petitioner is not yet entitled to collect sick leave payment under the terms of her contract and State law. Rather, petitioner must wait until the date of her deferred retirement, March 1, 2018, before she can assert her right to this payment.

II. Petitioner violated the 90-day rule.

N.J.A.C. 6A:3-1.3(i) provides that a "petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education . . . ." This limitations period stabilizes the relationship between teachers and the administration and gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after 90 days. Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 582 (1993).

The Commissioner may, in his or her discretion, relax the 90-day limitation period "in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." N.J.A.C. 6A:3-1.16. However, the 90-day rule has generally been strictly enforced in the absence of a compelling reason, such as where a substantial constitutional issue is presented, where judicial review is sought of an informal administrative determination, or where a matter of significant public interest is involved. Portee v. Newark Bd. of Educ., 94 N.J.A.R.2d (EDU) 381, 384. Typically, a petitioner's personal hardships during the 90-day period do not justify a waiver of the rule, except perhaps in cases of genuine incapacity. See Unangst v. Bd. of Educ. of Fredon, EDU 9828-98, Initial Decision (March 13, 2003), adopted, Comm'r (May 1, 2003), <https://njlaw.rutgers.edu/collections/oal/final/edu9828-98.pdf> (denying relaxation of 90-day rule to teacher in a severely abusive domestic relationship, noting that "[e]motional distress alone, without a showing of circumstances amounting to genuine incapacity, is not enough to toll the time limit for bringing an appeal to the Commissioner"); Bland-Carter v. State-Operated Sch. Dist. of Newark, EDU 1505-00,

Initial Decision (June 15, 2000), adopted, Comm'r (September 14, 2000), <https://njlaw.rutgers.edu/collections/oal/final/edu1505-00.pdf> (denying relaxation of 90-day rule where petitioner's father was hospitalized and died during the relevant 90-days, noting that petitioner returned to work during the period and thus must have been able to function).

Further, the fact that an action is transferred to the Commissioner from Superior Court is no defense to the 90-day rule. See Semprevivo v. Pinelands Reg'l Bd. of Educ., EDU 06386-09, Initial Decision (December 8, 2009), <https://njlaw.rutgers.edu/collections/oal/html/initial/edu06386-09.html>, adopted, Comm'r (January 15, 2010). In Semprevivo, a former student sought damages for tortious misconduct against his high school's athletic director after an incident of alleged verbal abuse. Approximately two years after the incident, the student filed an action in Superior Court, but the school board successfully argued that the matter should be transferred to the Commissioner. The school board then asserted that the petition was barred by the 90-day rule. The student argued that by seeking a transfer, the board had waived its defense of the 90-day time frame. The student also argued that he did not sleep on his rights, as he had filed a Tort Claim Notice within 90 days of the incident.

The ALJ concluded that the petition was untimely, as the petition was not filed within 90 days of the incident and none of the recognized grounds for waiving the jurisdictional bar had been established. While the student had filed a Tort Claim Notice within 90 days, that notice did not serve as a sufficient signal to the board that it might be faced with a more immediate challenge in front of the Commissioner. The ALJ also addressed the student's argument that the board's request of a transfer should be deemed a waiver of the 90-day rule defense, explaining that

> . . . while the Commissioner may determine that there exists a legitimate reason to exercise jurisdiction in a case that otherwise would be dismissed as untimely filed, a party cannot create jurisdiction where none exists and thus it is at best doubtful that a party can waive the 90-day rule and thrust upon the Commissioner the responsibility for deciding an untimely case. That the Board saw fit to raise the Commissioner's primary jurisdiction to the Superior Court and thereby seek transfer is not a reason to conclude that it

> cannot raise here the untimeliness of the filing. More importantly, here the Superior Court action was not filed until nearly two years after the date when the allegedly improper action by the Board and its employee occurred. [Semprevivo, supra.]

Here, petitioner's action is untimely because she failed to file her petition with the Commissioner until approximately 341 days after being notified of respondent's denial of sick time payout. Petitioner argues that she filed her petition with the Commissioner within 90 days after receiving a final order from Superior Court. Petitioner's Opposition Brief, p. 5. However, N.J.A.C. 6A:3-1.3(i) provides that such an action must be filed within 90 days of "a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." Thus, the 90 days clearly refers to the period after the respondent board's initial denial of payment, not the period after the Superior Court dismissed the action. To interpret this otherwise would contravene the public policy behind the 90-day rule.

Relaxation of the 90-day rule is inappropriate under the circumstances. Petitioner argues that there is a compelling reason to relax the rule because she was moving from New Jersey to Maine during the relevant period, thus making it difficult to retain counsel. Petitioner's Opposition Brief, p. 7. However, as previously mentioned, the 90-day rule is strictly enforced in the absence of a compelling reason, such as where a substantial constitutional issue is presented, where judicial review is sought of an informal administrative determination, or where a matter of significant public interest is involved. None of those circumstances are present here. Additionally, although relocating to a different state may induce stress, there is no evidence that petitioner suffered from a genuine incapacity during this time.

Further, the fact that the action was transferred to the Commissioner from Superior Court is no defense to the 90-day rule. Like in Semprevivo, petitioner's action was transferred to the Commissioner after the respondent board raised jurisdictional issues in Superior Court. The ALJ in Semprevivo concluded that the board's request for a transfer to the Commissioner did not constitute a waiver of the 90-day rule. In dismissing the action, the ALJ also found it significant that the student did not file in

Superior Court until approximately two years after the incident. Notably, here, petitioner failed to file in Superior Court until approximately 258 days after the denial of payment. Thus, even petitioner's initial Superior Court complaint was filed well beyond the 90-day period. Petitioner's claim must be dismissed as untimely.

III. Petitioner is not currently entitled to collect sick leave payment under the terms of her employment contract and State law; however, she may be entitled to this payment upon the date of her deferred retirement.

Under State law,

> [a]ll persons holding any office, position, or employment in all local school districts . . . who are steadily employed by the board of education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law . . . shall be allowed sick leave with full pay for a minimum of 10 school days in any school year. [N.J.S.A. 18A:30-2.]

"If any such person requires in any school year less than the specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year shall be accumulative to be used for additional sick leave as needed in subsequent years." N.J.S.A. 18A:30-3. Sick leave accrued by an employee in one district may transfer with her to another New Jersey district. N.J.S.A. 18A:30-3.2.

State law also places limitations on a school board's ability to pay former employees for unused sick leave. Both N.J.S.A. 18A:30-3.5, which applies to certain high-level officers, and N.J.S.A. 18A:30-3.6, which applies to individuals employed after May 21, 2010, restrict payment for accumulated sick leave to $15,000. Additionally, both statutes provide that "[s]upplemental compensation shall be payable only at the time of retirement from a State-administered or locally-administered retirement system based on the leave credited on the date of retirement." N.J.S.A. 18A:30-3.5; N.J.S.A. 18A:30-3.6. Thus, under State law, compensation for unused sick time is typically payable on the date of an individual's retirement from the TPAF or other retirement system.

Petitioner's contract with respondent explicitly references State law, noting "Unused sick leave days shall be accumulated in accordance with the provisions of Title 18A . . . Reimbursement for sick days shall be consistent with the law in effect at the time this Contract is signed." Respondent's Exh. A, p. 2-3. Notably, petitioner does not directly fall under the categories of employees described in either N.J.S.A. 18A:30-3.5 or N.J.S.A. 18A:30-3.6, as she is not a high-level officer, and her employment began before 2010.

However, these statutory provisions indicate that an individual is typically not entitled to be paid for unused sick time until her date of retirement from a State-administered or locally-administered retirement system. Here, it is undisputed that petitioner's deferred retirement date is March 1, 2018. Therefore, any right she has to payment for unused sick time cannot be enforced until then. If petitioner does not receive payment for unused sick leave upon her official retirement date, as recorded by the TPAF, she should be permitted to again file a petition with the Commissioner to enforce the terms of her contract.

Respondent argues that petitioner is not entitled to payment because she did not "actually retire." Respondent's Brief, p. 13. Respondent bases this conclusion on the fact that petitioner is currently working for a school district in Maine. Ibid. However, the plain language of the employment contract indicates that petitioner is entitled to the payment "[u]pon retirement from the Washington Township School District." Respondent's Exh. A. As previously stated, this will officially occur on March 1, 2018. The fact that petitioner has accepted employment in another state is irrelevant to whether she has "retired" from respondent's district or for TPAF purposes. And, unless respondent intends to follow petitioner around the country for the rest of her life, entitlement to payment cannot be based on when petitioner permanently ends her professional career in all geographic locations.

CONCLUSION

The current petition must be dismissed as untimely because petitioner failed to file with the Commissioner until approximately 341 days after being notified of

respondent's denial of sick time payout. Relaxation of the 90-day rule is not warranted under the circumstances, and the fact that the action was transferred to the Commissioner from Superior Court is no defense.

ORDER

Based on the foregoing, I hereby **ORDER** the petitioner **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 19, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: June 20, 2017

Date Mailed to Parties: June 20, 2017

cmo

285-17

D.T., on behalf of minor child, M.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the decision of the Eligibility Appeals Committee (EAC) of the New Jersey State Interscholastic Athletic Association (NJSIAA) which found that his son, M.T., transferred from St. Joseph's High School to Hammonton High School for athletic advantage; the resulting ruling made M.T. ineligible to participate in football at Hammonton for the 2017-2018 school year. Petitioner contended, *inter alia*, that M.T. transferred because he had been bullied by the coaching staff at St. Joseph's and felt unsafe; further, petitioner argued that the NJSIAA had denied him due process. Petitioner argued that the NJSIAA's decision imposing a one-year period of ineligibility on M.T. should be reversed.

The NJSIAA contended, *inter alia*, that: the petitioner was provided with due process; the decision of the EAC was not arbitrary and capricious as there was sufficient evidence in the record that M.T. transferred for athletic advantage; the testimony of M.T.'s coaches and teammate was consistent and credible, and demonstrated a pattern of deteriorating conduct by M.T. toward the coaching staff; and the EAC found M.T.'s claims unsubstantiated, and the testimony provided by M.T. and his parents to be incredible and generally unreliable. The NJSIAA urged that it did not apply its rules in an arbitrary, capricious, or unreasonable manner with respect to the petitioner, and as such the Commissioner should affirm the decision of the EAC.

The Commissioner upheld the NJSIAA's decision and dismissed the petition, finding that petitioner did not meet his burden so as to entitle him to prevail on appeal. In so deciding, the Commissioner – who may not substitute her judgment for that of the NJSIAA on appeal – noted that the NJSIAA's decision ruling that M.T. is ineligible to participate in football for the 2017-2018 school year was neither arbitrary nor unreasonable.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

September 28, 2017

285-17

AGENCY DKT. NO. 170-8/17

D.T., on behalf of minor child, M.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

For Petitioner, Nancy A. Valentino, Esq.

For Respondent, Michael W. Herbert, Esq. (Parker McCay, P.A.)

In this matter, petitioner seeks review of a decision of the Eligibility Appeals Committee (EAC) of the New Jersey State Interscholastic Athletic Association (NJSIAA), finding that a high school student, M.T., transferred from St. Joseph High School (St. Joseph's) to Hammonton High School (Hammonton) for athletic advantage, and ruling that M.T. is ineligible to participate in football at Hammonton for the 2017-2018 school year. The EAC found that M.T. transferred to Hammonton – in violation of Article V, Section (4)(K)(5) of NJSIAA's Bylaws, Rules and Regulations – in order to seek relief due to a conflict with the philosophy of the coaching staff at St. Joseph's.

On appeal, petitioner maintains that M.T. transferred because he was being bullied by the coaching staff at St. Joseph's, he felt unsafe, and he no longer wanted to be subject to "retaliatory and violative conduct" by the school's staff and administration. In support of petitioner's claims, M.T. submitted statements and testified that the coaching staff verbally and physically abused him, engaged in hazing activities, and ostracized him from the team during the off-season. Petitioner further maintains that he was denied due process from the NJSIAA because he was not presented with the evidence until the morning of the hearing; he was not made aware of his rights; and he did

not have enough time to obtain an attorney, as he was notified of the hearing less than one week before the scheduled date. Petitioner argues that the decision of the NJSIAA imposing a one-year period of ineligibility on M.T. should be reversed.

In reply, respondent maintains that petitioner was provided with due process as the EAC issued its final decision after a hearing on notice to the parties and a full right to be heard. Respondent also argues that the decision of the EAC was not arbitrary, capricious or unreasonable, as there was sufficient evidence in the record that M.T. transferred for athletic advantage. Respondent submits that the testimony of M.T.'s coach and teammate was consistent and credible, and demonstrated a pattern of deteriorating conduct by M.T. towards the coaching staff. Additionally, respondent contends that the EAC found M.T.'s claims and accusations unsubstantiated, and that the testimony provided by M.T. and his parents was "incredible" and "generally unreliable." Respondent argues that the NJSIAA did not apply its rules in an arbitrary, capricious or unreasonable manner with respect to the petitioner; as such, the Commissioner should affirm its decision.

NJSIAA has promulgated rules and regulations imposing restrictions upon a transfer student's eligibility to participate in sports. *See* NJSIAA Bylaws, Rules and Regulations, Article V, Section 4(K)(2). Typically, when a student-athlete transfers from one school to another without a bona fide change of residence by the student's parent or guardian, the student is subject to a 30-day period of ineligibility for any sport in which the student has previously participated at the varsity level. *See* Article V, Section 4(K)(2)(a). However, if – following an eligibility determination by the EAC – a student is found to have transferred for athletic advantage, the student may be subject to an extended period of ineligibility beyond the 30-day period.[1]

---

[1] A transfer for athletic advantage is defined as:

a. Seeking a superior athletic team;
b. Seeking relief due to a conflict with the philosophy or action of an administrator, teacher or coach relating to sports;
c. Seeking a team consistent with the student's athletic abilities;
d. Seeking a means to nullify punitive action by the previous school; or
e. Seeking to be coached by the coach at the new school.

It is well-established that the Commissioner's scope of review in matters involving NJSIAA decisions, including determinations made by the EAC, is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. Moreover, petitioners seeking to overturn decisions of the NJSIAA bear a heavy burden of proof. Absent a demonstration by petitioner in this matter that the NJSIAA applied its rules in a patently arbitrary, capricious or unreasonable manner, the Commissioner may not overturn an action by the NJSIAA in applying its rules.[2] *See N.J.A.C.* 6A:3-7.5(a)(2); *see also B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration." *Bayshore*, 122 *N.J.Super.* at 199-200. As such, the Commissioner may not substitute her own judgment for that of the NJSIAA where due process has been afforded and where exists sufficient credible evidence in the record to serve as a basis for the decision rendered by the NJSIAA. *See N.J.A.C.* 6A:3-7.5(a)(1); *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259.

Upon careful review and consideration, the Commissioner upholds the decision of the NJSIAA: the Commissioner finds that petitioner has not met his burden to prevail on appeal because his due process rights were not violated and the evidence in the record supports the NJSIAA's ruling. Petitioner's due process rights were not violated because D.T. was provided adequate notice of the hearing and an opportunity to review the record. The transcript of the hearing also reveals that petitioner fully participated in the process. The NJSIAA applied its rules in an appropriate and reasonable manner in light of its duty to ensure fairness and integrity in athletic competition statewide. M.T. – who had been on the St. Joseph's football team since his freshmen year of high school – did not make any allegations regarding the coaching staff until his junior year, and most of M.T.'s other claims also related to his junior year of high school. The EAC found that M.T.'s coach

[2] Arbitrary and capricious means "willful and unreasoning action, without consideration and in disregard of circumstances." *Bayshore Sew. Co. v. Dep't of Envt. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

and teammate provided credible testimony, and there is no basis to reject the EAC's determinations of witness credibility. Testimonies provided by M.T.'s coach and teammate contradicted M.T.'s accusations against the coaching staff, and revealed his previous declarations of intent to transfer to Hammonton for athletic advantage. It is undisputed that M.T. was dissatisfied with the coaching staff at St. Joseph's as evidenced by his various attempts to undermine the coaches during the course of his junior year. The evidence also does not support a finding that the coaching staff acted inappropriately towards M.T. Instead, the record establishes that M.T.'s decision to transfer to Hammonton was due to his disagreements with the philosophy and personal style of the coaching staff at St. Joseph's. As such, M.T.'s unsubstantiated accusations of inappropriate conduct by the coaching staff, coupled with his deteriorating performance on the team and his change in behavior towards the coaching staff, are dubious at best.

Accordingly – the Commissioner having found that petitioner was afforded due process and that M.T. transferred to Hammonton for athletic advantage – the NJSIAA's ruling that M.T. is ineligible to participate in football at Hammonton for a one-year period is upheld and the petition of appeal dismissed.

IT IS SO ORDERED.[3]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 9/27/17

Date of Mailing: 9/28/17

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

286-17

VALERIE KENNY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured teacher employed by the respondent Board – contended that the Board improperly found her guilty of harassment, intimidation and bullying (HIB), as those terms are defined under *N.J.S.A.* 18A:37-14, and sought to have her personnel file expunged of any record of the HIB allegations. The Board filed a motion to dismiss in lieu of an answer, asserting the petition was not timely filed and must be dismissed pursuant to *N.J.A.C.* 6A:3-1.3(i). Petitioner filed opposition to the motion to dismiss. The ALJ subsequently converted the Board's motion to a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner is a teacher in the school district; in December of 2016, petitioner was accused of bullying a student with disabilities; the matter was investigated by the school district's Anti-Bullying Specialist, who determined that an act of HIB had occurred; this finding was affirmed by the Superintendent and the Board; petitioner was notified on January 24, 2017 that she had been found guilty of HIB; petitioner did not submit her appeal until June 2017; instead, petitioner pursued contractual grievance proceedings through the Moonachie Education Association; petitioner asserted that her petition was timely, as the 90 day period for filing her appeal began when the Board denied her grievance in March 2017. The ALJ concluded that the Board's HIB determination was issued in January 2017, and the petitioner received proper notice thereof; however, petitioner's appeal was not filed until June 13, 2017 – well past the regulatory timeline. Accordingly, the ALJ granted the Board's motion for summary decision, and dismissed the petition as untimely.

Upon review, the Commissioner concurred with the ALJ that the petition must be dismissed as it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

286-17

OAL DKT. NO. EDU 09284-17
AGENCY DKT. NO. 115-6/17

VALERIE KENNY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the instant petition is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Initial Decision is adopted as the final decision in this matter – for the reasons stated therein – and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 9/27/17

Date of Mailing: 9/28/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 09284-17
AGENCY DKT. NO. 115-6/17

VALERIE KENNY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MOONACHIE, BERGEN COUNTY,
Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld Cohen, attorneys)

Dennis McKeever, Esq., for respondent (Sciarrillo Cornell, attorneys)

Record Closed: August 16, 2017 Decided: August 17, 2017

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Valerie Kenny, a tenured teacher employed by the Moonachie Board of Education (the Board), contends that the Board improperly found her guilty of harassment, intimidation and bullying (HIB), as those terms are defined by N.J.S.A. 18A:37-14. She seeks a declaration that the Board acted in violation of law, and asks

that her personnel file be expunged of any record of the HIB allegations. The Board replies that the petition was not timely filed, and should be dismissed pursuant to N.J.A.C. 6A:3-1.3(i).

PROCEDURAL HISTORY

The petition of appeal was filed with the Commissioner of Education on June 13, 2017. On June 27, 2017, the Board filed a Motion to Dismiss in Lieu of an Answer, per N.J.A.C. 6A:3-1.5(g). The contested case was transmitted to the Office of Administrative Law on June 29, 2017. Kenny filed a brief and certification in opposition to the motion on August 14, 2017. The Board replied to the opposition on August 16, 2017, and the record closed.[1]

FINDINGS OF FACT

The salient facts are undisputed, and I **FIND**:

Petitioner is a teacher who, in December 2016, was accused of bullying a student with disabilities. The matter was investigated by the Anti-Bullying Specialist, who determined that an act of HIB had occurred. The HIB investigative report was submitted to the Superintendent of Schools on December 20, 2016, who affirmed its findings, and reported the matter to the Board. On January 19, 2017, the Board voted to affirm the decision of the Superintendent.

Kenny was notified of the Board's decision on January 24, 2017. On January 25, 2017, the Moonachie Education Association (the Association) began the process of pursuing relief for Kenny via the contractual grievance procedure, which includes four steps: I. Informal Discussion; II. Administrative Principal; III. Board of Education; and IV. Binding Arbitration. Having received no relief at the earlier stages of the process, on March 17, 2017, the Association filed a Level IV grievance, through which it sought to bring the matter to binding arbitration. On March 21, 2017, the Board advised Kenny

[1] Since both parties submitted certifications and accompanying documents in support and opposition to the motion, I have converted it to a Motion for Summary Decision.

via a letter from its Interim Business Administrator that the grievance had been denied at Level III.

ANALYSIS AND CONCLUSIONS OF LAW

The Board seeks relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c) which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, supra, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 251-2, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts that require a plenary hearing, and the Board is entitled to judgment as a matter of law. The time for filing an appeal before the Commissioner of Education is clearly set forth at N.J.A.C. 6A:3-1.3(i), which provides that a petition of appeal shall be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education . . . which is the subject of the requested contested case hearing." Petitioners' appeal was filed well past the regulatory timeline, and must be dismissed.

Adequate notice has been defined as notice "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 587 (1993). The ninety-day period for commencing an action begins to run when the "plaintiff learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action." Ibid. The intent of the ninety-day rule is to stimulate litigants to pursue a right of action within a reasonable time, so that the opposing party may have a fair opportunity to defend. The rule furthermore exists to "penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs." Ibid.

Kenny asserts that her claim was not triggered until the Board denied her grievance. Having not timely heard from the Board at Level III of the grievance process, on March 17, 2017, her Association filed a Level IV grievance on her behalf, having read the Board's silence as a denial.[2] She thus urges that she had until June 17, 2017, to file her petition with the Commissioner. The Board replies that Kenny knew that the Board had acted to uphold its administrators' HIB determination as early as January 2017, making this petition of appeal well out of time.

I concur with the Board, which rightly notes that under N.J.S.A. 18A:37-15(e), a local board's HIB determination, "may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, no later than 90 days

[2] As noted above, on March 21, 2017, the Board formally denied the grievance at Level III.

after issuance of the Board's decision." The Board's HIB decision here was made on January 19, 2017.

Kenny chose to challenge the Board's HIB determination through the collective bargaining agreement's grievance process at her own peril, as this was not the appeal process clearly specified by the statute. Her pursuit of the grievance procedure did not toll the ninety days in which she was required to perfect an appeal before the Commissioner. Indeed, the Commission has held that attempts to resolve a dispute in other forums do not serve to toll the statute of limitations. See Kaprow, supra, 131 N.J. at 588; see also Riley v Hunterdon Cent. Bd. of Educ., 173 N.J. Super. 109 (App. Div. 1980). A petition must be filed within ninety days of receipt of notice of Board action, and not within ninety days of "exhaustion of other avenues and mechanisms." Wise v. Bd. of Educ. of the City of Trenton, EDU 160-00, Initial Decision (July 25, 2000), adopted, Comm'r (September 11, 2000), <http://njlaw.rutgers.edu/collections/oal/>. In Wise, much like here, the petitioner sought reconsideration of a board decision, rather than timely appealing to the Commissioner; his appeal was dismissed.

Moreover, it is well established that the ninety-day rule is to be strictly applied. See Kaprow, supra, 131 N.J. 572; Morris-Union Jointure Comm'n v. Bd. of Educ. of the Borough of S. River, 92 N.J.A.R.2d (EDU) 453; Markulin and the Neptune Educ. Ass'n v. Bd. of Educ. of the Twp. of Neptune, 92 N.J.A.R.2d (EDU) 406. While the Commissioner has the discretion to relax the rule, this extraordinary relief has been reserved only for those situations where a substantial constitutional issue is presented or where a matter of significant public interest is involved, beyond that of concern only to the parties. N.J.A.C. 6A:3-1.16; Portee v. Bd. of Educ. of the City of Newark, 94 N.J.A.R.2d (EDU) 381, 384; Wise, supra, EDU 160-00. Petitioner's claim certainly has import and significance to her, but no significance beyond that, making a relaxation of the rule unwarranted.

Accordingly, I **CONCLUDE** that the petition of appeal should be dismissed for failure to comply with the requirements of N.J.A.C. 6A:3-1.3(i).

ORDER

It is hereby **ORDERED** that the Board's Motion for Summary Decision be **GRANTED** and the petition of appeal **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 17, 2017

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 8/17/17

Date Mailed to Parties: 8/17/17

sej

288/17

OAL DKT. NO. EDU 10567-16
AGENCY DKT. NO. 177-6/16

IN THE MATTER OF THE LIMOUSINE SERVICE OF BP CORPORATION, STATE DEPARTMENT OF EDUCATION.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Settlement Agreement transmitted by the Office of Administrative Law have been reviewed. Pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the Settlement Agreement is deemed to be the final decision in this matter as the agency is a party to this matter.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 9/28/17
Date of Mailing: 10/04/17

In the Matter of LIMOUSINE SERVICE OF BP CORPORATION	STATE OF NEW JERSEY COMMISSIONER OF EDUCATION AGENCY DOCKET NO. 177-6/16 OAL DOCKET NO. EDU 10567-16 SETTLEMENT AGREEMENT

RECEIVED
2017 AUG -2 P 2:35
STATE BOARD OF EDUCATION

WHEREAS, Respondent Limousine Service of BP ("LSBP") is a school bus contractor subject to the provisions of N.J.S.A. 18A:39-1 et seq., N.J.S.A. 18A:6-7.1 et seq., and N.J.A.C. 6A:27-12.1 et seq.; and

WHEREAS, during the 2014-2015 school year, LSBP employed several individuals as either a school bus driver or school bus aide when such individuals had not received the criminal history record check required by N.J.S.A. 18A:39-19.1 and N.J.S.A. 18A:6-7.1, as applicable to each such individual; and

WHEREAS, Petitioner, the Commissioner of Education, issued an Order to Show Cause directing LSBP to show cause why an Administrative Order imposing a penalty against LSBP pursuant to N.J.S.A. 18A:39-20 and N.J.S.A. 18A:6-7.5 should not be entered; and

WHEREAS, LSBP filed an Answer to the Order to Show Cause on July 13, 2016; and

WHEREAS, this matter was transmitted to the Office of Administrative Law as a contested case on July 14, 2016;

NOW THEREFORE, it is hereby stipulated and agreed that this action is settled upon the following terms:

1. LSBP agrees to pay a monetary penalty in the amount of $25,000.00, which shall be paid in two installments. The first payment of $12,500.00 will be paid upon the signing of this Settlement Agreement. The second payment of $12,500.00 will be paid within 30 days of the signing of this Settlement Agreement. Each payment shall be delivered to:

Treasurer, State of New Jersey
c/o N.J. State Department of Education
Office of Accounting - 1st Floor
P.O. Box 500
Trenton, New Jersey 08625

2. LSBP agrees to take such actions as are required by the New Jersey Department of Education, Criminal History Review Unit ("CHRU"), to ensure LSBP's compliance with the statutes going forward. Specifically, LSBP shall annually, prior to the start of each school year, provide the CHRU a copy of the school bus certification roster required by N.J.S.A. 39-18, which shall be provided to the CHRU simultaneously with its submission to the county superintendent. At the same time the school bus certification roster is submitted to the CHRU, LSBP shall provide the CHRU a list of all non-school bus driver employees, identifying the position held by each individual listed and the start date of each individual's employment with LSBP.

3. The parties stipulate and agree that this Settlement Agreement sets forth the complete and full resolution of all issues between them with regard to Agency Docket No. 177-6/16.

4. The parties acknowledge that this Settlement Agreement will not impede the ability of the Commissioner to bring an Order to Show Cause pursuant N.J.S.A. 18A:39-20 and/or N.J.S.A. 18A:6-7.5 for any violations of the applicable statutes that may be discovered for subsequent school years.

5. This Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey, including by not limited to the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq.

6. The parties understand and agree to the terms of this Settlement Agreement. It is acknowledged that this Agreement has been entered into freely, willingly, and voluntarily, without duress or coercion, and with the opportunity for the parties to consult with representation of their choosing and at their option.

For Petitioner
Commissioner of Education

Carl H. Carabelli

Carl H. Carabelli, Manager
Criminal History Review Unit

Date: July 25, 2017

For Respondent
Limousine Service of BP

David Miller, President

Date:

292-17

T.P., ON BEHALF OF MINOR CHILDREN, A.P., M.P., AND J.P.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In February 2017, *pro se* petitioner appealed the determination of the respondent Board that her children are ineligible for a free public education in respondent's school district. Petitioner admitted in her appeal that she had been domiciled at an address in Keansburg, New Jersey, since the family's eviction from their previous home in Middletown Township in April 2016. The Board filed a counterclaim for tuition. A hearing in this matter was held on August 1, 2017.

The ALJ found, *inter alia,* that: pursuant to *N.J.S.A.* 18A:38-1(a), children between the ages of five and twenty years old are entitled to a free public education in the school district in which they are domiciled; the domicile of an unemancipated child is that of her parent, custodian or guardian; here, petitioner testified that on April 1, 2016 – facing eviction subsequent to foreclosure on the family home in Middletown Township – she entered into a lease for one unit of a two-family house in Keansburg; petitioner and her children had lived at the Keansburg address for sixteen months at the time of the hearing, and are therefore considered to be domiciled in Keansburg; petitioner's contention that her children should be permitted to continue to attend the Board's schools under the Educational Stability Act, *N.J.S.A.* 18A:7B-12(c), is without merit as petitioner offered no evidence that her intent was to move back to Middletown; rather, petitioner displayed an intent to remain in Keansburg as she stated that it was more affordable and more convenient to the location of her children's Middletown school than her former Middletown address had been. The ALJ concluded that petitioner's children were ineligible to receive a free education in the Middletown Township School District for the 2016-2017 school year, and that the Board is entitled to reimbursement for tuition in the total amount of $39,178.80.

Upon review, the Commissioner concurred with the ALJ's finding that the children were not domiciled in Middletown for the 2016-2017 school year, and were not entitled to a free education in the District during that time period. Further, the Commissioner concurred with the ALJ's assessment of the total tuition owed to the Board, but modified the ALJ's calculation of tuition to correct a typographical error. Accordingly, the Initial Decision of the OAL was adopted as the final decision, as modified above, and petitioner was directed to reimburse the Board in the amount of $39,178.80 for the period of ineligible attendance of T.P.'s children in the Middletown Township Schools. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 2, 2017

292-17

T.P., ON BEHALF OF MINOR CHILDREN, A.P., M.P., AND J.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

In February 2017, *pro se* petitioner appealed the determination of the respondent Board that her children are ineligible for a free public education in respondent's school district. Petitioner admitted in her appeal that she had been domiciled at an address in Keansburg, New Jersey, since the family's eviction from their previous home in Middletown Township in April 2016. The Board filed a counterclaim for tuition. A hearing in this matter was held on August 1, 2017.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a), children between the ages of five and twenty years old are entitled to a free public education in the school district in which they are domiciled; the domicile of an unemancipated child is that of her parent, custodian or guardian; here, petitioner testified that on April 1, 2016 – facing eviction subsequent to foreclosure on the family home in Middletown Township – she entered into a lease for one unit of a two-family house in Keansburg; petitioner and her children had lived at the Keansburg address for sixteen months at the time of the hearing, and are therefore considered to be domiciled in Keansburg; petitioner's contention that her children should be permitted to continue to attend the Board's schools under the Educational Stability Act, *N.J.S.A.* 18A:7B-12(c), is without merit as petitioner offered no evidence that her intent was to move back to Middletown; rather, petitioner displayed an intent to remain in Keansburg as she stated that it was more affordable and more convenient to the location of her children's Middletown school than her former Middletown address had been. The ALJ concluded that petitioner's children were ineligible to receive a free education in the Middletown Township School District for the 2016-2017 school year, and that the Board is entitled to reimbursement for tuition in the total amount of $39,178.80.

Upon review, the Commissioner concurred with the ALJ's finding that the children were not domiciled in Middletown for the 2016-2017 school year, and were not entitled to a free education in the District during that time period. Further, the Commissioner concurred with the ALJ's assessment of the total tuition owed to the Board, but modified the ALJ's calculation of tuition to correct a typographical error. Accordingly, the Initial Decision of the OAL was adopted as the final decision, as modified above, and petitioner was directed to reimburse the Board in the amount of $39,178.80 for the period of ineligible attendance of T.P.'s children in the Middletown Township Schools. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 2, 2017

OAL DKT. NO. EDU 3915-17
AGENCY DKT. NO. 38-2/17

T.P., ON BEHALF OF MINOR CHILDREN, A.P., M.P., AND J.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that A.P., M.P., and J.P. were not domiciled in Middletown for the 2016-2017 school year, and were not entitled to a free education in the District during that time period. The Commissioner further concurs with the ALJ's assessment of the total tuition owed to the Board; however, the calculation for tuition is modified as set forth below.[2]

Pursuant to *N.J.S.A.* 18A:38-1b and *N.J.A.C.* 6A:22-6.3, the Commissioner shall assess tuition against petitioner for the time period during which A.P., M.P., and J.P. were ineligible to attend the District's schools. The Commissioner modifies the ALJ's calculation of tuition owed to the Board for A.P.'s ineligible attendance from $11,806.20 to $13,726.80 ($76.26

[1] The Commissioner was not provided with a transcript of the August 1, 2017 hearing at the OAL.

[2] The ALJ's assessment of the total tuition due and owing to the Board for all three children – $39,178.80 – is correct, but there appears to be a typographical error in the Initial Decision pertaining to the cost of tuition for A.P.'s ineligible attendance in the District.

per day for 180 days). The Initial Decision erroneously listed the cost of A.P.'s attendance at $65.59 per day for 180 days, when in fact the tuition is $76.26 per day for 180 days.

Accordingly, the Initial Decision of the OAL – as modified herein – is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $39,178.80 for tuition costs incurred for the 2016-2017 school year, during which time A.P., M.P., and J.P. were ineligible to attend school in Middletown.

IT IS SO ORDERED.[3]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 10/02/17

Date of Mailing: 10/03/17

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3915-17
AGENCY DKT. NO. 38-2/17

T.P. ON BEHALF OF MINOR CHILDREN,
A.P., M.P. AND J.P.,
Petitioner,
v.
TOWNSHIP OF MIDDLETOWN BOARD
OF EDUCATION, MONMOUTH COUNTY,
Respondent.

T.P., petitioner, appearing pro se

Jeffrey R. Merlino, Esq. for respondent (Sciarrillo Cornell Merlino McKeever & Osborne, LLC)

Record Closed: August 4, 2017 Decided: August 18, 2017

BEFORE: **JEFFREY N. RABIN**, ALJ

STATEMENT OF THE CASE

Petitioner, T.P., the mother of minor children A.P., M.P. and J.P., has challenged the determination made by the respondent, Board of Education of the Township of Middletown, Monmouth County, that her children were not entitled to a free public

education in Middletown Township because petitioner and her children were not domiciled in the Middletown Township School District. Respondent filed a counterclaim seeking reimbursement of tuition for the time period A.P., M.P. and J.P attended school in Middletown Township, that being one hundred eighty (180) days each during the 2016-2017 school year, for a total of $39,178.80, and seeking a finding that petitioner is responsible to pay tuition for her three children if they continue attending Middletown Township schools during school year 2017-2018 while they are domiciled in a municipality other than Middletown Township, New Jersey.

PROCEDURAL HISTORY

On or about January 2, 2017, respondent notified the petitioner that her three children, A.P., M.P. and J.P, were ineligible to receive free educations in Middletown Township School District due to non-residency. Petitioner, T.P., filed a Pro Se Residency Appeal with the Department of Education on February 24, 2017. On March 15, 2017, respondent filed an Answer and Counterclaim with the Department of Education. The Department of Education transmitted this matter to the Office of Administrative Law (OAL) on March 21, 2017, for hearing as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Each party requested and was granted a single adjournment of the hearing. Upon due notice to all parties, the hearing was scheduled and heard on August 1, 2017. The record remained open for receipt of additional documentation, which was received on August 4, 2017, and the record closed on that date.

FINDINGS OF FACT

The facts of the case are not in dispute:

1. Prior to April 1, 2016, petitioner and her three children were domiciled in Middletown Township, New Jersey, and two of the children, M.P. and A.P., attended school in Middletown Township.

2. On April 1, 2016, facing eviction subsequent to a foreclosure on their home in Middletown Township, petitioner entered into a lease for one unit in a two-family residence at 109 Lawrence Avenue, Keansburg, New Jersey, a location closer to petitioner's children's schools in Middletown Township. This is the address where petitioner and her children continue to be domiciled. Petitioner's Pro Se Residency Appeal certified that her address is "109 Lawrence Avenue, Keansberg [sic], NJ." (Exhibit R-1.)

3. After moving to Keansburg Township, petitioner enrolled her son J.P. in kindergarten in Middletown Township, which he attended for the entire 2016-2017 school year.

4. After moving to Keansburg Township, petitioner's son, M.P., attended fifth grade in Middletown Township for the entire 2016-2017 school year, and her son, A.P., attended ninth grade in Middletown Township for the entire 2016-2017 school year.

LEGAL ANALYSIS AND CONCLUSION

Residency

The issue is whether petitioner's three children are eligible to attend respondent's public schools free of charge in accordance with N.J.S.A. 18A:38-1. If not, the issues are whether respondent's request for tuition reimbursement for the school year 2016-2017 should be granted, and whether petitioner is responsible to pay tuition for her children to remain enrolled in Middletown Township schools while the family is domiciled in a municipality other than Middletown Township, New Jersey.

Any child between the ages of five and twenty years old is entitled to a free public education in the school district in which he is domiciled. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). See V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom.; Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education).

A student is domiciled in a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1); State v. Benny, 20 N.J. 238, 250 (1955); In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999).

The domicile of an unemancipated child is that of his parent, custodian or guardian. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001); P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001). A child may also be considered domiciled in a school district if he lives with an adult domiciled in that school district, as long as the child is financially supported by that adult as if he were their own child, upon submission of a sworn affidavit to the board of education. N.J.S.A. 18A:38-1(b)(1).

A student may attend school in a district in which he is not domiciled, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2. A superintendent or administrative principal may also have a non-domiciled student removed from that school, on application to the board of education. N.J.S.A. 18A:38-1(b)(2).

When a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal for the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

Petitioner stated that as of April 1, 2016, she and her family became residents of Keansburg, New Jersey, and were no longer residents of Middletown, New Jersey. Petitioner testified that on April 1, 2016, facing eviction subsequent to a foreclosure on their home in Middletown Township, she entered into a lease for one unit in a two-family residence at 109 Lawrence Avenue, Keansburg, New Jersey. This is where petitioner and her three children have lived for sixteen months, and where they continue to live. Petitioner's Pro Se Residency Appeal application to the Commissioner of Education dated February 24, 2017, handwritten by petitioner, certifies that she and her family have an address of "109 Lawrence Avenue, Keansberg [sic], NJ."[1] Because petitioner is domiciled in Keansburg, and her children are living with her and supported by her in Keansburg, her children are considered domiciled in Keansburg. In re Unanue, supra.

Petitioner sought to rely on the Educational Stability Act, N.J.S.A. 18A: 7B-12(c). That statute permits free public education in the child's last school district when a child has been placed in a new resource family home, or a child's parent moves to a new district temporarily due to homelessness. That statute is not determinative here, as petitioner's children were not homeless; as residents at 109 Lawrence Avenue in Keansburg, they did not lack a fixed, regular, adequate residence. M.O'K. v. Bd. of Educ. of Cresskill, 2016 N.J. Super. Unpub. LEXIS 2046. Additionally, that statute does not apply because petitioner did not move to a different school district temporarily; she

[1] Petitioner's written request for an adjournment of this Hearing, dated June 13, 2007, also indicated that her current mailing address was 109 Lawrence Avenue, Keansburg, New Jersey.

entered into a formal lease for a home in Keansburg, New Jersey, and has now resided in that home for more than sixteen months.

The acts, statements and conduct of the individual, as viewed in light of all circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent/petitioner has the burden of proving domicile by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2). In the within matter, petitioner did not challenge the respondent's conclusion that she was domiciled in Keansburg. Further, petitioner offered no evidence that her intent was to move back to Middletown; rather, petitioner displayed an intent to remain in Keansburg: she stated that she moved to Keansburg because it was more affordable; she executed a year-to-year lease for property in Keansburg; she has now lived in Keansburg for over sixteen months; and she noted that her Keansburg address is more convenient because it is located closer to her children's schools than her former Middletown address.

Additionally, one of the purposes of the Educational Stability Act is to ensure that a child's school year is not interrupted by them being moved from one school district to another within a school year. It is noted that while petitioner moved out of Middletown Township in April 2016, her children remained in Middletown schools through the end of the school year, and respondent has not made a claim for tuition for the last three months of the 2015-2016 school year. Accordingly, petitioner has already been afforded whatever protections and benefits she might have received pursuant to the Educational Stability Act.

Accordingly, I **CONCLUDE** by a preponderance of the credible evidence that petitioner and her three children changed their domicile to Keansburg Township, New Jersey, in April 2016, that they were not domiciled in the Middletown Township, New Jersey, School District during the 2016-2017 school year, and that therefore they were ineligible to receive a free public school education in that school district for that time period. Additionally, I **CONCLUDE** by a preponderance of the credible evidence that petitioner and her three children are not currently domiciled in the Middletown

Township, New Jersey, School District, and that therefore they are not currently entitled to a free public school education in that school district.

Tuition Reimbursement

The respondent Board of Education asserts that it is entitled to be reimbursed for tuition for the period of A.P., M.P. and J.P.'s ineligible enrollment in its schools. Where, as here, the evidence does not support the petitioner's claim for a free public education, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

> If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

N.J.S.A. 18A: 38-1(b) similarly requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

Tuition for J.P.'s attendance in kindergarten in Middletown Township was $65.59 per day, for 180 days, for a total of $11,806.20 for 2016-2017. Tuition for M.P.'s attendance in fifth grade in Middletown Township was $75.81 per day, for 180 days, for a total of $13,645.80 for 2016-2017. Tuition for A.P.'s attendance in ninth grade in Middletown Township was $65.59 per day, for 180 days, for a total of $11,806.20 for 2016-2017. Accordingly, the total of out-of-district tuition for petitioner's three children for 2016-2017 was $39,178.80.

Based upon the facts and the legal principles cited above, I **CONCLUDE** that petitioner's children were ineligible to receive a free education in the Middletown

Township School District for the school year 2016-2017, and that respondent is entitled to reimbursement for the costs of tuition in the amount of $39,178.80.

I further **CONCLUDE** that petitioner's children will continue to be ineligible to receive a free education in the Middletown Township School District as long as they remain domiciled in a municipality other than Middletown Township, New Jersey.

ORDER

Based on the foregoing, respondent's determination that petitioner's children were ineligible for a free education in Middletown Township School District during the 2016-2017 school year is hereby **AFFIRMED**. It is **ORDERED** that petitioner, T.P., pay to respondent, the Board of Education of the Township of Middletown, tuition in the amount of $39,178.80 for the 2016-2017 school year. It is further **ORDERED** that petitioner shall be responsible to pay tuition to respondent if petitioner's children continue to attend Middletown Township, New Jersey, schools while they remain domiciled in a municipality other than Middletown Township, New Jersey.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 18, 2017
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: August 18, 2017

Date Mailed to Parties: August 18, 2017

JNR/cb

APPENDIX

WITNESSES

For petitioner:

T.P., appearing pro se

A.P.

For respondent:

None

EXHIBITS

For petitioner:

None

For respondent:

R-1 Agency Packet

Berdecia, Christina

From:	Berdecia, Christina
Sent:	Friday, August 18, 2017 3:07 PM
To:	Bloom, Randye; 'Ducan Kathleen (Kathleen.duncan@doe.state.nj.us)'; Greco, Margaret; 'Karin Molnar'
Subject:	EDU 3915-17 T.P. o/b/o A.P., M.P. and J.P. v. Twp. of Middletown BOE, Monmouth County (Initial Decision)
Attachments:	EDU 3915-17 T.P. v. Middletown BOE Initial Decision (no domicile).doc
Importance:	High

Tracking:

Recipient	Delivery
Bloom, Randye	Delivered: 8/18/2017 3:05 PM
'Ducan Kathleen (Kathleen.duncan@doe.state.nj.us)'	
Greco, Margaret	Delivered: 8/18/2017 3:05 PM
'Karin Molnar'	

********Please confirm receipt.********

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The decision issued by the Administrative Law Judge in the above-listed matter is attached. **Do not reply to this email address,** other than to confirm receipt. All other email replies will be deleted without response. You should refer to the concluding paragraph of the attached decision for information concerning your rights to file exceptions or to appeal this decision.

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Sincerely,

Christina A. Berdecia Judicial Assistant 1
Office of Administrative Law
9 Quakerbridge Plaza
Mercerville, NJ 08619
Fax No. (609) 689-4100

Judge Mary Ann Bogan Tele. No. (609) 689-4050
Judge Susan M. Scarola Tele. No. (609) 689-4051

Judge Jeffrey N. Rabin Tele. No. (609) 689-4057
Judge Ronald W. Reba T/A Tele. No. (609) 689-4062

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295-17

AGENCY DKT. NO. 216-9/17

IN THE MATTER OF THE TENURE HEARING OF PETER ELBERT, JOSEPH ARMENTAL, JOSEPH BELL, NOEL GORDON, NICOLE CARTWRIGHT, VENUS ROSE, LUIS SANCHEZ, AND JAMAYLA SCOTT, SCHOOL DISTRICT OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	COMMISSIONER OF EDUCATION DECISION

Tenure charges having been filed in the above captioned matter on September 20, 2017, together with a motion for a protective order asserting that such an order was required because of personally identifiable student information; and opposition to the motion having been filed by counsel on behalf of each of the individual respondents, the charges and accompanying statement of evidence are hereby temporarily sealed, pending resolution of the motion by the arbitrator to be assigned in these proceedings.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: ~~10/03/17~~
Date of Mailing: ~~10/03/17~~

296-17

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES
TENURE HEARING

~~~~~~~~~~~~~~~~~~~~~~~~~~~~

In the Matter of the Arbitration Between:

SCHOOL DISTRICT OF THE CITY OF ORANGE

CLAIMANT

AND

ROBYN HOLMES

RESPONDENT

MOTION

TO

DISMISS

~~~~~~~~~~~~~~~~~~~~~~~~~~~~

DOE # 102-5/17

ARBITRATOR: GERARD G. RESTAINO, ASSIGNED BY THE NEW JERSEY DEPARTMENT OF EDUCATION IN ACCORDANCE WITH C.18A:6-17.1

APPEARANCES:

FOR THE CLAIMANT

JESSIKA KLEEN, ESQ. — COUNSEL FOR CLAIMANT

JANELLE WINTERS, ESQ. — COUNSEL FOR CLAIMANT

FOR THE RESPONDENT

RONALD RICCI, ESQ. — COUNSEL FOR RESPONDENT

ROBYN HOLMES — RESPONDENT

PROCEDURAL BACKGROUND

Robyn Holmes, hereinafter referred to as the Respondent, is a tenured special education teacher employed as the Preschool Disabled teacher for Park Avenue School during the 2016-2017 school year. She has taught for twenty-six (26) years with an exemplary record.

On February 6, 2017, Assistant Principal, Ms. Devonii Reid, was notified by a paraprofessional that the Respondent had placed K.T.C , a non-verbal autistic student, under her desk. Ms. Reid entered the Respondent's classroom to assess the complaint and did in fact find K.T.C sitting underneath the Respondent's desk. At the end of the day on February 6, 2017, a meeting ensued with Ms. Reid, the Respondent and two (2) paraprofessionals.

Ms. Reid explained that the Respondent's action was inappropriate and reminded the paraprofessionals of their shared obligation to report inappropriate behavior that may lead to harm to students. Following that meeting Ms. Reid notified Dr. Paul Howard, Deputy Superintendent of Schools and Ms. Shelly Harper, Director of Special Services.

On February 8, 2017, a meeting was held with the Respondent, her Union Representative (not identified as NJEA or a local representative), Ms. Harper and Ms. Belinda Smiley, Human Resources Administrator. At that meeting Dr. Howard informed the Respondent that the Division of Child Protection and Permanency (CPP) was informed of the incident and has decided to conduct an investigation. Moreover, the Respondent was being reassigned to a position without student contact.

On February 10, 2017, Ms. Smiley submitted a summary of the February 8, 2017, meeting to the Respondent with copies to Dr. Howard, Ms. Harper, Dr. Myron Hackett, Principal of Park Avenue School, and Ms. Linda Siddiq , President of the Orange Education Association.

In that document Ms. Smiley indicated that the matter had also been referred to the Orange Police Department and that the District was awaiting the results of the CPP investigation. The Respondent was also informed that she is not allowed on the Park Avenue School premises and that she is not to contact staff, students or parents regarding this matter or for any other reason.

On February 14, 2017, Ms. Reid submitted a letter to the Respondent titled "Inappropriate Staff Conduct/Use of Corporal Punishment." In that letter Ms. Reid states in part that *"this letter serves as a written reprimand for your inappropriate behavior and failure to exercise the professional judgment of an Orange Public School employee."* Ms. Reid also stated that *"this reprimand is based upon my observation of the incident, discussion with each adult in the classroom and your acknowledgment of the acts described in the reprimand."*

Furthermore, Ms. Reid referenced what she had observed, and the actions of the Respondent were in violation of Board Policy 3281, Inappropriate Staff Conduct and Policy 3217, Use of Corporal Punishment. Ms. Reid also stated that a teaching staff member who is in direct violation of Policy 3217 *"will be subject to discipline by this Board and may be dismissed."*

Ms. Reid concluded by stating *"This letter should serve to underscore the importance of complying with Orange Public School policies, rules and regulations. I*

must inform you that further disciplinary action may occur potentially resulting in dismissal."

The Respondent signed that letter and acknowledged the following statement: *I acknowledge that I have received this written reprimand. I understand that my signature below does not imply agreement with this reprimand."*

On May 25, 2017, the District filed tenure charges against the Respondent charging her with Conduct Unbecoming, violation of Policies 3211, 3217 and 3281 based upon the February 6, 2017, incident. The second charge filed against the Respondent was Other Just Cause and incorporated all statements in Charge One into Charge Two.

The final statement as part of the charges states: *"The aforesaid facts demonstrate just cause warranting Respondent's dismissal from her position as a tenured special education teacher."*

I was appointed arbitrator in the matter at bar on June 12, 2017.

RESPONDENT

MOTION TO DISMISS

On August 23, 2017, the Respondent submitted a Motion to Dismiss the tenure charges on the grounds that the charges are *"precluded as Ms. Holmes has already been disciplined for the conduct that serves as the basis for the charges."*

The Respondent argues that the following cases grant credence and support to its position that the tenure charges must be dismissed:

Jill Buglovsky, School District of Randolph Township, Morris County

DOE 265-9/12 (Decided December 21, 2012)

John Carlomango, School District of the Township of Hillside

DOE 180-8/13 (Decided December 20, 2013

Lawrence Henchey, School District of Borough of New Milford, Bergen County

DOE 322-11/14 (Decided January 3, 2015)

The above decisions stand for well-settled case law that an employee, here a school teacher, cannot be punished twice for the same conduct. The arbitrators above determined that *double jeopardy* attached when the above respondents were charged twice for the same offense.

In the instant matter, the Respondent received a written reprimand (see February 14, 2017 letter) and now the District has filed tenure charges against the Respondent citing only the February 6, 2017, incident. Moreover, under Title 18A the written reprimand has significant consequences.

Therefore, *"the tenure charges filed against the Respondent are deficient and must be dismissed in their entirety."*

CLAIMANT

OPPOSITION TO MOTION TO DISMISS

The Claimant acknowledges the above cited cases by the respondent but offers Richard Graffanino, River Dell Regional School District, Bergen County, DOE 223-9/13 as support for its arguments.

The Claimant contends that the *"permissibility of tenure charges where prior discipline has been imposed turns on the timing of the discipline." (see Henchey,supra)* Moreover, *"a Board is not precluded from instituting tenure charges upon the same conduct giving rise to prior discipline where the tenure charges are filed*

contemporaneously."

In Graffanino the arbitrator held that the tenure charges were not precluded where the District previously withheld an increment for the same incident. The arbitrator determined that:

> *"The District's approach was not an attempt to duplicate punishment; but rather It was an attempt to fill a gap caused by the timing of the tenure charges. In the Interval before tenure charges were filed and again before an arbitration decision would issue, the District wanted to ensure that Graffaninos' salary was not increased. It may have been an unnecessary move because the gaps in time were so limited, but it was not inflicting a double penalty on respondent."*

The arbitrator in Graffanino noted that the Board had issued two forms of discipline concurrently, whereas in Henchey that Board had withheld an increment in 2013 for certain conduct and was attempting to revive those allegations nearly two years later. In Carlomagno, the Respondent had received a memorandum of discipline in December 2012 relating to specific conduct; the same conduct was raised as a count of tenure charges against him on May 28, 2013. Those tenure charges were filed five (5) months later but *"the disciplinary memorandum in question specifically stated that further instances of this type of behavior will be grounds for more severe disciplinary action. Thus, indicating that the initial memorandum of discipline constituted the finality of the discipline for that conduct and that future additional conduct would be necessary to prompt additional discipline."*

In Buglovsky the Respondent received a letter of reprimand on April 27, 2009, for inappropriate use of computer networks in violation of District policy. More than three (3) years later that Board raised the same charges for improper use of the computer network as grounds for tenure charges.

Unlike the cases cited by the respondent, the Board did not wait a significant

amount of time to file the tenure charges or revive the incident to impose duplicate discipline. The fact pattern in the instant matter are wholly distinguishable from the Respondent's cited cases. In conformance with Graffanino the *"Claimant here provided the letter of reprimand filling the gap, pending a determination regarding tenure charges."*

Most importantly, from a *"practical standpoint Respondent's interpretation of the case law would significantly constrain Boards of Education from addressing the actions of teachers during the period when tenure charges are being considered, prepared and certified. Especially in an instance such as this where the conduct of the teacher implicates student safety, District administration must be permitted to take Action to protect students and in doing so must inform the teacher of the allegations against them."*

For the foregoing reasons the Respondent's motion to dismiss should be denied, and this matter should proceed to a hearing on the merits.

DISCUSSION AND OPINION

For the reasons set forth below, Graffanino is distinguishable from the matter at bar and is not controlling. The February 10, 2017, memorandum from HR Administrator, Ms. Smiley, to the Respondent summarized the February 8, 2017, meeting with Dr. Howard and others. However, there is no reference that tenure charges would be filed as a result of the February 6, 2017, incident. Additionally, the memorandum references that the Orange Police Department and CPP would be conducting their own investigations, and the District would await the results. There is nothing dramatic about that memorandum in that it does not indicate that the results of

those investigations may be grounds for further disciplinary charges including tenure charges.

The February 14, 2017, letter from Assistant Principal, Ms. Reid, is much more revealing. The word reprimand is used four (4) times, and Board policies 3281 and 3217 are mentioned. Moreover, after discussing the use of Corporal Punishment, Ms. Reid states at the bottom of page one (1) that a teaching staff member who uses Corporal Punishment *"will be subject to discipline by this Board and* ***MAY be dismissed****."* (emphasis supplied)

On the top of the second page Ms. Reid states: *"This letter should serve to underscore the importance of complying with Orange Public School policies, rules and regulations. I must inform you that further disciplinary action* ***MAY occur potentially resulting in dismissal****."* (emphasis supplied)

The use of the word may in both sections of the letter clearly establishes that tenure charges were not being contemplated at that time. The use of the word further is exactly on point in the Carlomango case where the arbitrator said *"the disciplinary memorandum in question specifically stated that further instances of this type of behavior will be grounds for more severe disciplinary action. Thus, indicating that the initial memorandum of discipline constituted the finality of the discipline for that conduct and that future additional conduct would be necessary to prompt additional discipline."*

The Respondent had been disciplined via a written reprimand and thus cannot again be charged with the same conduct as a basis for tenure charges.

In Graffranino, Superintendent Fletcher told the NJEA representative "*that he was going to withhold Graffranino's increment and file tenure charges. He was not imposing*

separate penalties, but rather a two-part disciplinary measure that was justifiable under the timing and circumstances." Contrast that with the instant matter. The affidavit of Dr. Howard and dated March 24, 2017, references the February 8, 2017, meeting with the Respondent and her Union representative in which she stated *"...I specifically advised Ms. Holmes and made it clear to her that she **MAY** be dismissed from her position with the District upon the conclusion of the investigation."* Dr. Howard also referenced the February 14, 2017, letter to the Respondent from Ms. Reid in which Ms. Reid advised the Respondent that she ***MAY be dismissed from her position***.

Graffanino was mandatory; increment withholding and tenure charges. Here it is speculative and not done contemporaneously or concurrently. The incident occurred on February 6, 2017, and the charges were filed one hundred (100) days later on May 25, 2017. That defies the dictionary definition of contemporaneously; occurring or living at the same time, or concurrently; occurring or existing simultaneously or side by side. Carlomango was disciplined in December of 2012 and five (5) months later May 28, 2013, tenure charges were filed against him for the same infraction/conduct that led to the December 2012 memorandum of discipline. The arbitrator set that aside as being double jeopardy.

The Statement of Evidence signed by Dr. Howard makes no reference to any date of an infraction, violation of policies, rules/regulations, other than February 6, 2017. Another factor that has to be reviewed is the fact that in Graffanino, Superintendent Fletcher did not want that Respondent to receive any salary increase. That position is not found in the Statement of Evidence of Dr. Howard's affidavit.

The practical imperative of the Claimant's action was to deprive the Respondent of her due process rights by attempting to use the written reprimand dated February 14, 2017, as the basis for tenure charges. The Claimant has a high degree of comfort level but a careful review of its actions shows that comfort level to have a short life expectancy. If this was a case of progressive discipline incorporating additional infractions or policy violations, beyond the February 6, 2017, incident which would potentially lead to tenure charges being filed, the Claimant would have a basis for its actions. Nevertheless, the record is devoid of the continued vitality of the tenure charges filed by the Claimant. A mere scintilla of evidence to justify a written reprimand is wholly inadequate to support enhancing that written reprimand to tenure charges and dismissing the Respondent from employment.

Discharge is the highest form of economic capital punishment an employer can impose upon an employee. That action of the Claimant requires persuasive evidence to support the action. There were no sufficient or compelling reasons set forth by the Complaint to sustain the filing of tenure charges.

For the foregoing reasons, and having duly heard the proofs and allegations of the parties, I Award the following:

AWARD

The Respondent has met its burden of proof and the Motion to Dismiss the tenure charges is granted. The tenure charges filed against Robyn Holmes are dismissed in their entirety with prejudice, and she is to be returned to her position as a Special Education classroom teacher.

Dated: September 30, 2017

Gerard G. Restaino, Arbitrator

State of Pennsylvania)

County of Wayne) ss:

On this 30th day of September, 2017, before me personally came and appeared Gerard G. Restaino to me known to be the person who executed the foregoing document and he duly acknowledged to me that he executed the same.

Judith K. Restaino

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Judith K. Restaino, Notary Public
Lake Twp., Wayne County
My Commission Expires Nov. 10, 2017
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

297-17

STATE OF NEW JERSEY COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE	
	DOE DOCKET NO. 118-6/17
between	
SCHOOL DISTRICT OF THE TOWN OF BOONTON, MORRIS COUNTY	
Petitioner,	**CONSENT AWARD**
-and-	
WILLIAM HOLGATE,	
Respondent	

BEFORE: Michael J. Pecklers, Esquire, Arbitrator

DATE OF HEARING: August 16, 2017 (Telephonic)

DATE OF CONSENT AWARD: September 28, 2017

APPEARANCES:

For the Petitioner:

James L. Plosia, Jr., Esq., PLOSIA COHEN

For the Respondent:

William Holgate, Pro Se

WHEREAS, following the preferring of tenure charges by the Petitioner to the Commissioner of Education, and the assignment of the case to the undersigned, a discovery schedule including the propounding of interrogatories was set during the initial July 18, 2017 conference call; and

WHEREAS, opening arguments were accepted during a telephonic hearing conducted on August 16, 2017; and

WHEREAS, Respondent subsequently indicated his desire to not contest the charges and resign from his teaching position with the District; and

WHEREAS, following guidance from the undersigned, the dispute has been resolved via the attached September 8, 2017 MEMORANDUM AGREEMENT and GENERAL RELEASE and WAIVER, which are incorporated by reference herein; therefore,

BE IT RESOLVED, that the recommendation is made to the DOE that the same resolving the matter be adopted, as they comply with the *Cardonick* criteria set forth at N.J.A.C. 6A:3-5.6, if applicable.

Dated: September 28, 2017
NORTH BERGEN, N.J.

MICHAEL J. PECKLERS, ESQ.
ARBITRATOR

STATE OF NEW JERSEY
SS}
COUNTY OF HUDSON

ON THIS 28TH DAY OF SEPTEMBER, 2017, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.**, TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

OFFICIAL SEAL
ANGELICA SANTOMAURO
NOTARY PUBLIC - NEW JERSEY
My Comm. Expires July 29, 2019

MEMORANDUM OF AGREEMENT

This Agreement is entered into by and between the **BOONTON TOWN BOARD OF EDUCATION** ("District") and **WILLIAM HOLGATE** ("Holgate"). The parties hereby agree as follows:

1. Concurrent with the execution of this Agreement, Holgate shall submit to the District's School Business Administrator, Steven Gardberg, a valid and binding resignation of his employment with the District (for purposes or retirement with the New Jersey Division of Pensions, Public Employee Retirement System) effective June 30, 2017. This resignation shall become binding and irrevocable once it has been accepted by the Board of Education.

2. The District will agree not to pursue the Tenure Charges that have been filed against Holgate as a result of and in consideration for Holgate's resignation and his compliance with the terms of this Agreement. The District has determined that, given that fact that Holgate is resigning his tenured position in the District, it is in the public interest for the District to enter into this Agreement rather than continue to pursue the Tenure Charge case against Holgate.

3. Holgate has been advised that, as required by N.J.A.C. 6A:3-5.6 (a) (6), the District will forward a copy of this Agreement to the New Jersey Commissioner of Education, who in turn will forward the Agreement to the New Jersey State Board of Examiners for possible suspension or revocation of Holgate's New Jersey teaching certificate(s).

4. Holgate hereby agrees that he is entering into this Agreement with a full understanding of the terms contained herein and of his rights vis-à-vis this Agreement and in the Tenure Charge case which the District had instituted against him. He acknowledges that he had a right to consult with an attorney of his choosing with respect to his rights concerning the Tenure Charges and the execution of this Agreement, and that he is entering into this Agreement knowingly, voluntarily and without being under undue duress or coercion.

5. Holgate has no right to be paid for any additional monies by the District.

6. Pursuant to the attached General Release and Waiver, Holgate hereby waives any and all claims against the Board, its officers, employees, and agents arising out of his employment with the Board. Consideration for this Release exists due to the District's accepting Holgate's resignation from his tenured teaching position in lieu of the District pursuing tenure charges against Holgate. That Release is an integral part of this Agreement and is hereby incorporated into the Agreement.

7. Holgate agrees that he will have no right to apply in the future for a position of employment with the District, and that, should he do so in contravention of this provision, the District Board shall be legally permitted to ignore said application without any ability on Holgate's part to challenge or otherwise institute an action over the Board's failure to process or consider said application.

8. The parties agree that this Agreement shall be construed in accordance with the laws of the State of New Jersey, and that the laws of the State of New Jersey will apply to any dispute concerning it.

9. This Agreement shall be binding upon the parties, and may not be abandoned, supplemented, amended, changed, or modified in any manner, orally or otherwise, except in a writing of concurrent date or subsequent date, signed by a duly authorized representative of each of the parties hereto.

BOONTON TOWN BOARD OF EDUCATION

By: _____

Dated:

_____
WILLIAM HOLGATE

Dated: 9-8-17

GENERAL RELEASE AND WAIVER

I, WILLIAM HOLGATE ("Holgate") agreed to settle all outstanding claims against the **BOONTON TOWN BOARD OF EDUCATION** ("Board"), hereby provide the following General Release and Waiver ("Release"). The terms of the Release are as follows:

1. I acknowledge and agree that specific consideration for this Release is provided by the provisions of the attached Settlement Agreement, which is hereby integrated into this Release.

2. I agree to immediately dismiss with prejudice any claims which I have already brought and which are currently pending against any of the current or former Releasees. Current or former "Releasees", as that term is employed herein, shall include the Board, its officers, agents, servants, and employees, and their respective successors and assigns.

3. Without limiting the scope of the foregoing provision in any way, I specifically release all claims relating to or arising out of any aspect of my employment with the Board, including, but not limited to, all claims under The Age Discrimination in Employment Act, 20 U.S.C. §621, et seq., and specifically §626, Title VII of The Civil Rights Act, The Civil Rights Act of 1991 and the laws amended thereby, The American with Disabilities Act, The Family and Medical Leave Act of 1993, The New Jersey Law Against Discrimination, The New Jersey

This page reviewed by:

WILLIAM HOLGATE

Dated: 8-8-17

ACKNOWLEDGEMENT

I HAVE CAREFULLY READ AND FULLY UNDERSTAND THE TERMS AND CONDITIONS OF THIS RELEASE. BY MY SIGNATURE BELOW I DEMONSTRATE MY ACKNOWLEDGEMENT OF AND AGREEMENT TO EACH AND EVERY TERM OF THIS RELEASE. I ACKNOWLEDGE THAT I WAS ACCORDED AN OPPORTUNITY TO TAKE 21 DAYS TO CONSIDER WHETHER TO EXECUTE THIS RELEASE, BUT I HAVE SPECIFICALLY AND KNOWINGLY WAIVED THIS OPPORTUNITY. I ACKNOWLEDGE THAT I HAD THE OPPORTUNITY TO REVIEW THIS RELEASE WITH LEGAL COUNSEL AND/OR ANYONE ELSE OF MY CHOOSING, AND TO DISCUSS WITH EACH SUCH PERSON THE TERMS AND CONDITIONS OF THIS RELEASE AND MY RIGHTS UPON EXECUTION. NO REPRESENTATIONS CONCERNING THE TERMS OR EFFECT OF THIS RELEASE AND NO PROMISES, INDUCEMENTS, AGREEMENTS OR UNDERSTANDINGS OF ANY KIND WERE MADE TO ME OR WITH ME BY THE BOARD OR ITS ATTORNEYS TO CAUSE ME TO AGREE TO THE TERMS OF THIS RELEASE OTHER THAN AS SET FORTH IN THE DOCUMENT. I HAVE VOLUNTARILY SIGNED THIS RELEASE AS MY OWN FREE ACT WITH FULL KNOWLEDGE OF ITS TERMS AND CONDITIONS, WHICH ARE FINAL AND BINDING UPON ME. I UNDERSTAND THAT, FOR A PERIOD OF 7 DAYS FOLLOWING MY EXECUTION OF THIS RELEASE, I MAY REVOKE THIS RELEASE, AND THAT THIS RELEASE WILL NOT BE EFFECTIVE OR ENFORCEABLE UNTIL THE REVOCATION PERIOD HAS EXPIRED.

WILLIAM HOLGATE

Dated: 9-8-17

STATE OF NEW JERSEY :
:SS
COUNTY OF MORRIS :

I CERTIFY that on September 8, 2017, personally came before me and acknowledged under oath, to my satisfaction, that he is named in and personally signed this document.

Carol A. Perperas
A Notary Public of the State of New Jersey

CAROL A. PERPERAS
A Notary Public of New Jersey
My Commission Expires 10/28/21

298-17

OAL DKT. NO. EDU 12876-17
AGENCY DKT. NO. 192-8/17

C.B. and C.C, on behalf of minor children, I.T. and S.T,	
PETITIONERS,	COMMISSIONER OF EDUCATION
V.	DECISION ON
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, BERGEN COUNTY,	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. In this matter, the petitioners – the aunt and uncle of I.T. and S.T. – are challenging the Randolph Board of Education's (Board) decision denying the minor children a free education as "affidavit students" under *N.J.S.A.* 18A:38-1(b).[1] The ALJ denied the petitioners request for emergent relief, but found that the children are entitled to attend school in the District on a tuition basis pending the outcome of this case since the petitioners filed a timely appeal.

The procedural history of this matter is fully outlined in the Order on Emergent Relief and is generally not in dispute. By letter dated July 17, 2017, the Board notified the petitioners that I.T. and S.T. were denied enrollment in the District as "affidavit students" under

[1] A review of the file indicates that the petitioner may wish to alternatively challenge the Board's decision to deny their request to have the children attend school on a tuition basis. If the petitioners want to pursue that alternative, they should file an amended petition.

N.J.S.A. 18A:38-1(b).[2] In response to the Board's decision, the petitioners sent an email to the Superintendent indicating their disagreement with the Board's determination, but also stating that they would like to pursue the option of paying tuition for the children to attend school. Thereafter, the Board and the petitioners exchanged a series of emails regarding the details associated with having I.T. and S.T admitted as tuition students. The context of the emails included: the cost per pupil; the fact that payment is required upfront and no payment plans are available; that the Superintendent would share the petitioners' request to pay for tuition with the Board; and that the Superintendent would have a tuition agreement prepared for the petitioners' review.

On August 16, 2017, the Superintendent subsequently informed the petitioners that the Board denied their request to have I.T. and S.T. enrolled as tuition students. On August 17, 2017, the petitioners filed a residency petition with the Office of Controversies and Disputes challenging the Board's decision denying I.T. and S.T. enrollment as "affidavit students" under *N.J.S.A.* 18A:38-1(b). Despite the fact that the petitioners filed a residency petition, the Board refused to enroll the students – maintaining that the appeal was filed beyond the 21-day statutory period. The petitioners then filed an application for emergent relief seeking to have the students enrolled in the District during the pendency of the proceedings.

Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioners have failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. The Commissioner further finds, however, that I.T. and S.T. shall be enrolled in the District free of charge during the pendency of the proceedings before the Commissioner.

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[2] The July 17, 2017 letter stated that if the petitioners disagreed with the Board's determination, they had 21 days to appeal the residency determination to the Commissioner, and that if the appeal was filed within the 21 days, the students would be able to attend school in the District during the pendency of the appeal process.

Under *N.J.S.A.* 18A:38-1(b), if a board of education denies admission to a child between the age of 5 and 20 living in the home of a district resident, the resident may contest the board of education's decision to the Commissioner within 21 days of the date of that decision.[3] If the appeal is filed within 21 days, the child is entitled to attend school in the district during the pendency of the proceedings. Although the petitioners filed the residency petition outside the 21-day timeframe, the Commissioner finds that under the unique circumstances in this case, I.T. and S.T. are entitled to the protections of *N.J.S.A.* 18A:38-1(b).

In light of the ongoing tuition negotiations between the parties, it was reasonable for the *pro se* petitioners to hold off on filing a residency petition in reliance on the Board's representations concerning the admission of the children on a tuition basis.[4] Moreover, as soon as the Board notified the petitioners – on August 16, 2017 – that I.T. and S.T. were declined admission in the District as tuition students, the petitioners filed the residency petition the next day – on August 17, 2017. In so finding that I.T. and S.T. are entitled to the protections of *N.J.S.A.* 18A:38-1(b), the Commissioner is not only mindful of the extenuating circumstances in this case but also that the spirit and intent of the statute contemplates a scenario where children remain in school during the pendency of residency disputes.[5] *See generally, H.S., on behalf of minor child, H.S. v. Melindo Persi and Board of Education of the Township of Edison*, 96 *NJAR* 2d (EDU) 641. This statutory safeguard also enables children to attend school free of charge during the pendency of the proceedings which further exemplifies the desire of the Legislature to ensure that children are

[3] In order to satisfy the requirements of an "affidavit student" a resident of the school district is not required to have legal guardianship of the child.

[4] After this matter was transmitted to the OAL, the petitioners obtained counsel.

[5] The parents of I.T. and S.T. currently live in Santiago, Chile. This is not an "affidavit student" dispute where the parents are domiciled in another New Jersey school district where the children are entitled to attend school.

attending school.[6] If during the course of the proceedings it is ultimately determined that I.T. and S.T. are not entitled to attend school in the District as "affidavit students," the Commissioner will assess the petitioners tuition costs for any period of unlawful attendance in the District, a corresponding safeguard that is statutorily bestowed upon the districts in residency disputes. *N.J.S.A.* 18A:38-1(b).

The recommended Order of the OAL is modified accordingly. This matter shall continue at the OAL to determine whether the petitioners meet their burden of demonstrating that they have satisfied all of the criteria of the "affidavit student" law under *N.J.S.A.* 18A:38-1(b) and the implementing regulations. I.T. and S.T. shall be permitted to attend school free of charge during the pendency of the proceedings.

IT IS SO ORDERED.[7]

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 9/28/17
Date of Mailing: 10/06/17

[6] The ALJ found that I.T. and S.T. can attend school on a tuition basis until this matter proceeds before the Commissioner. There is no statutory or regulatory mechanism that provides for students to attend school on a tuition basis pending the outcome of a residency dispute. Therefore, if the residency petition is deemed to be timely filed, then it follows that the children are entitled to attend school in the District free of charge until the matter is resolved. *See*, *N.J.S.A.* 18A:38-1(b).

[7] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED
ORDER ON MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 12876-17
AGENCY DKT. NO. 192-8/17

C.B. & C.C. ON BEHALF OF MINORS I.T. AND S.T..,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,
Respondent.

Martin Liberman, Esq., appearing on behalf of petitioners

Marc H. Zitomer, Esq., for respondent (Schenck, Price, Smith & King. attorneys)

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, C.B. and C.C., on behalf of minor children I.T and S.T. challenge the Township of Randolph Board of Education's (Board or respondent) residency determination. On September 5, 2017, petitioner filed a Motion for Emergent Relief on

behalf of the minors to be enrolled in Randolph Middle School and Randolph High School respectively. In support of the motion, petitioner submitted a brief, certifications, letters, documents and copies of emails. Petitioner requested an adjournment of the September 13, 2017, hearing date with the consent of respondent. The adjournment was granted. Oral argument on the motion was held on September 18, 2017.

FACTUAL DISCUSSION

Based upon consideration of the documentary evidence presented, I **FIND** the following to be the **FACTS** of this matter.

C.B. and C.C. are married residents of Randolph who have guardianship of their niece and nephew I.T. and S.T. by power of attorney. The parents of the minors live and work in Santiago, Chile. The parents wanted I.T. and S.T. to receive an American educational experience. However, they cannot afford to leave their jobs and travel to the United States with their other children. I.T. and S.T. are American citizens. Petitioners gratuitously support I.T. and S.T. with no contributions or payments from the parents. I.T. and S.T. will live with petitioners from August 2017 to August 2018.

Petitioners attempted to enroll I.T. and S.T. in Randolph Middle School and Randolph High School in July 2017. On July 17, 2017 I.T. and S.T. were denied enrollment by respondent because there was no evidence of family or economic hardship rendering the parents incapable of caring for the minors and that they would only be living in Randolph for the school year. On July 24, 2017 petitioners were sent an email from Jennifer Fano (Fano), Superintendent of Randolph Township Schools informing them that there were two different appeals options both of which had to be filed within twenty-one days of the denial. The email also states that if they chose to go the tuition route the tuition for grades 6-8 was $13,488 and the tuition for grades 9-12 was $14,378. On July 26, 2017 petitioners informed Fano that they would pay the tuition for the minors. Fano requested the academic and discipline records of I.T. and S.T. On July 28, 2017 petitioners applied for the children to be enrolled as full paid tuition students. On August 2, 2017, Fano emailed petitioners to inform them that the Board was reviewing the academic records of the minors. On August 16, 2017 Fano

informed petitioners that their request that I.T. and S.T. be enrolled as full pay tuitions students was denied. Petitioners believed that I.T. and S.T. would be accepted as tuition paying students at Randolph and therefore did not file the appeal of the district's decision until after I.T. and S.T. were denied enrollment as tuition paying students at Randolph. On August 17, 2017, petitioners filed an appeal of the denial. In his response to the motion respondent stated that petitioners could appeal Randolph's denial of admission on a tuition basis. On August 28, 2017 petitioners went to enroll I.T. and S.T in school. At that time, they were told that they could not enroll the minors without the Petition of Appeal. On August 29, 2017 petitioners delivered the Petition of Appeal to the office of Fano. Fano emailed petitioners that the district had no obligation to enroll I.T. and S.T. and it did not enroll them.

Classes began in Randolph on September 7, 2017.

LEGAL DISCUSSION AND CONCLUSIONS

N.J.S.A. 18A:38-1(a) and (b) provides:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person who is domiciled within the school district;
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about

which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the resident in writing of his right to contest the board's decision to the commissioner within 21 days. No child shall be denied admission during the pendency of the proceedings before the commissioner. In the event the child is currently enrolled in the district, the student shall not be removed from school during the 21-day period in which the resident may contest the board's decision nor during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the resident, parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner;

(2) If the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the

> parent may contest the board's decision or during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner;
>
> The provisions of this section requiring proof of support, custody or tenancy shall not apply to a person keeping a child in his home whose parent or guardian is a member of the New Jersey National Guard or a member of the reserve component of the armed forces of the United States and who has been ordered into active military service in any of the armed forces of the United States in time of war or national emergency. In such a situation, the child shall be eligible to enroll in the district in which he is being kept, and no tuition shall be charged by the district. Following the return of the child's parent or guardian from active military service, the child's eligibility for enrollment without tuition in the district in which he or she is being kept shall cease at the end of the current school year;

Respondent denied petitioners' enrollment for free education in Randolph on July 17, 2017. Respondent and petitioners sent emails regarding options for enrollment of I.T. and S.T. Fano sent petitioners an email on July 24, 2017 informing them of the cost of tuition for each child as well as the fact that there were two different appeals options which had to be filed twenty-one days after the denial. The email also discussed petitioners paying tuition for I.T. and S.T. and what the amounts of the tuition would be for each. Emails between the parties regarding tuition were exchanged through August 2, 2017. On August 16, 2017 petitioners were advised that the I.T. and S.T. were denied enrolment as tuition paying students. Petitioners appeal was filed the next day. It was reasonable for the petitioners to assume that the twenty-one-day period for filling the appeal would begin after the denial of I.T. and S.T. as tuition paying students. They were working with respondent to reach a solution regarding the enrollment of the children. They were not informed that the minors would not be enrolled as tuition paying students until August 16, 2017. Petitioners filed the appeal on August 17, 2017. In his motion respondent states that petitioners can appeal the denial of admission of I.T. and S.T. as tuition paying students. I **CONCLUDE** that the twenty-one day period to

file an appeal of the determination of the Board that the minor children would not be admitted as tuition paying students began on August 16, 2017 and therefore petitioners filed a timely appeal.

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> 2. The legal right underlying petitioner's claim is settled;
> 3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in his favor.

It is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 968 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement). The moving party bears the burden of

proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief requires a "'clear showing of immediate irreparable injury,'" or a "'presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ibid. (citation omitted.)

In this matter the petitioners will suffer irreparable harm by not being allowed to be enrolled in school. School has already begun and petitioners' education is being affected by being denied access to education. The right for children between the ages of five to twenty to a free education is well settled in the statutes. The criteria that petitioner has a likelihood of prevailing on the merits is unclear. The petitioners state that the hardship of the parents of I.T. and S.T. is that they cannot bring their entire family to New Jersey because they have two other children and they both work. The hardship described here is not the type hardship envisioned by the statute and case law. The petitioner will suffer greater harm than the district if I.T. and S.T. are not enrolled in school because they will not be receiving an education.

All of the criteria of N.J.A.C. 6A:3-1.6(b) must be met in order for petitioner to prevail on a motion for emergent relief. I **CONCLUDE** petitioner did not meet all of the criteria of N.J.A.C. 6A:3-1.6(b) because they have not shown a likelihood of prevailing on the merits.

Accordingly, IT IS **ORDERED** that:

1. Petitioner's request for free tuition for I.T. and S.T. is **DENIED**.
2. I.T. and S.T. be enrolled in the Randolph School District on a tuition basis, pending the outcome of this case since petitioners filed a timely appeal.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of

Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

DATE

KIMBERLY A. MOSS, ALJ

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
Newark, NJ 07102
(973) 648-6093
Fax No. (973) 648-2358

Kimberly Moss
Administrative Law Judge

September 18, 2017

Kimberley Harrington, Commissioner
Department of Education
100 Riverview Plaza, 4th Floor
P.O. Box 500
Trenton, NJ 08625-0500
Attn: Samantha L. Price, Esq.

Re: C.B. and C.C. on behalf of I.T. and S.T. v. BOE of the Township of Randolph, Morris County
OAL Dkt. No. EDU 12876-17
Agency Dkt. No. 192-8/17

Dear Commissioner:

The Order issued on September 18, in the above referenced matter contained errors on page 2, second paragraph, first line reads, "C.B. and C.C. are married residents of Randolph who are the legal guardians of their niece and nephew, I.T. and S.T." This sentence should read **["C.B. and C.C. are married residents of Randolph who have guardianship of their niece and nephew I.T. and S.T. by power of attorney."]**

Also page 7, the third and fourth paragraphs should which reads: "It is **ORDERED** that I.T. and S.T. be enrolled in the Randolph School District pending the outcome of this case, since petitioners filed a timely appeal. and It is further **ORDERED** that petitioner's application emergent relief be and hereby is **DENIED**." These paragraphs should be deleted in its entirety and replaced with the following:

Accordingly, IT IS ORDERED that:

3. **Petitioner's request for free tuition for I.T. and S.T. is DENIED.**

4. **I.T. and S.T. be enrolled in the Randolph School District on a tuition basis, pending the outcome of this case since petitioners filed a timely appeal.**

Very truly yours,

Kimberly A. Moss
Administrative Law Judge

KM/ljb
Enclosure(s)
c: Martin Liberman, Esq.
Marc H. Zitomer, Esq.

299-17

OAL DKT. NO. EDU 08273-13
AGENCY DKT. NO. 75-3/13

VIRGINIA VERTETIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and *N.J.A.C.* 1:1-3.3 – along with copies of the notification sent to the parties by the OAL on August 31, 2017, providing petitioner with an opportunity to submit an explanation for her nonappearance – have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed a contested case before the Commissioner, and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 10/06/17
Date of Mailing: 10/06/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

OAL DKT. NOS. EDU 03271-14, EDU 03325-14, EDU 03327-14 and EDU 04078-14 (Consolidated)
AGENCY DKT. NOS. 33-2/14, 21-1/14, 14-1/14 and 75-3/14

MARILYN CROES,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,

RESPONDENT,

AND

ARLEEN MCQUADE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,

RESPONDENT,

AND

KEISHA INGRAM,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,

RESPONDENT,

AND

SARAH VACCA,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of these consolidated matters, the stipulations of dismissal, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 10/05/17

Date of Mailing: 10/06/17

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

MARILYN CROES,

Petitioner,

v.

BOROUGH OF HIGHLAND PARK BOARD OF EDUCATION,

Respondent.

OAL DKT. NO. EDU 03271-14

AGENCY DKT. NO. 33-2/14

ARLEEN MCQUADE,

Petitioner,

v.

BOROUGH OF HIGHLAND PARK BOARD OF EDUCATION,

Respondent.

OAL DKT. NO. EDU 03325-14

AGENCY DKT. NO. 21-1/14

KEISHA INGRAM,

Petitioner,

v.

BOROUGH OF HIGHLAND PARK BOARD OF EDUCATION,

Respondent.

OAL DKT. NO. EDU 03327-14

AGENCY DKT. NO. 14-1/14

SARAH VACCA,

Petitioner,

v.

BOROUGH OF HIGHLAND PARK BOARD

OAL DKT. NO. EDU 04078-14

AGENCY DKT. NO. 75-3/14

OF EDUCATION,

Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, P.C., attorneys)

Cynthia A. Satter, Esq., for respondent (The Law Offices of Stephen E. Gertler, attorneys)

Record Closed: July 28, 2017 Decided: August 21, 2017

BEFORE **JULIO C. MOREJON**, ALJ:

This matters were transmitted to the Office of Administrative Law on March 20, 2014, for determination as contested cases, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore

ORDER that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 21, 2017
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency:

Date Mailed to Parties: AUG 22 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

302-17 E

OAL DKT. NO. EDU 12751-17
AGENCY DKT. NO. 196-8/17

A.M., on behalf of minor child, O.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 10/06/17
Date of Mailing: 10/06/17

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 12751-17
AGENCY REF. NO. 196-8/17

A.M. ON BEHALF OF O.M.,
Petitioner,
v.

BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,
Respondent.

A.M., petitioner, pro se

Stephen R. Fogarty, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: September 12, 2017 Decided: September 13, 2017

BEFORE **EVELYN J. MAROSE**, ALJ:

Petitioner, A.M., has filed an application for emergency relief pursuant to N.J.A.C.1:1-12.6, through which he challenges the decision of the Board of Education of the Borough of Maywood (Board) to retain his daughter, O.M., in Kindergarten for the 2017-2018 School Year.

Several hundred pages were submitted in connection with this application and the matter was scheduled for oral argument at 1:30 p.m. on September 12, 2017. Initially the District attempted to change the date for oral argument, but petitioners opposed the request and the date remained as scheduled. When the parties identified themselves, at the time of oral argument, for the first time it was learned that neither parent was in appearance, nor was counsel retained. O.M.'s aunt stated the O.M.'s mother was picking up other children at school and O.M.'s father was out of state on "emergency business", of which he was aware last week. Present were O.M.'s aunt and her husband, both of whom stated to have "power of attorney" to argue in lieu of O.M.'s father. Neither individual had filed a Notice of Appearance, identifying their relevant work experience or other qualifications, in a timely manner, with service upon the District. Considering the opposition of the District, and the detailed written submissions of both parties, I determined that oral argument by these non-lawyers would be inappropriate and that the emergent matter could be decided on the papers submitted. N.J.A.C. 1:1-5.4. N.J.A.C. 1:1-5.5.

O.M. is a six year, ten month, old female who transferred from school in Albania to the District in January 2017 and was assigned to a kindergarten class. School in Albania was very different, with little focus on academics or structured social interaction, and with a less demanding day. For example, while Albania had a full day kindergarten program, the children were scheduled for a two hour nap every afternoon.

In addition to the expected language barrier issues, O.M.'s teacher soon determined that the O.M. was substantially behind her peers, socially and academically. Further, O.M. had difficulty with the change in the educational program from Albania to the District. It took the child several months not to "shut down" from educational learning in the afternoon, at a time that she would usually be napping for two hours. It took her several months to begin to understand the rules of the classroom, including taking turns, respecting the personal space and property of other students and following directions.

The District had on staff a paraprofessional, who was fluent in Albanian, who initially worked with O.M. daily and later on an "as needed" basis to assist O.M. in

transitioning and foster communication between O.M. and her teacher. (Certification of Anxhela Ballolli, dated September 6, 2017.) Though O.M. improved somewhat from January to June 2017, she still would repeatedly refuse to complete any work in a group setting and at times refuse to even work one on one with her teacher. The teacher noted several incidents of O.M.'s failure to follow directions and procedures, including her refusal to stay with her assigned teacher during a field trip.

O.M.'s parents were informed on numerous occasions of the child's educational progress. In February, the teacher reviewed her work with the parents and discussed O.M.'s social and behavioral issues. She informed the parents that she was uncertain if O.M. would be ready to move to first grade by the end of the school year and highlighted some academic and developmental standards that had to be met for promotion. She advised the parents both verbally and in writing that no decision regarding promotion would be made until the spring. (See Certification of Mallorie Gilbride, Exhibit D.)

At the request of the parents, a parent-teacher-guidance counselor conference was held in March 2017. One to one, pre-school tutoring was offered, which O.M. attended on numerous occasions. O.M. teacher stated that did not initially propose pre-school tutoring since O.M. was having difficulty with even her full time academic day and started her school day earlier would further tire the child. (See Certification of Mallorie Gilbride.)

On April 24, 2017, the teacher advised the parents that she would be recommending that O.M. be retained in Kindergarten for the 2017-2018 School Year, rather than promoted to first grade. She also advised them that her decision could be appealed to the principal. The parents met with the principal, the guidance Counselor and the teacher on April 28, 2017. Although the District staff explained the factual basis for the recommendation, the parents vehemently disagreed with the decision. Accordingly, the teacher and principal agreed to reconsider their decision if O.M. showed marked improvement by the end of the school year. (See Certification of Mallorie Gilbride, Certification of Ray Bauer, and Certification of Michael Jordon.)

Since the District found no marked improvement, O.M.'s parents were advised that the District would be moving forward with its decision to retain O.M. in Kindergarten. Thereafter at the request of the parents, another meeting was held with the parents, district staff and the Superintendent, who affirmed the decision to regain O.M. in Kindergarten. (Certification of Mallorie Gilbride, Certification of Ray Bauer, and Certification of Michael Jordon.)

The District detailed the standards that it applied in making its determination.

> In New Jersey kindergarten students are required to demonstrate a satisfactory understanding of very specific academic skills . . .Teachers are required to perform specific testing to determine a student's ability to: (1) identify upper and lower case letters; (2) identify letter sounds; (3) recognize and produce rhyming words; (4) read high-frequency words; and (5) demonstrate comprehension of a story read.
>
> Similarly, for mathematics, we (teachers) must access the student's ability to: (1) count to 100 by ones and tens; (2) compare numbers and set of objects; (3) add and subtract within 10 dimensional shapes; and (6) form numbers correctly. As to the third academic category, writing, the following skills are assessed: (1) forming letters correctly; (2) spelling words phonetically: (3) using a combination of drawings and writing: and (4) applying conventions of grammar and usage.
>
> Students are also expected to demonstrate adequate abilities in three non-academic areas: listening and speaking, social development and work habits. As to listening and speaking, teachers are required to report whether the student has demonstrated an ability to speak clearly; express self well; and participate in group discussions. Concerning social development, six categories are individually assessed as follows: exercises self-control; respects property of others; follows school rules; respects rights and feelings of others; shows self-respect; and demonstrates maturity. With regards to work habits, a student's performance is documented in eight categories: (1) demonstrates ability to focus; writes neatly and legibly; (3)

> follows directions; (4) works independently; (5) completes assignments in reasonable time; (6) assumes responsibility for personal belonging; (7) works cooperatively in groups; and (8) completes and returns homework on time.
>
> (See Certification of Mallorie Gilbride, Paragraphs 12-13.)

From January through June 2017, O.M.'s kindergarten teacher assessed her in the foregoing categories. As to social development, work habits, and listening and speaking, the assessments were done anecdotally through observations in the classroom and during free time. Academically O.M. was assessed by her classroom work and three times a year through specific assessments given to O.M. and her peers. Throughout her time in the District kindergarten, O.M. consistently demonstrated significant deficits in all assessed categories, which her teacher detailed via certification. Care was taken to ensure that O.M.'s unsatisfactory performance was not driven by a language barrier. As noted above, as necessary O.M. received aide from a paraprofessional who spoke fluent Albanian. In addition, at times, Jacqueline Helfricht, O.M.'s English as a Second Language (ESL) Teacher, provided instruction to O.M. specifically at her level of English understanding. It should also be noted, that numerous assessments, especially in Mathematics, did not require understanding the English language. (Certification of Mallorie Gilbride and Certification of Anxhela Ballolli.)

As an educational professional who worked with O.M. from January to June, O.M.'s teacher opined that O.M. is not academically or socially ready for first grade. O.M.'s scores, though somewhat improved from January, show substantial deficits in areas that are addressed in the kindergarten curriculum but not in the first-grade curriculum. The teacher noted that, "While I recognize the parents' apparent willingness to retain O.M. in June 2018, if she, in their words, were to "fail" first grade, O.M. would not receive, in first grade, the foundational skills necessary to ensure long term academic success that are only provided in a kindergarten classroom." Accordingly, kindergarten retention is necessary. (Certification of Mallorie Gilbride)

Via Certification, Elementary Principal, Ray Bauer, stated that after O.M.'s kindergarten teacher advised the parents that she was recommending that O.M. be retained due to concerns in the areas of academic performance, conduct and peer relations, he reviewed the teacher's recommendation together with relevant student records and fully supported retention. He advised the parents of this decision via letter dated April 27, 2017. On April 28, 2017, he participated in a meeting with O.M's parents, O.M.'s aunt, her teacher and the guidance counselor. The basis for the retention was examined and copies of O.M.'s recent were work was shown. (See Certification on Ray Bauer.)

Since the parents still vehemently disagreed with the retention decision, Principal Bauer agreed that were O.M. to show a marked improvement, the retention recommendation would be rescinded. The Principal also informed the parents of their right to appeal his decision to the Superintendent. On June 19, 2017, Principal Bauer, along with O.M.'s parents, O.M.'s aunt, the kindergarten teacher and the guidance counselor participated in a meeting with Superintendent. (Certification of Ray Bauer.)

Superintendent Michael Jordon certified that following the June meeting, he reviewed all relevant documentation and letters, together with O.M.'s ACCESS scores and affirmed the decision to retain O.M. Superintendent Jordon also confirmed that District procedures were followed in connection with the retention, including advising the parents in February 2017 that retention was being considered though no decision regarding promotion would be made until Spring. The retention recommendation was initiated by the classroom teacher, who then forwarded the recommendation to the Principal, who affirmed the recommendation. Then since the recommendation was appealed, the Superintendent made the final decision. (Certification of Michael Jordon.)

A.M. acknowledged that O.M. had difficulty when she started Kindergarten in the District. He affirmed that the new school environment was very different from Europe, where the children basically play and nap in Kindergarten. He acknowledged that for the "first couple of months" that she was in District, O.M. had difficulty with the "school rules." However, he asserted that O.M. has "come along way" socially and academically. She is not mentally delayed and he believes that she has learned

English in record time. A.M. does not see deficits at home and states that O.M. has good attendance and never fails to do her homework. (See Statement by A.M., notarized 9/7/17.)

A.M. notes that O.M. has parents, whose "care and interest is above and beyond." He is concerned that her teacher is simply not fond of O.M. because of her difficult start. He describes the child's desire to be a first-grade student and her distress over "this school thing." (See Statement by A.M., notarized 9/7/17.)

A.M. believes that the decision to retain O.M. was truly made from February 2017. He alleged that "every effort was not made" to ensure that that O.M. succeeded. He describes the ESL program as horrible, the pre-school tutoring as essentially non-existent, and the testing procedures used to access O.M. as unfair and contributing to her low scores. (See Statement by A.M., notarized 9/7/17.)

A.M. describes the District staff as arrogant in their dealings with the parents, and accuses them of lying. Among other things, he asserts that O.M.'s teacher would assert that things would be "all good" if she achieved something and then would add another goal. He alleged that the teacher initially told the parents that while she recommended O.M. be retained that the decision whether to retain the child was up to the parents. (See Statement by A.M., notarized 9/7/17.)

In accordance with N.J.A.C. 1:1-12.6, emergency relief may be granted "where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case . . ." My determination in this matter is further governed by the standard for emergent relief set forth by our Supreme Court in Crowe v. DeGioia, 102 N.J. 50 (1986), as follows:

> The judge may order emergency relief if the judge determines from the proofs that:
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted.
>
> 2. The legal right underlying the petitioner's claim is settled.

3. The petitioner has a likelihood of success on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the relief is not granted.

The moving party must satisfy all four prongs of the Crowe v. DeGioia standard to establish an entitlement to emergent relief. Id. at 132-35. In determining whether the moving party has met its burden of proving irreparable harm, more than a risk of irreparable harm must be demonstrated. The requisite for injunctive relief requires a "'clear showing of immediate irreparable injury,'" or a "'presently existing actual threat; (emergent relief) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ccntinental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980.)

The Commissioner has consistently held that local boards of education may promote or place students in public school grade levels according to their own rules and regulations. Shenkler v. Ho-Ho-Kus Bd. of Educ., 1974 S.L.D. 772, aff'd 1975 S.L.D. 1157; Boulogne v. Bd. of Educ. of the City of Jamesburg, 1964 S.L.D. 107; Wilcox v. Bd. of Educ. of the Borough of Oceanport, 154-55 S.L.D. 75. See also: N.J.S.A. 18A: 4-24, which provides that while the Commissioner may inquire into whether a local district is providing a thorough and efficient education, "nothing in this section shall affect the right of each district to prescribe its own rules for promotion." Thus, generally, the Commissioner will defer to local board discretion in the area of grade level placement.

The Commissioner's view is consistent with the generally accepted notion that he will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) <http://lawlibrary.rutgers.edu/oal/search.html>, citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966). The Commissioner will not substitute his judgment for that of the board of education, whose

exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960)

Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, at plenary hearing petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M. v. Moorestown, supra, EDU 2780-07, Initial Decision (February 6, 2008) <http://lawlibrary.rutgers.edu/oal/search.html>.

In the instant case, I **FIND** that there are numerous standards that are considered in assessing whether a child should be promoted from Kindergarten. The standards were presented in detail, by means of certification of O.M.'s Kindergarten teacher. While O.M. improved academically, socially and behaviorally from January to June 2017, she still showed substantial deficits in areas that are addressed in the Kindergarten curriculum but not in the first-grade curriculum and which are necessary to ensure long term academic success. In contrast, A.M. argues that O.M. has been under pressure since February 2017, regarding retention and is currently distressed about "this school thing." He notes that the child feels that she is ready to be in first grade and that she will be older than other children in her class if retained. I **FIND** that A.M.'s argument is speculative at best. The child is not qualified to determine whether she has met all the academic standards—socially, behaviorally and academically, to succeed in first grade. Further, she may just as likely be more distressed if her deficiencies in certain areas prevents her from having a successful first grade experience. In addition, O.M.'s parents have stated that if O.M. fails to meet the necessary standards to be promoted from first grade to second grade, they would not object to her retention in first grade. Such a commitment might be more distressful to O.M. that the acknowledgement that if she remains in Kindergarten another year, she will receive a stronger foundation to succeed in first grade. Accordingly, I **CONCLUDE**

that petitioner has not met her burden of proving irreparable harm if she is not promoted to first grade.

As in accordance with the above factual **FINDINGS,** I further **CONCLUDE** that when the equities and interests of the parties are balanced, petitioner will not suffer greater harm that the respondent will suffer if the relief is not granted. I also **FIND** that the District would suffer a harm, based upon its education obligations, if petitioner were promoted when the child was not ready.

I **FIND** that it is well settled law that promotion and retention are matters within the discretion of the local board of education, not the parents of pupils. The decision of a local board. in the absence of a finding that the action below was arbitrary, capricious or unreasonable, will not be overturned. Accordingly, I **CONCLUDE** that the petitioner has not met his burden in proving that the legal right under this request for emergent release is settled in his favor.

I further **FIND** that the District complied with its own policies and procedures regarding retention. In February 2017, mid-year, the teacher advised the parents that O.M. might not be ready to move to first grade in September 2017. She further advised the parents that she would not be making a recommendation regarding promotion or retention until the Spring 2017. The teacher continued to work with O.M., on a one-to-one basis and with her class, teaching her the core curriculum, which she needed to master to qualify for promotion. In late April, the teacher advised the parents that she had decided to forward her recommendation to the principal, that O.M. be retained rather than promoted, since her assessments indicated that she did not master the Kindergarten curriculum and was not ready to proceed to first grade. After O.M.'s principal affirmed the teacher's recommendation, the parents appealed the determination to the principal. After the principal, did not revoke his affirmation, the parents' appeal was heard by the District superintendent, who also affirmed the retention. I **FIND** that the reasons for the recommendation and affirmations were not arbitrary, capricious or unreasonable, but rather based upon specific District standards relating to language, mathematics, listening and speaking, social development and work

habits. Thus, I **CONCLUDE** that the petitioner has not demonstrated a likelihood of success on the merits.

I also **FIND** that petitioner's arguments regarding Kindergarten being optional and regarding days in attendance during a school year are not on point. O.M. was not retained based upon the number of days that she attended school in the District. She was also not retained about an optional program. O.M. was retained because she did not demonstrate the proficiencies required for movement into the educational program of first grade.

I **CONCLUDE** that petitioner has not satisfied the standard for emergent relief.

ORDER

I hereby **ORDER** that the petition for emergency relief be **DISMISSED**.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Sept. 13, 2017
DATE

EVELYN J. MAROSE, ALJ

kep

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing of Franky Flores-Perito:

THE BOARD OF EDUCATION OF NORTH BERGEN, HUDSON COUNTY

"Petitioner,"

- and -

FRANKY FLORES-PERITO

"Respondent."

Agency Docket No. 120-6/17

DECISION APPROVING SETTLEMENT AGREEMENT

Before
Joyce M. Klein
Arbitrator

Appearances:

For the Petitioner:
Kevin Hanly, Esq.
Kevin Hanly, Esq. LLC

Jack Gillman, Esq.
Ryglicki & Gillman, PC

For the Respondent:
Mario M. Blanch, Esq.
Mario M. Blanch LLC

On June 15, 2017, the Board of Education of North Bergen, Petitioner, filed tenure charges with the State of New Jersey Department of Education against Respondent, Franky Flores-Perito, a clerk employed by the Petitioner, alleging that Respondent lived in Pennsylvania in violation of the New Jersey First Act, N.J.S.A. 52:14-7 which requires that public employees be residents of New Jersey.

On September 19, 2017, representatives of the Board of Education of North Bergen [the "Petitioner"] and Franky Flores-Perito [the "Respondent"] met with the arbitrator via conference call and discussed terms for settlement of these tenure charges. The terms of settlement were approved by both Respondent and the Board of Education of North Bergen on September 20, 2017.

The terms of settlement provide that Respondent was terminated from employment effective October 1, 2017. The Settlement Agreement also provides that Respondent retains her right to a pension, as well as accumulated sick and vacation pay, if any, and that the Board will not object to any application for unemployment benefits by Respondent.

Under N.J.A.C. 6A:3-5.6, the arbitrator is required to issue a brief decision approving the settlement of tenure charges and explaining why the arbitrator is approving the terms of settlement. I have approved these terms for the following reasons.

I am persuaded that the issues that were raised in the Statement of Tenure Charges and Specifications filed by the Petitioner and the Answer to Tenure Charges filed by the Respondent have been fully reviewed and discussed by all parties and that the issues raised therein have been satisfactorily addressed by the terms of settlement. The terms of settlement reflect an appropriate resolution of the charges leveled against the Respondent and will allow both parties to move forward without using valuable educational time and resources to proceed with the hearing in this matter. The Respondent's agreement to withdraw the challenge to her termination in exchange for the Board of Education's agreement not to challenge her application for unemployment compensation is in furtherance of the Board's objectives to comply with the New Jersey First Act N.J.S.A. 52:14-7 requiring public employees to be residents of New Jersey. I find that the settlement terms properly balance the interests of both parties, as well as the public interest, and provide a satisfactory basis for the resolution of any concerns that were raised by the Statement of, and the Answer to, the Tenure Charges that were set forth in the record of this proceeding.

Accordingly, and based upon all of the above, this will serve as the arbitrator's approval of the parties' settlement agreement.

Dated: October 4, 2017
Ocean Grove, New Jersey

Joyce M. Klein

State of New Jersey }
County of Monmouth } ss:

On this 4th day of October, 2017, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

Gretchen L Boone

Gretchen L Boone
Notary Public
New Jersey
My Commission Expires 8-24-2022
No. 50066778

RYGLICKI & GILLMAN, PC
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&
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Co-Counsel for North Bergen Board of Education

	:	**STATE OF NEW JERSEY** **NEW JERSEY COMMISSIONER EDUCATION/ OFFICE OF**
IN THE MATTER OF FRANKY FLORES-PERITO, A TENURED CLERICAL EMPLOYEE EMPLOYED BY THE BOARD OF EDUCATION OF NORTH BERGEN, HUDSON COUNTY	:	**ADMINISTRATIVE LAW** **Docket No. 120-6/17**
	:	**STIPULATION OF SETTLEMENT**

IT IS HEREBY STIPULATED AND AGREED by the parties and their respective attorneys that this matter shall be settled in accordance with NJAC 6A:3-5.6 as follows:

1. Franky Flores Perito ("FFP") is a tenured clerk employed by the Board of Education of the Township of North Bergen, Hudson County ("Board") since 2004.

2. The New Jersey First Act ("Act") requires that all public employees appointed on or after September 1, 2011 be residents of New Jersey. NJSA 52:14-7.

3. On May 25, 2017, the Board filed with Hugo D. Cabrera, the Board Secretary, Tenure Charges and a Statement of Evidence against FFP alleging that she was a legal resident of the State of Pennsylvania in violation of the Act and Board Residency Policy #4210 ("Policy"). Copies of the Tenure Charges and Statement of Evidence were served upon FFP. Upon notice to FFP, on June 13, 2017, the Board approved a resolution certifying the charges by a majority vote of the full membership of the Board and suspended FFP without pay. The certified tenure charges were mailed to the Commissioner on June 15, 2017.

4. On or about June 17, 2017, FFP filed an Answer to the Tenure Charges. The Commissioner referred the matter to Joyce Klein to arbitrate the issue in accordance with NJSA 18A:6-16.

5. On or about June 13, 2017, FFP filed an Application for Exemption from the provisions of the New Jersey First Act. The Board filed opposition to this application. In that Application, FFP admitted that she resided at 185 Dover Drive, Bushkill, Pennsylvania (the "Property"). On September 12, 2017 hearing was held by the Employee Residency Review Committee of the Department of Labor and Workforce Development ("Review Committee"). At that hearing, FFP testified that she resided in Pennsylvania. The Committee denied her application for exemption from the New Jersey First Act on the grounds that based on the evidence presented and arguments made, FFP did not demonstrate a "critical need or hardship" which would warrant an exemption.

6. Based on the Board's investigation of this matter, and the submission and testimony of FFP for exemption, it is clear that FFP was in violation of the Act and the Policy. By way of example, the following events and/or documents evidence that by February, 2017, FFP was a resident of Pennsylvania for purposes of the Act and Policy:

a) FFP is the owner of the Property where she resides with her family.

b) By letter dated February 1, 2017, FFP informed the payroll department at the Board that she was moving to Pennsylvania permanently and was claiming exemption from withholding of NJ gross income tax (Exhibit 1). Her address at the top of that letter is the Property.

c) On February 1, 2017, FFP executed an Employee's Certificate of Nonresidence in New Jersey in which she declared, under penalty of perjury, that she was a

resident of Pennsylvania (Exhibit 2).

d) A search of the voter registration website of the State of Pennsylvania indicates that FFP is registered to vote in Pike County, Pennsylvania and that her status is active (Exhibit 3).

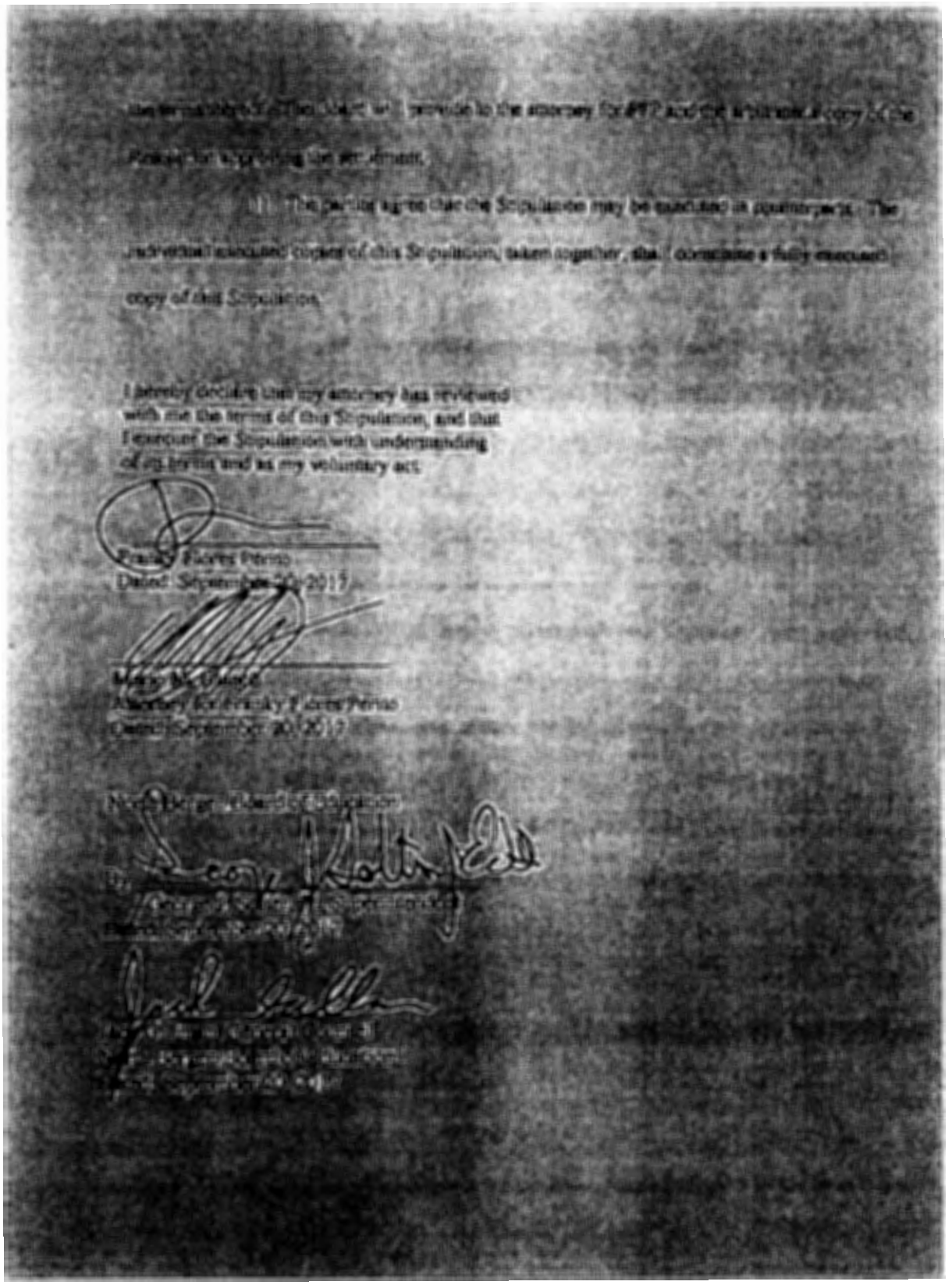
e) The Application for Exemption lists FFP's address as the Property (Exhibit 4), and at the hearing, FFP testified that she is a resident of Pennsylvania.

7. After the ruling by the Review Committee, the arbitrator and counsel for the parties conferenced the matter. All parties concluded that FFP could not comply with the Act and, therefore, was ineligible for continued employment by the Board. To continue with the matter through discovery and hearing could not change that conclusion.

8. As a result of the foregoing, the parties agreed that Franky Flores Perito shall be terminated from employment by the Board effective October 1, 2017. She will retain her rights to a pension under applicable law, and her rights to accumulated sick and/or vacation pay (if any) under applicable law and contract. To the extent that FFP is entitled to any reimbursement for sick and/or vacation pay, that determination shall be made by the Board and payment tendered within 45 days of the approval of this Stipulation by the Commissioner and arbitrator. As FFP was terminated she will qualify to collect unemployment benefits and the Board will not object to the collection of such benefits. Any objection previously lodged will be withdrawn.

9. The Act constitutes the public policy of the State of New Jersey and requires that employees be bona fide residents of New Jersey. Settlement of this matter is in furtherance of the public policy set forth in the Act.

10. This Stipulation of Settlement is conditioned upon and subject to approval by



I hereby declare that my attorney has reviewed with me the terms of this Stipulation, and that I execute the Stipulation with understanding of its terms and as my voluntary act.

Dated: September 20, 2017

Dated: September 20, 2017

305-17
OAL DKT. NO. EDU 4573-13
AGENCY DKT. NO. 208-7/12

YOU & ME PRESCHOOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF ADMINISTRATION AND FINANCE,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Settlement Agreement transmitted by the Office of Administrative Law have been reviewed. The agency is a party to this matter; therefore, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the Settlement Agreement is deemed to be the final decision.

IT IS SO ORDERED.

Kimberly Harrington

COMMISSIONER OF EDUCATION

Date of Decision: ~~10/11/17~~

Date of Mailing: 10/12/17

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YOU & ME PRESCHOOL, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF ADMINISTRATION AND FINANCE, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDU 04573-2013N AGENCY DOCKET NO. 208-7/12 CIVIL ACTION **SETTLEMENT AGREEMENT**

This settlement agreement ("Settlement Agreement") is entered into by and between Petitioner You & Me Preschool ("You & Me" or "the School") and Respondent New Jersey Department of Education ("NJDOE"), with approval of the court and the Commissioner of Education.

This matter involves You & Me's challenge of NJDOE's July 9, 2012 decision, pursuant to N.J.A.C. 6A:23A-18.3(c)(1)iii[1], to rescind You & Me's approval as an approved

[1] This regulation has since been recodified at N.J.A.C. 6A:23A-18.4(c)(1)iii.

private school for students with disabilities ("APSSD") for failing to attain the required average daily enrollment ("ADE") for four consecutive years.

Pursuant to N.J.A.C. 6A:5-1.1, You & Me sought a waiver of the ADE requirement before the Commissioner of Education, which he denied on June 29, 2012. The Appellate Division reversed and remanded the Commissioner's decision on November 4, 2013.

On July 29, 2014, the Acting Commissioner issued a new decision, denying You & Me's waiver request. The Appellate Division affirmed that decision on August 31, 2016.

You & Me filed a petition for certification with the New Jersey Supreme Court that was denied on December 6, 2016.

You & Me then filed a motion for reconsideration with the Supreme Court that was denied on February 7, 2017.

During the pendency of this litigation, NJDOE became aware that for at least the 2016-2017 school year, You & Me educated students, ages three through 13, and operated one preschool disabled class and two autism classes.

For the past several years, including the 2016-17 school year, NJDOE records evidence that You & Me has been approved to educate students, ages three through eight, and to operate two preschool disabled classes and one autism class (You & Me's currently approved program). NJDOE also does not have

records of an application by You & Me for the approval of any other classes or age groups.

You & Me contends that it understood its approval to be to educate students, ages three through 13, and to operate two autism classes, but has been unable to provide documentation in support of this contention.

The Parties understand that for purposes of this Agreement, all references to ADE shall mean ADE as defined by N.J.A.C. 6A:23A-18.1.

The Parties now agree to settle the above-captioned matter upon the following terms:

1. You & Me agrees to withdraw its appeal in this matter and release any claims and rights which were or could have been brought in the matter entitled You & Me Preschool v. New Jersey Department of Education, Division of Administration and Finance, Docket No.: EDU 04573-2013N, Agency Ref. No.: 208-7/12.

2. NJDOE agrees to withdraw its July 9, 2012 decision, pursuant to N.J.A.C. 6A:23A-18.3(c)(1)iii[2], to rescind You & Me's approval as an approved private school for students with disabilities ("APSSD").

[2] This regulation has since been recodified at N.J.A.C. 6A:23A-18.4(c)(1)iii.

You & Me's Required ADE for the 2017-2018 School Year

3. You & Me must attain a minimum ADE of 16 public school placement students for the 2017-2018 school year, as measured as of April 30, 2018.

4. If You & Me does not attain a minimum ADE of 16 public school placement students for the 2017-2018 school year, as measured as of April 30, 2018, its approval as an APSSD will be rescinded, effective June 30, 2018.

5. NJDOE will notify You & Me in writing whether the School has attained a minimum ADE of 16 public school placement students for the 2017-2018 school year, as measured as of April 30, 2018.

6. If You & Me fails to meet the minimum ADE of 16 public school placement students for the 2017-2018 school year, as measured as of April 30, 2018, NJDOE will also notify the School in writing of the rescission of its approval as an APSSD by May 30, 2018, pursuant to Paragraph Four, above.

7. Within ten (10)days of receiving notice from NJDOE that its approval as an APSSD will be rescinded pursuant to Paragraph Four, above, You & Me will notify its enrolled students' sending districts, in writing, that the School's approval as an APSSD will be rescinded, effective June 30, 2018. You & Me will copy the NJDOE, Office of Special Education

Policies and Procedures ("OSEPP") on these written notifications.

You & Me's Required ADE for the 2018-2019 School Year

8. You & Me must attain an ADE of 18 public school placement students for the 2018-2019 school year, as measured as of April 30, 2019.

9. If You & Me does not attain an ADE of 18 public school placement students for the 2018-2019 school year, as measured as of April 30, 2019, its approval as an APSSD will be rescinded, effective June 30, 2019.

10. NJDOE will notify You & Me in writing whether the School has attained a minimum ADE of 18 public school placement students for the 2018-2019 school year, as measured as of April 30, 2019.

11. If You & Me fails to meet the minimum ADE of 18 public school placement students for the 2018-2019 school year, as measured as of April 30, 2019, NJDOE will also advise the School in writing of the rescission of its approval as an APSSD, by May 30, 2019, pursuant to Paragraph Nine, above.

12. Within ten (10) days of receiving notice from NJDOE that its approval as an APSSD will be rescinded pursuant to Paragraph Seven, above, You & Me will notify its enrolled students' sending districts, in writing, that the School's

approval as an APSSD will be rescinded, effective June 30, 2019. You & Me will copy OSEPP on these written notifications.

You & Me's Required ADE for the 2019-2020 School Year

13. You & Me must meet an ADE of 24 public school placement students for the 2019-2020 school year, as measured as of April 30, 2020.

14. If You & Me does not attain an ADE of 24 public school placement students for the 2019-2020 school year, as measured as of April 30, 2020, its approval as an APSSD will be rescinded, effective June 30, 2020.

15. NJDOE will notify You & Me in writing whether the School has attained a minimum ADE of 24 public school placement students for the 2019-2020 school year, as measured as of April 30, 2020.

16. If You & Me fails to meet the minimum ADE of 24 public school placement students for the 2019-2020 school year, as measured on April 30, 2020, NJDOE will also advise the School in writing of the rescission of its approval as an APSSD, by May 30, 2020, pursuant to Paragraph Fourteen, above.

17. Within ten (10) days of receiving notice from NJDOE that its approval as an APSSD will be rescinded pursuant to Paragraph Twelve, above, You & Me will notify its enrolled students' sending districts, in writing, that the School's

approval as an APSSD will be rescinded, effective June 30, 2020. You & Me will copy OSEPP on these written notifications.

You & Me's Required ADE After the 2019-2020 School Year

18. For every school year after the 2019-2020 school year, You & Me will be subject to the ADE requirements set forth in N.J.A.C. 6A:23A-18.4(c)(1)iv as long as those requirements are in effect.

Waiver of Future Claims

19. If You & Me's approval is rescinded under the conditions set forth in Paragraphs Four, Nine, or Fourteen, above, You & Me agrees to waive any and all hearings to which it is entitled pursuant to N.J.A.C. 6A:3-1.11. You & Me further agrees that if its approval is rescinded under the conditions set forth in Paragraphs Four, Seven, or Twelve, above, it will not oppose the rescission of its approval as an APSSD before the Commissioner of Education or any other forum.

Improvements to You & Me's Facility

20. Based upon You & Me's indicated desire to make improvements to its facility to accommodate additional students, NJDOE agrees that such improvement costs will be deemed allowable so long as You & Me complies with, and the improvement costs do not exceed, the regulatory requirements, , such as those set forth at N.J.A.C. 6A:23A-18.5 and 18.6.

You & Me's Approval to Operate

21. You & Me agrees that it will not apply for an exception to the age range and group sizes specified in N.J.A.C. 6A:14-4.4 through 4.7 for the 2017-2018, 2018-2019 or 2019-2020 school years. Following the 2019-2020 school year, any request for an exception to the age range and group sizes specified in N.J.A.C. 6A:14-4.4 through 4.7 will be reviewed in accordance with the procedures set forth in N.J.A.C. 6A:14-4.9. This paragraph does not limit You & Me's ability to apply for other amendments to the School's program pursuant to the Amendment Procedures for Receiving Schools set forth at N.J.A.C. 6A:14-7.3, which require the Department's approval. This limitation is not designed to have an impact on the applications to amend the School's currently-approved program provided in Paragraphs 22 and 23.

22. If You & Me wants to educate students over the age of eight for the 2017-2018 school year and beyond, within 30 days of the execution of this Settlement Agreement, You & Me must follow the Amendment Procedures for Receiving Schools set forth at N.J.A.C. 6A:14-7.3 to seek NJDOE's approval to amend the School's currently-approved program.

23. If You & Me wants to operate anything other than two preschool disabled classes and one autism class for the 2017-2018 school year and beyond, within 30 days of the

execution of this Settlement Agreement, You & Me must follow the Amendment Procedures for Receiving Schools set forth at N.J.A.C. 6A:14-7.3 to seek NJDOE's approval to amend the School's currently-approved program.

24. Within 45 days after You & Me submits all required documentation and complies with all NJDOE request(s) for site visit(s) under N.J.A.C. 6A:14-7.3, NJDOE will notify You & Me of its decision(s) to approve or disapprove the School's request(s) to amend its currently-approved program.

25. While approval of You & Me's request(s) to amend its currently-approved program will not unreasonably be withheld, You & Me acknowledges that NJDOE may deny You & Me's request(s) to amend its currently-approved program if the county office of education determines that the request(s) is/are not appropriate for approval.

26. If NJDOE denies You & Me's request(s) to amend its currently-approved program, You & Me may not deviate from its currently-approved program unless and until it receives approval from NJDOE to do so.

27. If NJDOE denies You & Me's request(s) to amend its currently-approved program, within ten (10) days of receiving that decision, You & Me must take steps to disenroll any students, whom are enrolled for the 2017-2018 school year, and whom You & Me is not approved to educate. Specifically, You

& Me must inform the sending district(s) that its/their student(s) must be removed from the School and enrolled in a new placement in accordance with the procedures set forth in N.J.A.C. 6A:14-7.7. No placement shall be terminated until the sending district secures a new placement and enrolls the student therein.

Terms of General Application

28. This Settlement Agreement constitutes the entire agreement between the Parties and supersedes any prior understanding or representation of any kind preceding the date of its execution.

29. Nothing in this Settlement Agreement shall preclude NJDOE from exerting its regulatory authority regarding You & Me's program, accounting, financial reporting, or tuition rate setting.

30. There are no other promises, conditions, understandings, contracts or other agreements, whether oral or written, relating to the subject matter of this Settlement Agreement.

31. It is expressly understood and agreed upon by each of the Parties that this Settlement Agreement constitutes a complete and final general Release between the Parties with respect to any and all past and present liabilities, claims, demands, rights and causes of action, guarantees, claims for

damages, settlements, costs, attorneys' fees, and compensation of any kind or nature whatsoever (whether derivative or individual in nature), whether known or unknown, against the Parties.

32. The parties agree that this Settlement Agreement resolves all issues between them arising from the July 26, 2012 Petition of Appeal.

This Settlement Agreement shall be effective and binding on the date that the Commissioner of Education approves it.

Date: 8/10/17

Claudia Sommerer
Director, You & Me School

Date: 8-10-17

Vito A. Gagliardi, Jr., Esq.
Attorney for Petitioner

Date: 8-14-17

Kevin Dehmer
Chief Financial Officer and Assistant Commissioner,
New Jersey Department of Education

Date: 8-16-17

John Worthington
Director, New Jersey Department of Education,
Office of Special Education Policies and Procedure

Date: 8/15/17

Kathryn E. Duran
Deputy Attorney General
Attorney for Respondent

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 04573-13
AGENCY DKT. NO. 208-7/12

YOU & ME PRESCHOOL,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF ADMINISTRATION AND FINANCE,
Respondent.

Vito A. Gagliardi, Jr., Esq., for petitioner You & Me Preschool (Porzio, Bromberg & Newman, attorneys)

Kathryn E. Duran, Deputy Attorney General, for respondent New Jersey Department of Education (Christiphor S. Porrino, Attorney General of New Jersey, attorneys)

Record Closed: August 22, 2017 Decided: August 24, 2017

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

Petitioner You & Me Preschool (now "You & Me School," hereinafter petitioner or You & Me) is an approved private school for students with disabilities (APSSD), specifically children on the autism spectrum located in Edison, New Jersey, and

affiliated with and subsidized by JFK Medical Center. It was approved as an APSSD in 1992. At the time of its approval, the regulations required You & Me to maintain an average daily enrollment (ADE) of sixteen (16) students. N.J.A.C. 6A:23A-18.3(c)(1)(iii). Because the regulations were amended (and recodified) in 2004, You & Me was grandfathered from the then-newly enacted requirement of an ADE of twenty-four (24) students, however, any grandfathered APSSDs that fell below the ADE of sixteen would have their status changed to "preliminarily approved," and would then be required to re-attain that status within three school years, or its approval would be rescinded.

On December 18, 2009, the Department notified You & Me that it had failed to meet the ADE requirement and that its status was being changed to one of preliminary approval. Petitioner was advised that it must attain the ADE by the end of the 2011-2012 school year. You & Me did not increase its ADE to the minimum requirement over the next three years. On or about June 11, 2012, You & Me submitted a formal request for a Department waiver of the ADE requirement. Under cover of June 29, 2012, (apparently postmarked July 10, 2012), Acting Commissioner Christopher Cerf denied the waiver request. On July 9, 2012, the Assistant Commissioner notified petitioner that its APSSD approval was being rescinded effective July 1, 2012.

On July 25, 2012, You & Me filed a Notice of Appeal with the Appellate Division appealing the denial of the waiver request. On July 26, 2012, You & Me filed an administrative action seeking this administrative hearing and a stay of the rescission of its APSSD approval. On July 31, 2012, respondent consented to the request for a stay and the Commissioner accordingly ordered the grant of the stay until the underlying merits could be adjudicated.

On March 28, 2013, respondent filed its Answer to the Verified Petition of Appeal on the administrative action. The Department's Bureau of Controversies and Disputes transmitted the matter to the Office of Administrative Law (OAL) on April 3, 2013.

PROCEDURAL HISTORY

The Honorable Imre Karaszegi, Jr., A.L.J., was assigned to the disputed case. Initially, plenary hearing dates were scheduled for November 2013. Prior thereto, both parties requested that the OAL action be placed on the inactive list pending a remand on November 4, 2013, from the Appellate Division to the Department on the waiver appeal. The Orders of Inactivity were continued from time to time from November 2013 through September 2016 during the pendency of the remand consideration, a second appeal, and a second decision from the Appellate Division. On September 15, 2016, You & Me filed a Petition for Certification to the New Jersey Supreme Court, which was denied on December 12, 2016, and a Motion for Reconsideration, which was denied on February 7, 2017. In the interim, a case management status conference was scheduled for November 2, 2016.

Prior to the scheduled conference call, Judge Karaszegi was elevated to the Superior Court of New Jersey and this matter was re-assigned to the undersigned. I maintained the scheduled status conference and learned from counsel that the petition to the Supreme Court was pending and that the school was open through at least June 2017 in light of the previous stay and inactivity orders consented to by the Deputy Attorney General for the Department. I monitored the matter and was advised on April 13, 2017, that the last appeals had been exhausted and that the respondent was prepared to file a motion for summary decision within the next week.

On April 18, 2017, I convened another telephonic status conference with counsel. With the consent of counsel, a briefing schedule was established for the filing of the dispositive motion. Respondent was to file its motion by the end of April; petitioner would have until May 26, 2017, to respond and file any cross-motion; respondent could reply by June 9, 2017, and if there is a cross-motion, petitioner could file the final reply by June 19, 2017.

On or about April 20, 2017, respondent[1] New Jersey Department of Education, Division of Administration and Finance (respondent or Department) filed a Motion for Summary Decision before the undersigned in accordance with the above briefing schedule. In addition, respondent filed directly to the Department Commissioner a Motion for Emergent Relief, with a courtesy copy only to the undersigned. Under cover dated May 1, 2017[2], the Office of Controversies and Disputes confirmed that the Commissioner had referred the Motion for Emergent Relief to the OAL for determination pursuant to N.J.A.C. 1:1-12.6 and 6A:3-1.6. In light of the fact that the undersigned was out of the country May 2 through May 11, 2017, oral argument on the emergent relief application was scheduled for May 25, 2017, the first available date to which the parties both consented. After argument on the motion, both parties requested that I reserve on issuing a ruling so that they could discuss a possible resolution.

Under cover of August 15, 2017, counsel for the Department of Education, Division of Administration and Finance, forwarded a fully executed Settlement Agreement between the parties and requested that if approved, I incorporate same into an order. I have reviewed the record and the terms of Settlement Agreement and Release and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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[1] The moving papers incorrectly identify the Department as the petitioner. It will be correctly denominated the respondent herein.

[2] Apparently, an initial communication of the Commissioner's transmittal of the Motion for Emergent Relief back to the OAL was either lost or misdirected by the OAL.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 24, 2017
DATE

Gail M. Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency: 8-29-17

Date Mailed to Parties: AUG 29 2017

Kenneth Sachs
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

306-17

DORIT SNOW,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner challenged her removal as a School Occupational Therapist by the respondent Board for failure to maintain her Occupational Therapist license. Petitioner contended that she was entitled to, but did not receive, a tenure hearing prior to her removal. The Board asserted that it acted reasonably when it terminated petitioner because her license had lapsed. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue, and the matter is ripe for summary decision; in September 2015, petitioner began to have medical issues that caused her to miss work; during this period of time, on September 30, 2015, petitioner's Occupational Therapist license lapsed; petitioner's license was not restored until January 20, 2016; the Board became aware that petitioner's license had expired, and voted at its meeting on January 14, 2016 to terminate her employment, effective the same day; petitioner was informed of this decision on January 15, 2016; pursuant to *N.J.S.A.* 18A:28-14 and *N.J.A.C.* 6A:9B-14.11(b), the lapse in petitioner's licensing required that she be terminated from her position; and petitioner's arguments that her medical problems should excuse her failure to maintain her license and that she should be entitled to a tenure hearing are without merit. The ALJ concluded that petitioner's Occupational Therapist license lapsed on September 30, 2015 and was not restored until January 20, 2016; and the Board had no choice but to remove petitioner upon learning that she no longer possessed a valid license for the position she held. Accordingly, the ALJ granted the Board's motion for summary decision and denied petitioner's cross motion.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 12, 2017

OAL DKT. NO. EDU 05902-16
AGENCY DKT. NO. 98-3/16

DORIT SNOW,	:	
PETITIONER,	:	
		COMMISSIONER OF EDUCATION
V.	:	
		DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner and the Board's reply thereto.[1]

In her exceptions, petitioner argues that the Administrative Law Judge (ALJ) failed to consider the circumstances surrounding her health in rendering the Initial Decision. Petitioner contends that the ALJ inappropriately relies upon *Shane Hunsicker v. Board of Education of the High Point Regional High School*, Commissioner Decision No. 59-15, affirmed 2016 *N.J. Super. Unpub.* LEXIS 1147 (App. Div. 2016), because the facts of that matter are distinguishable from the instant matter. Petitioner was incapacitated during a "bona fide medical leave" when her license lapsed; she immediately informed the Board of her lapsed license; she did not assist students while her license was expired; and she renewed her license prior to her return to work date. On the other hand, in *Hunsicker*, the Commissioner noted that "petitioner had let his license lapse over a year before the tragic event, and had continued to work without a license for five years." *Id.* at 3. Although *N.J.S.A.* 18A:28-14 allows boards to terminate a

[1] A response to a reply is not contemplated by *N.J.A.C.* 1:1-18.4. Accordingly, the response filed by petitioner will not be considered by the Commissioner.

teaching staff member without filing tenure charges for failing to hold an appropriate certificate, petitioner maintains that the ALJ failed to consider the circumstances involving petitioner's lapsed license, particularly that she did not assist students during that time. Petitioner urges the Commissioner to reject the Initial Decision and reinstate petitioner as an Occupational Therapist.

The Board argues in reply that it acted reasonably in terminating petitioner based on the loss of her license.[2] The Board maintains that petitioner became ineligible for employment when she allowed the required credentials and licensing for her position to expire. Further, the Board contends that the ALJ properly relied on *Hunsicker, supra*, because the facts are analogous to this matter. The athletic trainer license for the petitioner in *Hunsicker* had expired; similarly here, petitioner's required occupational therapist license expired. Although petitioner argues that her medical circumstances should have impacted the Board's decision, the Board points out that the Commissioner found in *Hunsicker* that a teaching staff member must be removed for failure to maintain a required license, regardless of tenure status or personal circumstances.[3] As such, the Board asks the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner agrees with the ALJ – for the reasons thoroughly expressed therein – that petitioner was appropriately terminated because her Occupational Therapist license lapsed on September 30, 2015 and was restored on January 20, 2016. The Commissioner does not find petitioner's exceptions to be persuasive. Petitioner was required to

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[2] The Board also alleges in its reply that petitioner was validly terminated based on the abandonment of her work. The Commissioner notes that the Board would have been required to file tenure charges in order to pursue termination based on the abandonment of her position. *N.J.S.A.* 18A:6-10; *N.J.S.A.* 18A:28-5.

[3] Additionally, the Board contends in its reply that petitioner stopped working without prior leave or notice and that she did not indicate when she was returning to work. The Board further suggests that petitioner "did not have medical problems; she was in the midst of a divorce and could not deal with same." (Reply Exceptions at 4) The facts as set forth in the Initial Decision indicate that petitioner suffered from "severe medical issues that caused her to miss work." (Initial Decision at 2) The ALJ also noted that "Petitioner continued her treatment successfully in Israel and was able to contact respondent, with a disputed degree of success, in order to keep them apprised of her medical status." *Ibid.* The Commissioner notes that the Board did not file exceptions to challenge the ALJ's factual findings and cannot instead do so by way of its reply.

have a "currently valid license issued by the New Jersey Occupational Therapy Advisory Council." *N.J.A.C.* 6A:9B-14.11(b). It is undisputed that her license lapsed on September 30, 2015 and was restored on January 20, 2016. The Board had the authority to terminate petitioner for failure to hold a valid certification, pursuant to *N.J.S.A.* 18A:28-14, regardless of whether she was assisting students during the period of her lapsed license. Further, it is mandatory for districts to remove individuals who do not have required licenses, as "the employing school district *shall* remove from the position any teaching staff member who fails to maintain the mandated license, certificate or authorization . . ." *N.J.A.C.* 6A:9B-5.1(c) (emphasis added). The regulation "provides no exemption for tenured individuals or hardship." *Hunsicker*, 2016 *N.J. Super. Unpub.* LEXIS 1147 (App. Div. 2016). As such, the Board did not act in an arbitrary, capricious, or unreasonable manner in terminating petitioner for failing to hold a current required Occupational Therapist license, since it is mandatory for districts to remove individuals who have not maintained their licenses.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[4]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 10/12/17

Date of Mailing: 10/12/17

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION

OAL DKT. NO. EDU 05902-16
AGENCY DKT. NO. 98-3/16

DORIT SNOW,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,

Respondent.

Kathleen Naprstek Cerisano, Esq. for petitioner, (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Sebastian Ferrantell, Esq. for respondent, (Montenegro, Thompson, Montenegro, & Genz, attorneys)

Record Closed: June 16, 2017 Decided: July 14, 2017

BEFORE **DEAN J. BUONO,** ALJ:

PROCEDURAL HISTORY

Petitioner, Dorit Snow (Snow or petitioner), challenges her removal as a School Occupational Therapist by respondent, Board of Education of the Township of Brick, Ocean County (Board or respondent) for failure to maintain her Occupational Therapist license. Petitioner contends that she was entitled to, but did not receive, a tenure

hearing prior to her removal. The procedural history and facts of this case represent the facts at issue for these cross-motions for summary decision.

FACTUAL DISCUSSION

The parties each separately argue that there are no contested issues of material fact and thus summary decision is appropriate for their respective positions. While partially true, many facts that are not in dispute derive from the core issue. Having reviewed the briefs in support of the motion for summary decision and opposition briefs and cross-motion, the few facts that are in contention concern issues that are not core to the issue of whether or not Snow maintained her occupational therapist license. As such, I **FIND as FACTS:**

Petitioner began her employment with respondent in 2007 and subsequently acquired tenure as an Occupational Therapist. However, in September 2015, petitioner began to have severe medical issues that caused her to miss work. Petitioner's parents, who are from Israel, were unable to remain in the United States to care for her and subsequently took her to Israel for medical treatment and support. Petitioner continued her treatment successfully in Israel and was able to contact respondent, with a disputed degree of success, in order to keep them apprised of her medical status.

It is undisputed, however, that petitioner's Occupational Therapist license lapsed on September 30, 2015. Respondent became aware that petitioner's license had expired and, at its' meeting on January 14, 2016, voted to terminate petitioner's employment based on the lapsed license, effective January 14, 2016. On January 15, 2016, petitioner was informed of the decision to remove her from the position. Petitioner's Occupational Therapist license was restored on January 20, 2016.

FINDINGS OF FACT

Petitioner cannot contest the fact that her Occupational Therapist license lapsed on September 30, 2015 and was restored on January 20, 2016. Respondent became aware that petitioner's license had expired and at its meeting on January 14, 2016,

voted to terminate petitioner's employment based on the lapsed license, effective January 14, 2016. On January 15, 2016, petitioner was informed of the decision to remove her from the position. Accordingly, I **FIND,** by a preponderance of credible evidence, that petitioner's Occupational Therapist license lapsed on September 30, 2015 and was restored on January 20, 2016.

The issue presented by the respondent in their cross-motion for summary decision is whether a school board may remove a tenured teaching staff member from her position, without a tenure hearing, if she fails to maintain the required licensure for that position. Respondent further argues that Snow's conduct acted as a "voluntary or constructive quit." However, petitioner argues that she was "tenured" and in constant contact with the Board and thereby removal was not appropriate. I disagree in part with respondent.

LEGAL ARGUMENT AND CONCLUSION

Pursuant to N.J.A.C. 1:1-12.5(b), a summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules, R. 4:46-2. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In connection, therewith, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

> [A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not . . . to weigh the evidence and determine the truth of the matter but

> to determine whether there is a genuine issue for trial'.
>
> [Brill, supra, 142 N.J. at 540 (citations omitted).]

The purpose of the Tenure Act, N.J.S.A. 18A:28-1 to -18, is "to aid in the establishment of a competent and efficient school system by affording teaching staff members 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528-29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App.Div.1949)). Thus, generally, under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to -18.1, "[n]o person shall be dismissed or reduced in compensation ... if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public-school system of the state ... except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing[.]" N.J.S.A. 18A:6-10(a).

However, tenure protection has certain limits. Importantly, N.J.S.A. 18A:28-5 provides that:

> [t]he services of all teaching staff members ... and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect ... shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment [for the statutorily prescribed amount of time].
>
> [N.J.S.A. 18A:28-5(a) (emphasis added).]

Furthermore, under N.J.S.A. 18A:28-14, "[the] services of any teaching staff member who is not the holder of an appropriate certificate, in full force and effect, issued by the state board of examiners under rules and regulations prescribed by the state board of education may be terminated without charge or trial[.]" Ibid. (emphasis

added). And, under N.J.A.C. 6A:9B-5.1, "any person employed as a teaching staff member by a district board of education shall hold a valid and appropriate certificate," "the certificate holder shall obtain any license, certificate, or authorization required by State or Federal law, a licensing board, or N.J.A.C. 6A:9B-4.1 and 4.2 for the individual to serve in a position," and an "employing school district shall remove from the position any teaching staff member who fails to maintain [a] mandated license, certificate, or authorization." N.J.A.C. 6A:9B-5.1(a), (b), and (c) (emphasis added).

In Hunsicker v. Bd. of Educ. of the High Point Reg'l High Sch., EDU 17519-13, Initial Decision (Dec. 22, 2014), adopted, Comm'r (Feb. 12, 2015) <http://www.nj.gov/education/legal/commissioner/2015/feb/59-15.pdf>, affirmed, 2016 N.J. Super. Unpub. LEXIS 1147 (App. Div. May 18, 2016), for example, the Commissioner of Education held that, in accordance with N.J.A.C. 6A:9B-5.1, a school board properly removed a tenured athletic trainer without a tenure hearing because his required athletic trainer license had expired.[1] And, while the Commissioner noted that a personal tragedy may have played a role in petitioner's failure to renew his license, the Commissioner stated that he did not have any discretion to circumvent the requirements of N.J.A.C. 6A:9B-5.1.

As the Commissioner explained, "[t]he tenure statutes allow teaching staff members to remain employed pending hearings about their fitness to teach, administer or provide special education services under certificates issued by the New Jersey Board of Examiners," but "there is no statutory authority which allows a local Board of Education or the Commissioner of Education to retain an individual whose work [like an athletic trainer's] is also governed by the Board of Medical Examiners, and who has failed to conform to that Board's practice requirements." In affirming the Commissioner, the Appellate Division noted that, "[f]or employment as a school athletic trainer, the law clearly required appellant to have a valid athletic trainer license and a valid educational services certificate and school athletic trainer endorsement. N.J.S.A. 18A:26-2-2.4; N.J.A.C. 6A:9-5.1(a)-(b)," and held that "[a]ppellant's lack of an athletic trainer license effectively rendered his educational services certificate and endorsement invalid, thus

[1] N.J.A.C. 6A:9-5.1 was recodified after the events in Hunsicker to N.J.A.C. 6A:9B-5.1.

making him ineligible for employment as a school athletic trainer, ineligible for tenure protections, and subject to mandatory removal. N.J.S.A. 18A:26-2; N.J.S.A. 18A:26-2.4; N.J.S.A. 18A:28-5(a); N.J.A.C. 6A:9-5.1(a) and (c)."

Here, like in Hunsicker, respondent had no choice but to remove petitioner upon learning that her Occupational Therapist license expired. Petitioner was not entitled to a hearing prior to her dismissal because school occupational therapists "...are required to hold a valid occupational therapist license issued by the New Jersey Occupational Therapy Advisory Council...." N.J.A.C. 6A:9B-14.11(b), Petitioner's license lapsed, and N.J.S.A. 18A:28-14 and N.J.A.C. 6A:9B-5.1(c) require that she be terminated from her position. While petitioner argues that her medical problems should excuse her failure to maintain her license and that she should be entitled to a tenure hearing, the Commissioner clearly stated in Hunsicker that a teaching staff member who fails to maintain a required license must be removed, regardless of tenure status or personal circumstances. This conclusion is unaltered by the fact that petitioner's license was reinstated shortly after respondent terminated her.

I **CONCLUDE** that petitioner's Occupational Therapist license lapsed on September 30, 2015 and was restored on January 20, 2016. Having reviewed the parties' submissions in support of, and opposition to, the within motion, I **CONCLUDE** that no issue of material fact exists on the issue of licensure and petitioner's appeal should be **DISMISSED**.

ORDER

It is therefore hereby **ORDERED** that the respondent's motion for summary decision be and hereby is **GRANTED**. It is further **ORDERED** that the petitioner's motion for summary decision be and hereby is **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 14, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: July 14, 2017

Date Mailed to Parties: July 14, 2017

/vj

307-17

PAULA MELNYK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE DELSEA REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured special education teacher who has been employed by the respondent Board's school district since 1991– appealed the determination of the Board to terminate her employment as a part-time special education teacher in an alternative education program which is held after regular school hours. Petitioner alleged that she had acquired tenure in the part-time position, and sought reinstatement with back pay. The Board denied that it violated petitioner's tenure or seniority rights with respect to the part-time position. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts in dispute here, and the matter is ripe for summary decision; at issue in this case is whether the petitioner's tenure rights were violated by the Board when it declined to assign her to teach English in an after school program for the 2015-2016 school year; petitioner was not separately entitled to tenure for her time teaching English inside a classroom during her alternative education assignment as the position was "extracurricular," and the position in the alternative education program did not require any additional certificate; petitioner was not entitled to compensation from the extracurricular position because the alternative program's duties were not engrafted onto her regular duties as a special education teacher; further, the remuneration for her extracurricular service was established separately from her employment contract; and petitioner was paid an hourly wage for the after school assignment, not as part of her contracted salary. The ALJ concluded that petitioner has not met her burden of proof to demonstrate that she is entitled to judgment as a matter of law. Accordingly, the Board's motion for summary decision was granted, the petitioner's cross motion was denied, and the matter was dismissed.

The Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 12, 2017

OAL DKT. NO. EDU 12061-15
AGENCY DKT. NO. 161-7/15

PAULA MELNYK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE DELSEA REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Paula Melnyk, and the Delsea Regional High School Board of Education's (Board) reply thereto. In this case, the petitioner – a tenured special education teacher – alleges that the Board violated her tenure rights when it terminated her position as a teacher in the Delsea Regional High School District's (District) alternative education program, which is held after regular school hours.[1]

The Administrative Law Judge (ALJ) determined that the petitioner did not acquire tenure in the alternative program teaching position because the assignment did not require a certificate separate from the one under which she acquired tenure in her teaching position in the general education program. The ALJ also found that the petitioner is not entitled to compensation as a result of her termination from the position because the duties of the alternative education program were extracurricular and were not engrafted onto her duties as a regular program teacher,

[1] Since 1991, the petitioner has been employed by the Board as a full time special education teacher assigned to teach classes during the day. Beginning in or around 2002, petitioner was also assigned as a special education teacher to teach special education classes during the evening in the District's alternative education program.

nor were her salary and stipend treated as one. Therefore, the ALJ granted the Board's motion for summary decision and dismissed the petition of appeal.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the petitioner did not acquire tenure in the alternative education program position. The petitioner acquired tenure in the District as a special education teacher employed by the District since 1991 and the petitioner continues to be a teacher in the general education program. The petitioner's tenure protections, however, do not extend to the alternative education program position because it is well recognized that "no tenure protections flow from extracurricular positions unless the position requires additional certification." *John Manley v. Board of Educ. of the Township of Old Bridge, Middlesex County*, EDU 10644-04 (November 4, 2005), adopted by the Commissioner, December 19, 2005 (Decision No. 450-05) (citations omitted). It is undisputed that the petitioner's general education position and the alternative education program position both require an Instructional Certificate. Moreover, the two positions were sufficiently separate so that the teaching position at the alternative education program is clearly extracurricular.[2]

The Commissioner is also in accord with the ALJ's determination that the stipend received by the petitioner for the teaching position at the alternative education program is not protected by tenure; therefore, the petitioner has suffered no reduction in salary. The petitioner is not entitled to compensation because the Board did not treat the stipend that the petitioner received for the alternative education program as an "integral portion" of the petitioner's salary. Instead the stipend was based on an hourly rate pursuant to a separate agreement, and as such, constituted

[2] It is important to note that if the teaching staff member taught exclusively as a teacher in the District's alternative education program, the teaching staff member could accrue tenure by virtue of the requisite years of service in that position. Under the circumstances in this case, the alternative education position was an extracurricular position for the petitioner that did not require any additional certificate and, therefore, was not a separately tenurable position.

extra compensation. *John Manley v. Board of Educ. of the Township of Old Bridge, Middlesex County*, Commissioner Decision No. 450-05, decided December 19, 2005. Finally, the Commissioner finds the exceptions submitted by the petitioner to be unpersuasive as they largely replicate the arguments advanced at the OAL, which were fully considered and appropriately addressed by the ALJ in the Initial Decision.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 10/12/17

Date of Mailing: 10/12/17

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 12061-15
AGENCY DKT. 161-7/15

PAULA MELNYK,
Petitioner,
v.
DELSEA REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, GLOUCESTER COUNTY,
Respondent.

Keith Waldman, Esq., for petitioner (Selikoff & Cohen, PA, attorneys)

Andrew W. Li, Esq., for respondent (Parker McKay, PA, attorneys)

Record Closed: June 29, 2017 Decided: July 12, 2017

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

The petitioner, Paula Melnyk, a full-time, tenured special education teacher in the general education program, appeals the determination of respondent, Board of Education of the Delsea Regional High School District, Gloucester County (Board), to

terminate her employment as a part-time special education teacher in an alternative education program held after regular school hours, alleging that she had acquired tenure in the part-time position.

PROCEDURAL HISTORY

Sometime prior to July 2015 the petitioner was advised that she would not be reappointed to the part-time position, and on July 7, 2015, she petitioned the Commissioner of Education for reinstatement to that assignment with back pay, as her tenure rights had been violated. On August 7, 2015, the Board filed an answer denying that it violated her tenure or seniority rights with respect to the assignment.

On August 11, 2015, the Commissioner transmitted the matter to the OAL, where it was filed as a contested case on August 12, 2015. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On March 9, 2017, the parties filed cross-motions for summary decision. Briefs were filed on April 4 and 28, 2017. After a conference call on June 29, 2017, the record closed.

FACTUAL DISCUSSION

The following **FACTS** are not in dispute:

Since September 1991 the petitioner has been employed by the Board "as a full-time special education teacher assigned to teach classes during the day." The petitioner, who holds an Instructional Certificate with "Teacher of the Handicapped and Elementary School Teacher" endorsements and "highly qualified status in English instruction," has tenure in her position as a special education teacher in the general education program. According to her 2014–2015 "Teacher's Contract," her salary was $82,874, and "[i]t is further understood that if compensation is to be made to the teacher for extra-curricular duties, such compensation shall be made to the teacher at the completion of the extra-curricular duties unless otherwise stated in writing."

In September 2002 the Board assigned the petitioner "as Special Education Alternative Program Teacher to teach special education classes in the evening." The alternative education program to which the petitioner was assigned was known as "BookBinders," which was offered by the Board in accordance with N.J.A.C. 6A:16-9.1 to -9.3.[1] Classes were held after regular school hours in the afternoon and evening. While the program was "separate and distinct from the already existing programs operated by the Board," "[i]ndividualized instruction to all pupils shall address the Core Curriculum Content Standards," and, "[f]or a pupil with a disability, the alternative education program shall be consistent with the pupil's Individualized Education Program (IEP)." As such, in order to participate in an alternative education program such as BookBinders, "[i]nstructional staff . . . shall be appropriately certified." According to the petitioner, her BookBinders assignment "require[d] an Instructional Certificate with a Teacher of the Handicapped endorsement."

With the exception of the 2009–2010 school year, the petitioner served in this position continuously until the end of the 2014–2015 school year. On August 7, 2014, the Board's superintendent, Piera Gravenor, notified Melnyk by letter that the Board had approved her for a position as "Bookbinders Teacher—English . . . [a]t a rate of $20.00 per hour" for the 2014–2015 school year. However, for the 2015–2016 school year, the Board assigned another teacher, Chelsea Glenn, to teach English in the BookBinders program, but not the petitioner.

The petitioner petitioned the Commissioner of Education for reinstatement to her BookBinders assignment with back pay, alleging that she had achieved tenure in her

[1] According to N.J.A.C. 6A:16-9.1, "[e]ach district board of education choosing to operate an alternative education program, pursuant to N.J.A.C. 6A:16-1.3, shall approve the alternative education program." Under N.J.A.C. 6A:16-1.3, "alternative education program" is defined as

> a comprehensive educational program designed to address the individual learning, behavior, and health needs of students who are not succeeding in the general education program or who have been mandated for removal from general education, pursuant to N.J.A.C. 6A:16-5.5, 5.6 and, as appropriate, 5.7. The alternative education program shall provide a variety of approaches to meet the State-adopted standards, such as, through non-traditional programs, services, and methodologies to ensure curriculum and instruction are delivered in a way that enables students to demonstrate the knowledge and skills specified for all students in N.J.A.C. 6A:8.

BookBinders assignment and that the Board had violated her tenure and seniority rights by hiring "a replacement teacher for Petitioner in her alternative school assignment effectively terminating Petitioner's alternative school assignment . . . at the end of the 2014–2015 school year."

The Board denied that it had violated the petitioner's tenure or seniority rights with respect to the BookBinders assignment and asserted that she "was not reappointed to an extra-duty position in the alternative program and she is not automatically entitled to reappointment in that position by virtue of tenure/seniority akin to any other extra-duty assignment."

The issue is whether the petitioner separately acquired tenure in the alternative education teacher position, such that she is entitled to reinstatement, together with full back pay, benefits, and emoluments of the position, with interest, retroactive to June 2015.[2]

LEGAL ANALYSIS AND CONCLUSION

Legal Analysis

I. Summary Decision Standard

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

[2] The Board argues that the petitioner is barred by laches because she left the position in 2009 for a one-year period. The Board argues, essentially, that it reasonably relied on her failure to institute litigation to its unfair detriment. The argument lacks merit, however, because the petitioner was gone only a year and returned to serve for five subsequent years—indicating that she was in fact voluntarily "taking a break" as she asserts. Nothing in the record suggests that the Board declined to renew the petitioner for the alternative education program in 2009. She cannot be found to have failed to act on her rights when it is unclear that she previously had any rights that were violated. The petitioner argues that the Board failed to assert laches in its answer to the complaint and is therefore unable to claim the affirmative defense.

Here, there are no genuine issues of material fact, and this matter is ripe for summary decision.

II. Tenure Law

The purpose of teaching-staff tenure laws is "to aid in the establishment of a competent and efficient school system by affording teaching staff members 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528–29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)). Thus, tenured teaching staff members "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause." N.J.S.A. 18A:28-5.

In order to acquire tenure, a teaching staff member "must comply with the precise conditions articulated in the [tenure] statute." Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 72 (1962). Thus, a teaching staff member "is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time." Spiewak v. Summit Bd. of Educ., 90 N.J. 63, 74 (1982). Under N.J.S.A. 18A:28-5(a), "teaching staff members,"[3] including teachers, principals, and vice principals, who hold appropriate certificates acquire tenure after employment for:

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[3] A "teaching staff member" is defined as

> a member of the professional staff of any district or regional Board of education, or any Board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners and includes a school nurse and a school athletic trainer.
>
> [N.J.S.A. 18A:1-1.]

These timeframes apply to "[t]he services of all teaching staff members employed prior to the effective date of P.L.2012, c.26 (C.18A:6-117 et al.)," which was August 6, 2012. N.J.S.A. 18A:28-5(a).

> (1) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (2) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (3) The equivalent of more than three academic years within a period of any four consecutive academic years.

Importantly, "the positions listed in N.J.S.A. 18A:28-5 are . . . separately tenurable," and "tenure is achieved in a specific 'position,' and the scope of the tenured position is initially limited by the 'certificate' the teaching staff member must hold to satisfy the prerequisite of qualifications for his or her employment . . . ." Nelson v. Bd. of Educ., 148 N.J. 358, 368 (1997) (quoting Ellicott v. Bd. of Educ. of Frankford, 251 N.J. Super. 342, 348 (App. Div. 1991)).

III. Were the petitioner's tenure rights violated by the Board when it declined to assign her to teach English in the BookBinders program for the 2015–2016 school year?

The issue is whether the petitioner acquired tenure rights with respect to her BookBinders assignment as a special education teacher where the BookBinders assignment was an extracurricular duty performed in the evenings that did not require additional certification beyond that required by the petitioner for her primary position as a special education teacher during regular school hours. In Dignan v. Board of Education of Rumson-Fair-Haven Regional High School, 71 S.L.D. 336, 341, aff'd, St. Bd. of Educ., 74 S.L.D. 1376, aff'd, App. Div., 75 S.L.D. 1083, the Commissioner held that a tenured teacher who was assigned to an extracurricular position as faculty advisor to the school newspaper had no tenure rights thereunder, because "a board of education has the authority to assign and reassign teachers to extra-classroom curricular duties in addition to their regularly-scheduled classroom-instruction assignment and to pay such additional remuneration as it deems reasonable and appropriate therefor," and, "absent a requirement for a certificate other than that of a

teacher, no tenure status accrues to such assignments, and they are renewed or discontinued at the discretion of the board." Dignan, supra, 71 S.L.D. at 343.

Under the facts of that case, a tenured teacher, Joseph Dignan, was assigned by the school board to the extra-classroom duty of faculty advisor for the school newspaper as an "annual assignment" from the 1961—1962 school year through the 1969–1970 school year, and "was paid a sum as an honorarium in addition to his regular salary as a teacher." Id. at 341. However, after the school board declined to renew his assignment for the 1970–1971 school year and instead appointed another teacher as faculty advisor, Dignan claimed that he had tenure rights to the faculty-advisor position and the associated compensation. Ibid.

While the Commissioner recognized that Dignan had tenure as a teacher, and could not be dismissed from that position without cause, the Commissioner rejected Dignan's "claim to any special status or tenure as a faculty advisor for the school newspaper." Ibid. Instead, the Commissioner explained:

> [i]t is clear that [under N.J.S.A. 18A:27-4] a board of education has the right to assign and transfer or reassign teachers in its employ. . . . [Dignan] was relieved of an extra-classroom duty which had been assigned to him each year for a certain number of years. The Board was not obligated to continue this assignment for each succeeding year. [Dignan's] duties as faculty advisor were not permanently engrafted on his duties as a teacher, either by rule or by the terms of his employment. . . .
>
> . . . .
>
> It is [also] clear that the extra compensation ceases when the extra-classroom assignment is no longer performed.
>
> [Id. at 341, 342 (citation omitted).]

Thus, in that case, the school board "acted reasonably and within its discretionary authority in relieving [Dignan] of his extra compensation, and assigning that responsibility and extra remuneration to another member of the faculty." Id. at 346.

In contrast, in Ocasal v. Elmwood Park Board of Education, 97 N.J.A.R.2d (EDU) 623, a tenured teacher, who had both an instructional certificate and a supervisory certificate, also achieved tenure in his extra position as "staff development departmental facilitator" and was entitled to the stipend associated with the position because the additional job, unlike his teaching position, required a supervisory certificate and not an instructional certificate, and he served under his supervisory certificate for the requisite number of years.

Traditionally, "extracurricular" is the word used to describe school programs designed to enhance the education of students outside of the classroom, or regular curriculum, such as the school newspaper or athletics. See Smith v. Bd. of Educ. of Paramus, 68 S.L.D. 62 (stating that "extracurricular or cocurricular activities comprise all those events and programs which are sponsored by the school and may reasonably be characterized as a supplement to the established program of studies in the classroom in order to enrich the learning and self-development opportunities of pupils"), aff'd, St. Bd. of Educ. (Feb 5, 1969).

However, the definition of "extracurricular" also includes "lying outside one's regular duties or routine." Merriam-Webster Online Dictionary, "extracurricular," <https://www.merriam-webster.com/>. Thus, while the petitioner taught English inside a classroom during her BookBinders assignment, the assignment was extracurricular in the sense that it fell outside her usual duties as a special education teacher during regular school hours. Here, as in Dignan, and not as in Ocasal, the position was extracurricular and did not require additional certification beyond the petitioner's teaching certificate. Accordingly, the petitioner was not separately entitled to tenure in the alternative education position.

Moreover, Melnyk is not entitled to compensation for removal from her extracurricular or cocurricular position because the alternative program's duties were not engrafted onto her regular duties as a special education teacher, and, further, because the remuneration that she was paid for her extracurricular service was established separately from her employment contracts. Nothing in the petitioner's contract as a special education teacher required her to participate in the alternative

program. Instead, for the 2014–2015 school year, she received a salary of $82,874 for her teaching position in the general education program, and she received separate remuneration of twenty dollars an hour for her extracurricular duty as an English teacher in the BookBinders program. Therefore, her compensation for her work in the alternative program was not an integral part of her contractual salary. Cf. Shriner v. Bd. of Educ. of Boonton, 75 S.L.D. 939 (finding that a tenured teacher was entitled to compensation as athletic director because the school board incorporated his stipend into his contract salary, and in all other ways treated the stipend as salary, and thus the stipend amount was protected by tenure even though the position for which he received the stipend was not). Consequently, as the petitioner's former position in the alternative program was neither engrafted onto her primary tenured position nor compensated as an integral part of her salary, the petitioner is not entitled to back pay or other compensation.

Conclusions

The petitioner did not acquire tenure in the BookBinders position because the assignment did not require a certificate separate from the one under which she acquired tenure in her teaching position in the general education program and was extracurricular. Furthermore, she is not entitled to compensation because the duties of the alternative education program were not engrafted onto her duties as a regular program teacher, nor were her salary and stipend treated as one integral whole.

Accordingly, because the petitioner has not met her burden of proof and demonstrated that she is entitled to judgment as a matter of law, her motion for summary decision shall be denied, and her petition shall be dismissed.

The Board, however, has met its burden of proof that it is entitled to judgment as a matter of law; therefore, its motion for summary decision shall be granted.

ORDER

It is hereby **ORDERED** that the motion for summary decision filed by the Board of Education of the Delsea Regional High School District, Gloucester County, is **GRANTED**, and the motion for summary decision filed by the petitioner is **DENIED**. It is further **ORDERED** that the petition be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 12, 2017
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: July 12, 2017

Date Mailed to Parties: July 12, 2017

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

Brief

For respondent:

Brief

H.M., ON BEHALF OF MINOR CHILDREN, S.K. AND C.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her children are ineligible for a free public education in respondent's school district. Petitioner and her children resided in Ewing prior to February 2014, when they were evicted from a rental property. H.M. acknowledged that her family then moved to an address on Carteret Avenue in Trenton, but contended that as of September 2015, they resided on Steinway Avenue in Ewing with H.M.'s sister. The Board asserted that the results of a residency investigation showed that H.M. and her family continued to reside in Trenton through January 19, 2016. The Board sought tuition for the period of ineligible attendance by H.M.'s children.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1, petitioner has the burden of proof in a determination of residency ineligibility; the Board's residency investigation revealed that H.M.'s children were transported to school in Ewing from the Trenton address where H.M. claimed to have resided from February 2014 to September 2015; the testimony given by H.M. and her sister, L.M., regarding H.M.'s residency lacked credibility; and while H.M. may have desired to be in the Ewing School District so that her children could complete their education, she did not maintain residency in the district during the time period for which the Board seeks tuition reimbursement. The ALJ concluded that petitioner did not meet her burden of proof that the Board acted arbitrarily or capriciously in determining to remove H.M.'s children from the district schools. Accordingly, the ALJ denied H.M.'s petition and ordered that the Board is entitled to reimbursement from petitioner in the total amount of $10,366.62 for the period of ineligible attendance of H.M.'s children.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and petitioner was directed to reimburse the Board in the amount of $10,366.62 for tuition costs incurred during the period when S.K. and C.K. were ineligible to attend Ewing schools. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 13, 2017

OAL DKT. NO. EDU 01720-16
AGENCY DKT. NO. 4-1/16

H.M., ON BEHALF OF MINOR CHILDREN, S.K. AND C.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain her burden of establishing that she was a domiciliary of Ewing from September 30, 2015 through January 19, 2016. The Commissioner further concurs with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in the District's schools during this time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor children were ineligible to attend school in Ewing. Therefore, the Board is entitled to tuition reimbursement in the amount of $10,366.62 ($75.20 per day for 66 days for S.K. and $81.87 per day for 66 days for C.K.) for the time period of September 30, 2015 through January 19, 2016, during which petitioner's minor children were ineligible to attend.

[1] The Commissioner was not provided with a transcript of the November 21, 2016 hearing at the OAL.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $10,366.62 for tuition costs incurred during the time period that S.K. and C.K. were ineligible to attend school in Ewing. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 10/13/17

Date of Mailing: 10/13/17

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01720-16
AGENCY DKT. NO. 4-1/16

H.M. ON BEHALF OF MINOR CHILDREN S.K. AND C.K.,
Petitioner,
v.
BOARD OF EDUCATION TOWNSHIP OF EWING, MERCER COUNTY,
Respondent.

H.M., petitioner, pro se

Joseph L. Roselle, Esq. for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: March 2, 2017 Decided: August 30, 2017

BEFORE **JOSEPH A. ASCIONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves a residency dispute and a claim for reimbursement of tuition from September 30, 2015 through January 19, 2016, for the two minor children of H.M. Petitioner requested a hearing. The Ewing Township Board of Education, Mercer County (District) seeks reimbursement of a total of $10,366.62 for sixty-six school days

for each of H.M.'s children times the per diem rate for each school they attended while not residing in the district.

On February 2, 2016, this matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On November 21, 2016, the OAL conducted a hearing. The parties were afforded the opportunity to submit post-hearing closing memoranda. Respondent made a submission and the record closed on March 2, 2017. Extensions of time to file the Initial Decision were granted by the Acting Director and Chief Administrative Law Judge.

FACTUAL DISCUSSION AND FINDINGS

Prior to February 2014, H.M. and her children resided in Ewing Township, Mercer County. In February 2014, H.M. and her children no longer resided on Lower Ferry Road, Ewing. She denied homelessness. In September 2015, H.M. claimed her residence at XX Steinway Avenue, Ewing. This address is H.M.'s sister's address in Ewing. She claims her sister accommodates her residence there without a lease or payment. H.M. acknowledges there are no household bills in her name at the Steinway Avenue address. H.M. testified that a few days a week her children either shared a room or slept on the couch at the Steinway Avenue address. From February 2014 through September 2015, H.M. claims to have resided at XXX Carteret Avenue in Trenton. H.M. did not notify the District of her Trenton address, however, she registered her children in September 2014 and September 2015 as residing in Ewing.

L.M., H.M.'s sister, testified that she lived with her at times over the past ten years. They had confusion regarding the residency. The address at XX Steinway Avenue is a two-family house. Also residing there were L.M.'s son and his fiancée and their two children. H.M. fully moved out as of February 2016. She claimed the investigation only occurred for ten days.

David Mikalauskas, the district attendance and residency officer, noted the February 2014 eviction from the Lower Ferry Road address when he first started to

investigate petitioner's residency. They did not take H.M. off the rolls of residents until the 2015/16 school year, at which time an investigation commenced. He testified that the daily rates for Ewing High School and Fisher Middle School reimbursement is based on the annual amount of $13,762 and $14,984 respectively. There are 183 school days in a year. v So the per diem reimbursement amount is $75.20 and $81.87, respectively. He testified that the time period the district seeks reimbursement is sixty-six days from September 30, 2015 through January 19, 2016. These amounts total $4,963 and $5,403.42, respectively for a total amount for both students of $10,366.62.

Peter L. Manetto, Jr. testified to part-time employment with the District. He commenced an investigation of H.M.'s residence on September 30, 2015, at XXX Carteret Avenue, Trenton. He surveilled the location on ten separate days through November 3, 2015. H.M.'s children on nine of the ten surveillance days left the Carteret Avenue property and arrived at the Ewing High School and Fisher Middle School driven by H.M. on at least six of those occasions in a vehicle registered in her name showing the address at Steinway Avenue, Ewing.

H.M. and her sister tried to explain that the children reside at the Steinway address, however, this tribunal cannot accept their testimonies as explanations for the facts that on nine of ten occasions during an approximate twenty-five school day period H.M.'s children traveled from the Carteret Avenue location to the Ewing schools.

After consideration of the documentary evidence and testimony of the witnesses, I **FIND** as **FACT** the following:

1. Prior to February 2014, H.M. and her children resided in Ewing Township, Mercer County.

2. H.M.'s children respectively attended Fisher Middle School and Ewing High School during the time period reimbursement is sought.

3. H.M. acknowledged that from February 2014 through September 2015, H.M. resided at XXX Carteret Avenue in Trenton.

4. H.M. did not notify the District of her Trenton address, however, she registered her children in September 2014 and September 2015 as residing in Ewing.

5. The district commenced an investigation at sometime in September 2015 of the residency of H.M. and her children.

6. The investigation (R-1) reveals that nine of twenty-five school days during the period from September 30, 2015 through November 4, 2015, H.M.'s children were dropped off at the Ewing schools from a location in Trenton where she claims to have resided from February 2014 through September 2015.

7. H.M.'s children resided in Trenton from September 30, 2015, until she removed herself from the district on January 16, 2016, a period of sixty-six school days.

8. Respondent's reimbursable tuition for Ewing High School is $75.20 per day, for Fisher Middle School is $81.87 per day.

9. The time period for which tuition is sought is sixty-six school days

10. The total reimbursable tuition is $5,403.42 for C.K.; and $4,963.20 for S.K., for a total of $10,366.62.

LEGAL DISCUSSION

Petitioner has the burden of proof in a determination of residency ineligibility N.J.S.A. 18A:38-1. Here petitioner complains of the finding of the District but cannot dispute the investigative report that a substantial time in October 2015, her children were taken to the school from out of the district. The location was the residence petitioner claimed she resided at until the start of the investigation. While she may have desired to be in the Ewing District to finish her children's education, she did not maintain residency within the district during the time period the District seeks reimbursement.

CONCLUSION

I **CONCLUDE** petitioner has not met her burden of proof that the District acted arbitrarily or capriciously in determining to remove H.M. from the residency roll of Ewing School District and seek tuition reimbursement during the time from September 30, 2015 through January 19, 2016.

I **CONCLUDE** petitioner has not met her burden of proof that she resided within the district during the time from September 30, 2015 through January 19, 2016.

ORDER

It is **ORDERED** that the petition is **DENIED** based upon petitioner's failure to meet her burden of proof that the District acted arbitrarily or capriciously in disputing H.M.'s residency and entitlement to reimbursement.

It is **ORDERED** the respondent is entitled to be reimbursed from petitioner the amount of $10,366.62 for tuition for her two children for a total of sixty-six days.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 30, 2017
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 8/30/17

Date Mailed to Parties: 8/31/17

/lam

APPENDIX

LIST OF WITNESSES

For Petitioner:

H.M.

L.M., sister of parent petitioner

For Respondent:

David Mikalauskas, Residency Officer, Ewing Township BoE

Peter L. Manetto, Jr., Residency Investigator, Ewing Township BoE

LIST OF EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Investigative Report September 30 through November 3, 2015

308-17

OAL DKT. NO. EDU 494-17
AGENCY DKT. NO. 324-12/16

C.E., on behalf of minor child, K.E.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY.	:	
RESPONDENT.	:	

On June 29, 2017, a final agency decision was rendered in this matter, wherein the Commissioner adopted the Administrative Law Judge's finding that C.E. was not a domiciliary of West Orange during the 2016-2017 school year, and therefore, K.E. was not entitled to a free education in the District's schools during that time. The Commissioner assessed petitioner, Corey Ellington, $17,069.00 in tuition costs, to be reimbursed to the West Orange Board of Education for K.E.'s period of ineligible attendance in the District's schools pursuant to *N.J.S.A.* 18A:38-1. The Board subsequently notified the Commissioner that petitioner had failed to reimburse respondent as directed in the final decision, and has requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Petitioner offered no reasons why the judgment against him should not be so docketed, although given an opportunity to do so by this agency.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Corey Ellington is now subject to entry of a judgment by the court in the amount of $17,069.00, which represents the total payment ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 10/11/17
Date of Mailing: 10/16/17

312-17

Pursuant to Referral by the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire

In the matter of:

The Tenure Hearing of Iman Jones	:	
	:	**Agency Docket No. 92-5/17**
State Operated School District of The City of Newark, Essex County	:	

Decision

Appearances:

On behalf of the State Operated School District of The City of Newark:
Brenda C. Liss, Esquire
Ashley N. Higginson, Esquire
Riker Danzig Scherer Hyland & Perretti, LLP
One Speedwell Ave.
Morristown, NJ 07962-1981

On behalf of Iman Jones:
Joseph Fusella, Esquire
55 Washington, Street
P.O. Box 1432
Bloomfield, NJ 07003

Introduction

This matter arises from tenure charges of conduct unbecoming a staff member against teacher Iman Jones, (Respondent) by the State Operated School District of The City of Newark, Essex County (the District) and a June 16, 2017 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Bureau of Controversies and Disputes pursuant to *P.L. 2012, c. 26* as amended by P.L. 2015, c. 109.

The hearing in this matter was conducted on July 24, August 21, 25 and 28, 2017 in Newark, New Jersey. All parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent Iman Jones was present for the entire hearing and testified on her own behalf. At the close of the hearing on August 28, 2017, the parties elected to submit written closing argument, upon the receipt of which by the arbitrator on September 29, 2017 the matter was deemed submitted.

This Decision is made following careful consideration of the entire record in the matter, including the under-sign's observations of the demeanor of all witnesses.

Issues

The issues presented in this matter may be accurately stated as follows:

> Has the District met its burden of establishing the truth of its conduct unbecoming tenure charges against Respondent, and (a) if so, what is the appropriate penalty, if any, and (b) if not, what is the appropriate remedy?

The Tenure Charge

The tenure charges in this matter were certified by the State District Superintendent of the State Operated School District of The City of Newark Christopher Cerf on May 11, 2017. The related March 24, 2017 Notice of Tenure Charges to Iman

Jones focuses primarily upon a May 5, 2015[1] incident involving Students A and Z[2] in Respondent's classroom and provides in relevant part:

> **PLEASE TAKE NOTICE** that H. Grady James, IV Principal of Hawthorne Avenue School, hereby files charges of unbecoming conduct and other just cause against Iman Jones ("Respondent"), a tenured teacher employed by the State-operated School District of the City of Newark ("School District"), pursuant to N.J.S.A. 18A:6-11 AND N.J.S.A. 6A:3-5.1.
>
> **CHARGE ONE: UNBECOMING CONDUCT**
>
> 1. Respondent has engaged in conduct unbecoming a professional teaching staff member. Specifically, Respondent has committed the following acts that constitute unbecoming conduct:
>
> 2. On May 5, 2015 two first-grade students in Respondent's class at Hawthorne Avenue School, A.B. and Z.T., were running around the classroom and engaging in horseplay near Respondent's desk. During the horseplay while running around, student A.B. cut student Z.T. on his scalp with a razor. Student A.B. had obtained the razor in, on or near Respondent's desk.
>
> 3. At the time of the incident in which student A.B cut student Z.T. with the razor, Respondent was standing in the doorway of the classroom, using her cellphone and not paying attention to the students. Respondent was unaware of the occurrence and unaware of Z.T.'s injury until Z.T. approached her with blood running down his face and his hand on his head.
>
> 4. Z.T. was taken to the school nurse, who administered emergency medical treatment. An ambulance was called, Z.T.'s parent was contacted, the Newark Police Department was advised of the incident. Z.T.'s parent was advised to take Z.T. to the hospital for treatment. Z.T. was taken to the hospital and there received treatment, including sutures and stitches.
>
> 5. The School District reported the incident to the New Jersey Department of Children and Families, Institutional Abuse Investigation Unit ("IAIU"). IAIU investigated the incident and determined that "neglect/inadequate supervision is established regarding [Respondent's] action, in accordance with N.J.S.A. 9:6-8.21" and that A.B. and Z.T. were neglected children.
>
> 6. By engaging in the conduct set forth above, Respondent exercised extremely poor judgment and careless, reckless and wanton disregard for her students, such that Respondent cannot be trusted with the supervision of students. For these reasons, Respondent's behavior

[1] All dates are 2015 unless otherwise indicated.

[2] Students are herein identified by their first initial.

was conduct unbecoming a member of the professional staff of the School District.

7. By engaging in the conduct set forth above, Respondent failed to carry out her duty to protect the safety and well being of students, and put one or more students at substantial risk of harm. For this reason, Respondent's behavior was conduct unbecoming a member of the professional staff of the School District.

8. Respondent's conduct set forth above is contrary to that which the School District may reasonably expect of members of its professional staff, resulted in physical injury to a student, provided a poor role model for students, and is damaging to the reputation of the School District. For these reasons, Respondent's behavior was conduct unbecoming a member of the professional staff of the School District.

TENURE CHARGE TWO: OTHER JUST CAUSE

9. The School District repeats and realleges the facts set forth in paragraphs 1 to 8 above.

10. The acts and omissions described above constitute other just cause for dismissal of a tenured teaching staff member.

WHEREFORE, the undersigned hereby requests the following relief:

a. Dismissal of Respondent from the position in which she has tenure in the School District;

b. Suspension of Respondent without pay, pending review and consideration of these charges; and

c. Such further relief as may be authorized by law and deemed equitable by the State District Superintendent, the Commissioner of Education and any assigned arbitrator.

District Evidence

As fact witnesses the District presented Hawthorne Avenue School Principal Henry Grady James, IV; Vice Principal Terry Lane; Hawthorne Avenue School nurse Karen Wenson ; District's Manager of Compliance and Tenure at the time Michelle Takyi and the District's Special Assistant for Teacher Quality at the time Havier Nazario.

Nazario testified that the District has a policy - reviewed with staff annually on organization day – that teachers are responsible for supervising their students and maintaining such supervision at all times. He testified that the general policy relating to adult use of cell phones in schools is that the phones should be kept on silent, that they can be used for emergencies and that it is not considered an appropriate classroom management technique for teachers to telephone the parents of students during class and in front of other students for student-behavior purposes. Such use of a cell phone, Nazario testified, degrades the authority of the teacher in the eyes of students and cannot be accomplished without diverting the attention of the teacher from the students. Nazario also explained that other District policies are also reviewed at the beginning of the year staff meetings including those relating to accident responses and injuries by weapons responses.

A razor blade is considered a weapon, Nazario testified, and he recalled receiving a call about the May 5 incident late in the day of the 5th from vice principal Lane during which the vice principal reported there had been a serious injury; that a student had been cut in the head and that at the time Respondent was not in the classroom and was on her cell phone. Vice principal Lane also reported that the police had been called and that the student and student's parents were on the way to the hospital in an ambulance. According to Nazario, he instructed Lane to write up an incident report and the matter was reported to the New Jersey Department of Children and Families, Institutional Abuse Investigation Unit (IAIU). Nazario explained that the District Talent Office immediately determined to remove Respondent from the classroom pending the IAIU and subsequent District

investigations of the matter, and that as a result, Respondent was assigned to the District's central office as of May 6.

Nazario admitted that each school principal has the authority to establish his or her own cell phone rules, but that in any case it was his opinion that no principal would approve the use of cell phone calls to parents for classroom management reasons in the presence of students.

Terry Lane is the vice principal of the Hawthorne Avenue School and during the 2014-2015 school year supervised the school's K through Second Grades. Lane was Respondent's immediate supervisor. She testified that she visited Respondent's class daily because, in her view, Respondent had challenges relating to classroom management. According to Lane, as a consequence of her frequent visits to the classroom, she believed she had a good relationship with the first-grade students in the class. Lane testified that at some point after the start of the school year, co-teacher Warren Davis was assigned to Respondent's class in an effort to address what Lane characterized as Respondent's pattern of absences and to assist with pedagogy, etc. Eventually the co-teachers split the subjects to be taught with Respondent being responsible for literacy. Lane testified that on occasion she observed Respondent sitting at the teacher's desk in the classroom, but never saw her instruct from the desk. Like other teachers, Lane testified, Respondent would teach from all around the classroom. It is undisputed that Davis was not present in the classroom during the afternoon of May 5.

Lane explained that Respondent's classroom was located in the Temporary Classroom Unit (TCU); a one-story facility attached to the main school building by a door and consisting of two hallways in the shape of an "L." According to lane, the school

nurse's office is also located in the TCU and fairly close to Respondent's classroom; about half way down the hall. Lane claimed that she told Respondent a number of times that she did not want the teacher using her cell phone during instructional time because it would cause the children to get excited and distracted the teacher from monitoring the students. Although she believes Respondent heard her on this issue, Lane testified, Respondent did not "own it." Lane testified that she also told Respondent it can be a problem to call parents on the teacher's personal cell phone because the parents then have the teacher's number. Better to use the nurse's office phone for calls to parents, Lane explained to the teacher.

Lane testified that she knew the protocol at the school was that teachers could call parents. However, she further testified, she did not understand the protocol to mean that teachers could call parents during instructional time; that is why she informed her teachers that they could use the phone in the nurse's office or the main office to call parents.

Lane testified that prior to May 5, she never had an incident of a student being injured by a weapon in the school. Lane explained that there have been other injuries at the school from gym class or playground activity; including injuries that have resulted in the student being taken to the hospital by ambulance at the request of parents. The school's practice, Lane testified, it to have the injured student examined by the school nurse and to have the student's parents contacted. The nurse decides if paramedics should be called. If more than one student is involved, Lane further testified, the involved students are separated. All involved adults are asked to submit a written report on the incident.

Lane testified that in the late afternoon of May 5 she was in the main office when the office clerk told her the vice principal was needed in the nurse's office. Lane walked to the nurse's office and observed Z with an ice pack on his head. According to Lane she asked the student what happened; what the student was doing and what Respondent was doing at the time. According to Lane when she asked Z what respondent was doing the student stated that the teacher was on her cell phone and not in the classroom.[3] According to Lane, the blade used to cut Z was in the nurse's office at the time – a metal blade about two inches in length, sharp on one side with a hole in the wider end where it looked to Lane as if the blade could be attached to a handle.

Lane testified that she then went directly to Respondent's classroom where, according to Lane, she found "mass hysteria" with all of the students trying to explain what had happened; that A and Z were running around the classroom and when Lane asked where Respondent was, students reported that she was on the phone. According to Lane when she asked A what had happened and where did the blade come from, the student responded that "he hit me" and did not offer a response to the question of where the student had gotten the blade.

School security removed A from class and took the remainder of the class to dismissal. Lane was aware that the police were coming and returned to the nurse's office. There, she observed Respondent, paramedics, Z's parents and two police officers. Lane testified that while in the office she overheard Respondent say that A and Z were running

[3] Lane completed a "Staff Incident Report" that same day stating only that; "When asked, What was the teacher doing? Z stated, 'She was talking on her cell phone.'" The following day, the school, via an "Incident Report" signed by vice principal Tijuana Porter as "recorder" and identifying Lane as the "reporter" reported to the District again that "When asked, What was the teacher doing? Z stated, 'She was talking on her cell phone.'"

around the classroom and she saw A cut Z on the top of the head. Respondent also stated that she did not know where A got the blade from. According to Lane, Respondent stated that she was in the classroom at the time. Z and Z's parents then accompanied the paramedics to the hospital. Lane testified that she asked Respondent to write a report on the incident, that such was protocol, and that she wanted the report because the statements of Respondent in the nurse's office did not match the accounts Lane had received from students in the classroom that Respondent was on the cell phone at the time of the incident. Respondent did not submit the requested report.

Lane explained that it was not up to her to decide whether Respondent was in the room or not at the time of the incident and that she knew the matter had to be subject to an investigation. By letter dated May 5, Respondent was informed by District Chief Talent Officer Vanessa Rodriguez that the District "has been notified of an allegation that was made against you" and that effective May 6, the teacher was reassigned until further notice to Assistant Superintendent Roger Leon's Network Office.

Neither A nor Z, nor many of the other students in the class returned to the classroom the following day, Leon testified. However, Z's mother and many "aunts and uncles" did come to the classroom that afternoon and wanted answers about the safety of Z in the school. Lane testified that after the May 5 incident the community was angry and intense and wanted to know why the police had been in the school, and the identity of the other child involved. Additionally, Lane stated, there were media outlets outside of the school trying to interview classmates of Z.

Lane testified that on May 6 she called Child Protective Services (NJ Department of Children and Families) and explained the situation. The Department's Institutional

Abuse Investigation Unit (IAIU) thereafter conducted an investigation of the matter and eventually issued two December 1 "Findings Reports," one to an interested parent and one to the District, the former stating in part:

> IAIU conducted its required investigation and determined that the allegation of Neglect/inadequate Supervision is Established.
> IAIU has determined that [Z] is a neglected child, but, in taking into account the aggravating and mitigating factors associated with the incident, the neglect does not warrant a finding of substantiated. The determination of whether a finding of child neglect is Substantiated or Established is an administrative decision made sole by IAIU.
> ...
> The appropriate licensing or supervisory authority may take additional action as a result of this investigation.

The IAIU report issued to the District again stated that the report ("review") is solely administrative and summarized the findings of the investigation, in part as:

> ...The results of the investigation indicate that [Respondent] failed to provide adequate supervision for A and Z. A and Z were horse-playing behind [Respondent's] desk and running around the classroom. While running around, A inadvertently cut Z on his scalp with a razor found in or near [Respondent's] desk. [Respondent] was standing in the doorway of the classroom on her cell phone and not paying attention to A and Z at the time of the incident. [Respondent] was unaware of any incident until Z walked over to her with his hand on his head and blood was observed running down his face.
>
> Based upon the information gathered and the physical observation of the children, A and Z are neglected children. The information gathered indicates that A and Z were placed at substantial risk of harm by virtue of the incident...

The District also conducted its own investigation into the matter, a process that was held in abeyance per District policy while a matter is being investigated by the IAIU. The District's investigation included the findings of the IAIU; review of surveillance videos of the hallway outside of Respondent's classroom before, during and after the May 5 incident; and interviews of Lane, school nurse Karen Wenson, eight-year-old classmate "J" and Respondent. The District's investigator, then Manager of Compliance

and Tenure Michelle Takyi, issued a January 6, 2017 "Findings Report" wherein Takyi concluded with the following "Recommended Action:"

> Z was injured by a razor that was found in [Respondent's] classroom while she was inside the classroom teaching the classroom. According to [Respondent's] own testimony.[4] She noticed that A kept getting out of his seat. Besides threatening to call his father as an attempt to get him to sit down, [Respondent] did not utilize any other classroom management technique to ensure that A remained seated. As such A was allowed to roam the classroom. Although [Respondent] denied seeing A near the teacher's desk located in the classroom. Student witness J witnessed A take the razor from the desk located in the classroom. During the course of horseplay with Z A cut and injured Z on the head with the razor. Student witnesses informed Vice Principal Lane and J also informed district representative that [Respondent] was outside of the classroom at the time A cut Z on the head. Although surveillance cannot corroborate this, the witnesses; testimony was consistent in this regard. Based on the findings, I recommend the District pursue tenure charges for termination against [Respondent] for neglect of duty, which resulted in serious injury to a student.

School nurse **Karen Wenson** testified that in her 13 years as nurse at the school she has requested an ambulance many times for various student injuries, but that the May 5 incident was the first time she requested an ambulance due to an injury by a weapon. According to Wenson, even before Z arrived in her office she could hear students running down the hall calling out "nurse, nurse." When they arrived with Z – who she described as being hysterical - she quickly began washing off Z's head and asked what happened. The five or six first graders reported A had cut Z with a blade that he got from the teacher's desk, and when Wenson asked; "where is your teacher?" they responded "in the classroom."

Wenson testified that Z's head wound looked more serious than it actually was because – like mouth wounds – head wounds bleed profusely. She explained that, as the

[4] The Report's references to "testimony" refers to unsworn statements made to the investigator. There are no sworn witness statements in the record.

school nurse, she determines if and when an ambulance is required to transport a student to the hospital. In the case of Z on May 5, after she washed up the student and stopped the bleeding she observe two cuts on Z's scalp; one superficial and a second an inch long that was deep enough to require stiches; a procedure that required the student to go to the emergency room. Thus, Wenson explained, she called an ambulance and when dispatch summoned the ambulance due to a blade injury of a student, the police – who monitor ambulance dispatch – also responded to the call. When the police arrived, they wanted to interview A, but, Wenson testified, she and school administration would not permit such without a parent being present.

Z did not return to school for two or three weeks after May 5, Weson recalled. Although she attempted to called Z's mother to check on Z, her calls were not answered. In her view, Wenson testified, the cut would have required only a few stitches and there was no medical reason for Z to be out of school.

Hawthorn Avenue School Principal **Henry Grady James, IV**, was on an extended leave at the time of the May 5 incident. He testified the District and school have a policy that teachers are responsible for the safety of their students and his school had a policy that teachers were not to use their cell phones as such conduct means the teachers are not teaching. According to James, he follows a progressive discipline policy relating to teacher cell-phone use when he observes such. He further testified that a December 9, 2014 email[5] he sent to his teaching staff, including Respondent, providing:

> ...The world is not perfect, therefore when a situation arises where a child disrupts the lesson for any reason, make a mental note of it and reach out to the parent (if the level of disruption is not very serious). If in fact a student is habitually disruptive, disrespecting and or not focused during the lesson, it is the job of the supervising adult to

[5] Relied upon by Respondent as authority for her calling parents during class time.

> redirect the child with some sort of intervention(s). Reach out to a parent first. Try to converse with the student at lunch or after school. Whatever you do, please do something...

was not an instruction for teachers to call parents during instructional time. He testified that he had previously explained at a staff meeting that the primary message (as contained in the email) was to first speak with the parents about student disruption before contacting an administrator.

James testified that he signed off on the Tenure charges. Before doing so, he reviewed all of the evidence attached to the charges (the Statement of Evidence and supporting documents) buy did not review Takyi's January 6, 2017 Internal Investigation Findings Report. According to James, the May 5 injury was a direct result of a teacher not managing her classroom. If Respondent was on her cellphone at the time, James asserted, she could not have been managing her class, and if she was not on her cell phone, it would be even worse as the teacher was simply not paying attention; was not managing the class. Such conduct James asserted, is "conduct unbecoming" as it is conduct by the teacher that is outside of the expectations of the District.

There was significant aftermath to the May 5 incident, James testified, as he heard from parents that they were "pissed" about what happened and the incident was reported on a local television news channel. Considering this occurred during the period of the "One Newark" initiative where parents could choose the schools for their children, James explained, such bad publicity could result in fewer parents sending their children to Hawthorne Avenue School and could eventually result in the closure of the school.

The **surveillance video** offered by the District shows the hallway outside of Respondent's classroom from a five or so minutes prior to the cutting incident to a number of minutes after the incident. The video does not show Respondent outside of the

classroom at the time of the incident. The video does not offer a view into the door alcove leading to Respondent's classroom.

Respondent Evidence

Respondent Iman Jones has taught in the Newark School District since 1999, initially as a per diem teacher and since 2003 as a full-time teacher. At the time of the incident at issue herein, Respondent had no record of discipline.[6] Following closure of the District elementary school where she taught for a number of years, Respondent was assigned to teach first grade at the Hawthorn Avenue Elementary School for the 2014-2015 school year. Respondent testified that she had not previously taught first grade. Her first-grade class was composed of 20 or 21 students.

Respondent described her classroom at Hawthorn as having clusters of student desks arranged in groups forming the dots on a five dice, an additional area with a rug (referred to as the rug area) and a single teacher desk. According to Respondent, she did not use the teacher desk as she usually would be standing, walking around the classroom or seated at one of the five desk clusters (her "stations") when instructing students. Respondent further testified that the first-grade class was assigned two teachers, herself and Ms. Warren Davis; that the two teachers split the subjects for purposes of teaching and that Respondent told Davis that Davis could have the teacher desk. Respondent explained that she kept her personal belongings in a locked cabinet in the classroom. The door into the classroom from the hallway had a single window covered by paper and opened toward the hallway into an alcove somewhat larger than the width of the door.

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[6] Grievant's file contained a subsequent December 11, 2015 letter of reprimand; a letter Respondent asserted should have been removed from her file as the result of a settlement.

According to Respondent, she collected her students from gym class in the early afternoon of May 5 and as they were returning to the classroom one of her students, N, asked if he could go back to gym. When Respondent told N he had just been to gym and could not go back, the student, according to Respondent, responded by grabbing items off of a cabinet in the classroom and throwing them onto the floor, pushing a desk over and throwing things sporadically around the classroom. Respondent testified that N had engaged in such behavior in the past; that the school's child study team had come up with a number of interventions for N when he acted out, and that on this occasion Respondent thought it best to use her cell phone to call N's mother to avoid the child possibly being referred to an area hospital's mental department where the child had been sent by school administration on six prior occasions. Respondent recalled that N's mother came approximately five to seven minutes after her call and took N home. Respondent testified that she understood that under school policy she could use her cell phone under such circumstances.

After N left and she straightened out the class room, Respondent began teaching the subject block, during the course of which, she testified, she stood at the board and walked around the classroom. During the course of the lesson Vice Principal Lane came to the class-room, returned a student she had been meeting with to the room and sat in the back of the room for a minute and then quietly got up and left the class. Respondent recalled that sometime thereafter during the course of the lesson, student A – who Respondent described as a very energetic student who had a hard time staying seated – got up out of his seat. Such conduct by A was not unusual in Respondent's experience, and she had previously used different strategies to modify A's behavior, including sitting

the student in another seat away from other students, spend one-on-one time with the student, established various rules, used a student contract and written daily reports home. Such strategies did not work with A, Respondent asserted, and she eventually submitted INRS study team paperwork seeking assistance from the administration with respect to A. (Grievant further recalled that she had not yet received a response to her request due to the extended absence of the study team's head counselor.) In any event, on the occasion when A got up out of his seat on May 5 Respondent asked the student to sit with her at the cluster where she was then seated. A did not do so and instead, Respondent testified, walked to the rug area and Respondent again instructed the student to take his seat. He again did not do so and Respondent again told the student to come sit near her. When A refused the instruction, Respondent stated she would have to call A's dad. (Respondent explained that she had used this strategy in the past and when she had previously gotten A's dad on the phone and had the dad speak to A, the student would thereafter cooperate.) On this occasion, Respondent recalled, A went to his seat as Respondent was making her call but when he realized his dad did not answer the call, A got back up, walked over to another student desk cluster and spoke to student Z, at which point both students A and Z walked over to the rug area. Respondent testified she then called A's mom, was unable to get her and left her a message. Respondent then called out to Z to return to his seat, that he did not want to "get a yellow," at which point Z returned to his desk.

According to Respondent, she then got up and walked between the rug area and Z's student cluster, a conduct Respondent described as creating a barrier between A and Z consistent with the "Strategy of Proximity Rule." There was a point, Respondent

explained, where A walked over to Z and "did some playful type of movement" with his hands toward Z. Both students were smiling and Respondent explained she could not describe A's action as a hit. Respondent again told A to sit down. Respondent remained standing and recalled that she was looking down at another student's paper and work when she sensed a child standing next to her. Responded looked down to her side and saw Z standing there with his hands on his head and a "trickle" of blood on his forehead. According to Respondent, she then looked at A and said: "what did you do?" A respondent by just looking at the teacher and looking surprised. Respondent testified that she hit the classroom intercom button, assigned another student to accompany Z to the school nurse, opened the classroom door for the two students so no blood would get on the doorknob and using the intercom told the main office what had happened. She testified that as she was speaking to the main office, some of her students began to say "that's my cousin and such" and ran out of the room to accompany Z to the nurse. Respondent testified that she did not call the nurse to her classroom because there was only a "trickle" of blood on the student's forehead and she was confident Z could get to the nurse's office – only down the hall and to the left – with no problem.

Respondent testified that at the time she did not know what could have caused Z's injury and that another student pointed out something on the floor to her; a small piece of bloody metal that Respondent then picked up with a piece of paper. She testified that she had never seen the object before, does not know where the object came from or how long it was in the classroom. Respondent testified that she later handed the object to the security guard. Although Respondent testified that she did not actually see the incident happen, she was present and "in the moment" standing by Z's cluster. Respondent denied

that she was out of the classroom or in the classroom doorway vestibule or on her phone at the time of the injury. She testified that she was surprised by the incident and does not know what she could have otherwise done to prevent the incident.

Positions of the Parties

The parties submitted post hearing briefs containing exhaustive analysis of the factual and legal issues presented by the record, the entirety of which have been fully and carefully considered by the undersigned. Only summaries of the post hearing briefs are offered below:

Position of the School District

The District argued that the evidence supports its tenure charges. There are a number of important undisputed facts in the record that on their own lead to a conclusion that Respondent failed to supervise her students adequately. A and Z were misbehaving in the class; A somehow had a razor or box cutter and in the course of their horseplay A cut Z in the head causing injury requiring the student to be taken by ambulance to the hospital where he received stiches. Respondent was unaware of the razor being in the room, was unaware of A having the razor and does not know how it happened that A cut Z. In such circumstances, the facts should speak for themselves. Whether Respondent was on her cell phone or not or whether Respondent was in the classroom or outside of the classroom, she was on duty and responsible for the safety of her students. Yet her student was injured and under the circumstances presented the burden should shift to Respondent to establish that she was not negligent and Respondent failed to show she was not negligent. Considering further that the evidence establishes that Respondent was

on her cell phone and out of the classroom at the time of the injury and failed to follow procedures and protocols, the record further supports a finding that Respondent engaged in unbecoming conduct.

In regard to a finding of unbecoming conduct based upon failure to supervise. as is presented here, such can be found when a teacher is present but is negligent in supervising students, or when a teacher leaves students unattended. Teachers have a duty to supervise students and monitor their behavior in spite of other distractions and even one incident of failure to supervise can be sufficient to support removal. Here, Respondent owed a duty of care to her students; she was required to exercise the degree of care for the safety of others which an ordinary person would exercise under similar circumstances. Here, the District has a pupil safety policy recognizing that the "safety of its pupils is a consideration of utmost importance" and that "the staff must maintain complete classroom...supervision during regular school hours." As principal James testified, the District has a blanket policy that "adults who are supervising children are responsible for the safety of children period." Thus, the duty of Respondent toward her students was clear.

Also clear is the fact that Respondent breached her duty. Respondent clearly failed to exercise the level of vigilance required of a teacher. In this regard, if the teacher is in front of students, circulating and engaging, the May 5 incident would never have happened; the razor blade would not have had a presence the classroom, A would not have had the opportunity to cut his classmate with the blade, Z would not have been injured and required medical attention and trauma experienced by other students in the class would never have happened. The doctrine of *res ipsa loquitur* supports a finding

that Respondent's negligence was the proximate cause of Z's injury. Thus, as is required by the doctrine, Respondent was the only adult in the room and consequently had exclusive control of the object or means that caused the accident. New Jersey courts have recognized that in child abuse matters, the doctrine of *res ipsa loquitur* has resulted in a shifting of the burden of proof where only certain individuals have had access or custody of the abused child. In this matter, the District argued, fairness and common sense dictate that that the burden of proof shift to Respondent. Respondent had a duty; she was in a circumstance where she was required to meet that duty; she was the only one in the classroom with the duty and during her time in such circumstance a hazard arose, continued and resulted in injury to Z. Given that Respondent had an undeniable duty to supervise her students adequately and ensure their safety, she should be required to offer a satisfactory explanation of Z's injury. Respondent offered no such explanation and she should not be permitted to hide behind the burden of proof in order to avoid the consequences of her negligence.

Although Respondent should be found to have engaged in unbecoming conduct even in the absence of her being on her cell at the time of Z's injury, the evidence establishes that she was, in fact on her cell phone, and such conduct has been found to be unbecoming conduct. Here, when Lane first saw Z in the nurse's office the student reported that at the time of his injury Respondent was on her cell phone. Although such may be hearsay, the statement is nonetheless admissible because is was an excited utterance having been made soon after the significant event when Z was still in an excited state and had not had time to deliberate and fabricate a false story. Moreover, the statement by Z was made in response to a plainly open ended question by Lane and was

consistent with the statements of multiple students made within five minutes of Z's statement. Z's statement establishes that Respondent was on her cell phone at the time of Z's injury. Additionally, the statement should be held reliable under the residuum rule.

The record also establishes that Respondent engaged in unbecoming conduct by leaving her classroom unattended during the time when Z was injured. In this regard vice principal Lane testified that students reported to her that Respondent was outside of the classroom on her cell phone at the time of the injury to Z, and one student witness reported the same during his interview with the District investigator. Considering Respondent presented a self-serving statement on the issue, the students had nothing to gain by providing their version of events, that their statements that Respondent was not in the room at the time of the injury, should also be credited.

Respondent also engaged in unbecoming conduct by failing to present a written report on the incident as required by District protocol, and further failed to comply with the clear directive of her supervisor to write such a report.

Respondent's failure to adequately supervise students and failure to comply with her supervisor's directive represented a clear failure by Respondent to conduct herself in a manner expected of a public-school teacher. Such a duty represents the most basic obligation of a teacher to her students and their parents. The penalty for instances of such misconduct should reflect the nature and gravity of the offense found, including any injury to students and the harm done to the school district's maintenance of discipline and the proper administration of the school system. Here, Respondent's failure to meet her obligation resulted in a significant injury to a student, caused trauma to her entire class and degraded the reputation of the school in the eyes of the school community and the

public. Considering that Respondent failed to take responsibility for her conduct and failed to show remorse, such establishes a strong likelihood of reoccurrence of the failure to supervise should Respondent be returned to the classroom. Under such circumstances dismissal is appropriate; the tenure charges should be upheld and Respondent should be dismissed from her tenured position.

Position of Respondent

Respondent maintained that the tenure charges should be dismissed. The District has the burden of establishing by a preponderance of the evidence that its tenure charges against Respondent are true. Such a burden is not met where, as here the Respondent argued, the District has primarily relied upon hearsay testimony to establish its case. The District's case is based upon the hearsay content of staff reports and the hearsay content of the final report of investigator Takyi. The District failed to present any live witness to establish the facts upon which the District relies and, as a consequence, Respondent has been wholly unable to confront the witnesses who have testified against her. Although the arbitrator may have the authority to admit documents into evidence that contain hearsay statements, certainly where, as here, there is no corroborating evidence to support the truth of the hearsay, documentary statements should not be considered for the truth of the matters asserted therein.

In this regard, there were no witnesses offered at the hearing who saw the May 5 incident; neither Z nor A, nor any of their classmates were call to testify at the hearing and no formal written or recorded statements were taken from any student. Similarly, the report of the IAIU is hearsay and on its face the report states that it is not adjudicative,

but is solely investigative. Due process requires the District to prove the charges as serious as those brought here against Respondent, by a preponderance of the credible evidence. Here, the hearsay evidence relied upon by the District is not reliable and is insufficient to satisfy the District's burden.

In its effort to bolster its weak case the District offered evidence of observations of prior classroom lack of management by Respondent and Respondent's reputation relating to classroom management. Such should not be given weight as it is well established that evidence of prior bad acts may not be the basis for drawing inferences relating to what Respondent may have, or may not have, done on May 5. Certainly, such may not act as a substitute for admissible evidence relating to what happened in the classroom on May 5.

As for the surveillance video offered by the District, it can fairly be assumed that what is shown on the video from 2:05:41 and 2:11:28 shows what occurred in the hallway after the injury to Z. Arguably relevant as to what happened before and during the incident is shown on the video from 1:58:53 to 2:05:41, and that portion of the video does not show Respondent outside of her classroom. In this regard, the District's claim that Respondent could have been outside of her classroom but in the door alcove and consequently not within the video view is mere guessing on the part of the District.

The fact is, the Respondent argued, here Terry Lane showed bias against Respondent and rushed to judgment against the teacher. Thus; (1) Lane stated as early as May 5 that she wanted Respondent removed; (2) Lane's claim that Respondent did not comply with instructions to write a report did not acknowledge that the employee was not permitted to return to the school after May 5; (3) Lane prejudged Respondent by

assuming that the teacher had some wrongdoing to acknowledge, amounted to an inappropriate attempted to justify her actions even before the matter had been investigated; (4) Lane presumed Respondent had received favorable ratings at her prior school to "get her out" of that school; (5) Lane reported that Respondent could be seen in the hallway on the surveillance video at the time of the incident, even though such is not reflected in the video; and (6) Lane made no effort whatsoever to ask the co-teacher in the room about that teacher's use of the teacher desk or other possible sources of the blade.

The District also failed to prove negligence by Respondent as the evidence establishes that Respondent acted reasonably under the circumstances. A and Z were engaged in horseplay – conduct not uncommon with six-year-old boys. There was no reason whatsoever of Respondent to anticipate that one of the two boys would have a blade or that the injury done to Z was reasonably foreseeable.

The fact is Respondent was the only eyewitness to the incident offered at the hearing and her testimony was clear, concise and direct. Based upon her testimony there was absolutely nothing whatsoever to indicate that A and Z had any animosity between one another or that a risky or dangerous situation was developing. As reflected in Respondent's testimony that the two were smiling at one another at the time of the incident and from the surveillance video that just minutes before the incident the two boys were together in the hallway getting drinks of water without any conduct that could be interpreted as a precursor to violence. They were two six-year-old boys behaving as six year old boys.

There is nothing in the record to show that Respondent deviated from the standard conduct expected of a teacher and the District cannot support it case by hearsay upon hearsay evidence; it cannot, as it has attempted to do, bolster non-reliable hearsay evidence with more non-reliable hearsay evidence. Hearsay cannot compensate for a lack of evidence. The tenure charges should be dismissed and Respondent should be reinstated with full back-pay.

Discussion

New Jersey law establishes that no tenured, public school teacher in New Jersey may be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause." Unbecoming conduct is defined generally as conduct that has a tendency to destroy public respect for government employees and confidence in the operation of public services, or where it is shown that an employee lacks fitness to discharge duties and functions of the employee's office or position. Unfitness to remain in a tenured teacher position may be established by a single incident if significantly flagrant, or through progressive discipline for less serious matters. Here, the District has the burden of establishing the truth of its tenure charges by a preponderance of the evidence.

Considering the full record in this matter including all testimony, evidence and argument of the parties, I find that the District has established the truth of its unbecoming conduct charge against Respondent in part, thus warranting discipline, but has failed to establish that Respondent engaged in such conduct that otherwise warrants her termination.

The Record Fails to Establish that Responded was on Her Cell Phone and/or Outside of the Classroom at the time of the May 5 Incident or that Respondent was the Source of the Razor Blade

The District offered no witness with first-hand knowledge of what occurred in Respondent's classroom on May 5; no student was called as a witness to give testimony on what led up to the injury to Z and/or what Respondent was doing during the period leading up to the injury. Nor did the District show that first-hand witnesses were unavailable to testify, offer any statements of any witnesses taken under oath or offer any direct statements of any first-hand witness whatsoever. Instead, the District relied upon the report and testimony by Lane of a statement made by Z to Lane while Z was in the nurse's office being treated after the incident; testimony by nurse Wenson of statements by other students made to the school nurse while she was treating Z that the blade came from the teacher's desk; testimony of Lane regarding statements made to her by students immediately after the incident; a report of a statement made by a student during the District's internal investigation; and statements made by Respondent as to what occurred in the classroom that the District argues are inconsistent with Respondent's later statements and inconsistent with the statements of students. All of these statements offered by the District are out-of-court statements. Those alleged to have been made by students were offered by the District for their truth. All such offered statements of students are hearsay. The District argues that notwithstanding their hearsay nature reported student statements are admissible for their truth and are reliable because; (a) in regard to the statement of Z to Lane in the nurse's office that Respondent was on her cell phone and was not in the classroom at the time of the injury, the statement falls within the excited utterance exception to the hearsay rule, (b) the statements of other students that

Respondent was on her cell phone and standing outside of the classroom are consistent with both the statement to Lane by Z and the statements of other students and (c) the statements are admissible under the residuum rule.

I am not persuaded by the District's arguments in this regard. The statement of Z to Lane, although not made contemporaneously with the injury, may have been made during the period when Z could be fairly said to have still been in an excited state as a result of the incident, and the student's narrow statements about how he received his injury may arguably be admissible under the exception. However, I do not find the further statement of Z made in answer to a question by an authority figure such as Lane about the whereabouts of the teacher, to be so directly related to the injury as to fall within the exception. Even assuming arguendo that the statement of Z falls within the exception, I do not find the statement reliable as the contents of the statement itself presents questions of its reliability by begging the question of how the student could have been aware of what the teacher was doing at the time the student was engaged with A who had a blade in his hand and was attacking the student. Additionally, Lane's testimony in this regard is inconsistent with her own recording of Z's response in her own "Staff Incident Report" of the conversation made within hours of the conversation on May 5 wherein she reported that Z responded to her question by stating only that the teacher was on her cell phone and made no record of any additional statement by Z about the teacher being outside of the classroom. As for the statements of other students made to the school nurse about the source of the razor, those statements do not arguably fall within any exception to the rule. Similarly, the statements of other students made to Lane in the classroom after the incident and to the District investigator many months later do

not benefit from any exception to the hearsay rule. Again, if such statements were important to the resolution of this matter, they could have been, but were not, offered through testimony of the students.

The District also argues that considering the circumstances involving young students and the unusual nature of the event, the residuum rule should apply as this is an administrative matter and as such, findings – even those in part based upon hearsay - need be supported by only a small amount of non-hearsay evidence. Additionally, the District argues that as the rules of arbitration apply, the undersigned need not slavishly comply with the rules of evidence.

The AAA rules of arbitration are controlling of this matter and the residuum rule is well recognized. However, children can be easily influenced by statements of their peers and by their desire to please the adult authority figures around them. Under the circumstances presented, I find no admissible evidence - relating Respondent's whereabouts or phone use - of significance sufficient upon which to hang a hat of residuum. Similarly, in applying my experience as an arbitrator, I am simply not persuaded as to the appropriateness of relying upon the recollection of District witnesses as to the collective statements of a group of mostly unidentified six and seven year olds as the basis of my finding fact, where, as here; (1) the District has presented no direct testimony or other evidence of what took place in the room and (2) the evidence presented by the District of what took place outside of the classroom does not support the District's claim that Respondent was outside of her classroom at the time of the incident.

Based upon such considerations, I find that the District has failed to meet its burden of establishing the truth of those portions of its tenure charges asserting that

Respondent (1) was on her cell phone[7] and (2) was not in the classroom at the time of the May 5 incident.

The Record Nevertheless Establishes that Respondent Failed to Adequately Supervise her Students

Although I have found out-of-court statements by students to be non-admissible, the statements of Respondent as a party to the proceeding are admissible for their truth. To support its charges, the Districts relies, in part, upon statements by Respondent[8] overheard by Lane made to the parent of Z while in the nurse's office describing the boys "running around" the classroom and being in the teacher's desk area. These statements are in contrast to the subsequent statements and testimony of Respondent that does not describe the two involved students "running around" the classroom together and engaging in horseplay, but instead offers a more tempered description of the boys' conduct.

Between the description of events reportedly given by Respondent at the time of the incident describing the two students as "running around" the classroom and the description given by Respondent over two years later on the stand, I find that the former more accurately described the nature of the conduct of A and Z. I base such finding on; (a) the contemporaneous character of Respondent's reported May 5 statements and (b) the fact that the contemporaneous descriptions are entirely consistent with the energetic character of the conduct of the two students in the hallway as captured on the surveillance

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[7] Consistent with the argument of Respondent, I do not find that Respondent's prior use of her cell phone in the classroom may be relied upon to establish that she was using the phone at the time of the May 5 incident.

[8] None of these alleged statements by Respondent addressed in this section are arguably relevant to the issues previously addressed of whether or not Respondent was on her cell phone or outside of the classroom at the time of the incident and, as a consequence, are not relevant to my prior discussion of those issue.

video only minutes prior to the incident; conduct that I find likely continued when the two returned to the classroom.[9] Additionally, it is plain from Respondent's various descriptions of the student's conduct and the fact that the two students were obviously engaged in non-academic activity when Z was injured, that the two boys were engaged in "horseplay."[10]

Considering that the May 5 incident took place eight months into the school year, by which time standards of conduct and behavior should have been well established in the classroom by the teacher, I am in agreement with the District's position that the fact that A and Z were engaging in horseplay and running around the classroom evinces a failure by Respondent to manage her classroom. In such circumstances, I find it reasonable to hold Respondent accountable for any harm to students or property that could foreseeably result from such behavior. Students running around and engaging in horseplay or roughhousing in a classroom environment in the presence of other students is not a benign or inconsequential activity. Aside from its impact on education, permitting such activity unnecessarily increases the risk of accidents and student injury; injury that could foreseeably range from minor to serious. Whether such injury actually occurred or not, I find that by failing to adequately manage her classroom and supervise her students on May 5, Respondent allowed her students to be exposed to the potential of such foreseeable harm.

Considering such, I find that the District has established the truth of its charges to the extent they allege that by failing to adequately manage her classroom on May 5

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[9] Even crediting Respondent's version of events, I am persuaded that Respondent was failing to adequately managing her classroom.

[10] Respondent also characterized the students' activity as horseplay in her brief.

Respondent failed to conduct herself in the manner the District could fairly expect from a reasonably prudent person in her teaching position and thereby, through such negligence, caused her students to be unnecessarily exposed to harm that could foreseeably result from such conduct. However, my findings of such unbecoming conduct by Respondent in this regard is limited to the "exposure" of her students to foreseeable harm. Respondent should not be held accountable for exposure to unforeseeable harm or actual harm that occurred of an unforeseeable nature.

Z's Being cut by a Blade was Unforeseeable

I am not persuaded that Respondent should be held accountable for the harm that actually occurred to Z. The blade involved, as described by two District witnesses and Respondent was small, was without a handle and was not a knife in the traditional sense. As reflected in the testimony of various District witnesses – no student has ever been injured before by a weapon of any kind in the school and the District, to this day, has no idea where the blade used by A came from or how it got into the school. There is no evidence in the record that the District anticipates (i.e.; foresees) first graders having weapons in its elementary schools. There is no record evidence that the District trains its grade school teachers to be weapons aware, or how to disarm a student with a weapon, or how to protect other students in the presence of a weapon wielding student. In other words, the District as an organization does not anticipate – it does not foresee – its first graders having knives in school. In such circumstances, there is no reason to believe that a reasonable person in the positon held by Respondent would have been aware of the blade's existence, or foreseen first grader A's using a blade to cut first grader Z in the

head during the school day. I find that such classroom conduct was well outside of the reasonable expectations of foreseeable conduct in the classroom.

Based upon such considerations, I find that the actual injury received by Z was not foreseeable by a reasonably prudent person and, as a consequence, I do not find that Respondent failed her duty of care in such regard. Consistent with such finding, I further find that although the District experienced negative consequences from the community for the May 5 incident, such consequences were not the result of Respondent failing to satisfy a duty owed the District or her students. Having not failed a duty, such may not be a basis for supporting a tenure charge against Respondent.

Failure to Submit a Written Report

Finally, the District argues that Respondent should be subject to discipline because she failed to submit a written report of the incident as directed by Lane on May 5. Respondent argues that she was not given the opportunity to file such a report as she was removed from the school effective the very next day.

I find the District has failed to support its assertion in this regard as the tenure charges do not allege such a failing by Respondent and considering the extended period between the May 5 incident and the District's filing of the tenure charges, and the fact that there is no evidence that the District ever attempted to remind the relocated teacher of the need to file a report nor counseled that such failure could result in discipline, I find the District's attempt to base discipline on such is untimely and contrary to fundamental notions of fairness that underlay principles of due process.

Conclusions

The District has failed to establish the truth of a significant portion of its tenure charges and, as a result, has failed to establish that termination of Respondent, a tenured teacher, is warranted.

The District has established the truth of the tenure charge that Respondent failed to adequately manage her classroom by allowing students to engage in horseplay and thereby exposing students to potential foreseeable harm, contrary to the reasonable expectation of the District, and that Respondent thereby engaged in conduct unbecoming.

Discipline for the unbecoming conduct found should be reasonably commensurate with the gravity of the offense found, within the context of progressive discipline and Respondent's discipline and service record. Considering that Respondent is a long-term employee with little or no history of prior discipline, and acknowledging that the foreseeable harm to students from failure to manage the classroom in the manner found herein could be significant, I find that a suspension of 60 calendar days is consistent with the gravity of the offense found.

ORDER

To the extent that the District has shown that Respondent failed to adequately manage her classroom by allowing students to engage in horseplay and thereby exposing students to potential harm, I find that the District has established the truth of its conduct unbecoming charge against Respondent. As to all other allegations of conduct

unbecoming within the subject tenure charges, I find the District has failed to establish such by a preponderance of the evidence and hereby dismiss such charges.

Consistent with such findings the District is ORDERED to:

1. Promptly offer Respondent reinstatement to her former position.

2. Make Respondent whole for any and all losses of pay, seniority and other benefits she may have suffered as a result of her unpaid suspension-pending-investigation from the date of the commencement of her unpaid suspension to the date of her reinstatement by the District, less 60 calendar days of pay attributable to the suspension ordered herein.

Dated: October 20, 2017

Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Decision in Agency Docket Case No. **92-5/17** relating to tenure charges against Iman Jones on Friday, October 20, 2017.

Timothy J Brown

313-17M

313-17

STATE OF NEW JERSEY
BEFORE THE COMMISSIONER OF EDUCATION
AND
THE DIRECTOR OF THE NEW JERSEY STATE BOARD OF EXAMINERS

	:	JOINT ORDER OF PREDOMINANT INTEREST
DAVID RAFFO,	:	OAL DKT. NO. EDU 09448-17
APPELLANT,	:	Agency Dkt. No. 106-5/17
v.	:	
NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,	:	
RESPONDENT.	:	
AND	:	
IN THE MATTER OF THE CERTIFICATE(S) OF DAVID C. RAFFO.	:	OAL DKT. NO. EDE 10580-17 Agency Ref. No.: 1617-190

JOINT DECISION

On May 31, 2017, David Raffo filed a petition of appeal with the Commissioner of Education challenging the New Jersey State Board of Examiner's (SBE) refusal to issue him a supervisor certificate based on an accusation that Raffo breached the security and confidentiality of the 2016 Partnership for Assessment of Readiness for College and Careers (PARCC) assessment. On July 6, 2017, the petition was transferred to the Office of Administrative Law (OAL) for a hearing as a contested case.

On April 6, 2017, the State Board of Examiners (SBE) filed an Order to Show Cause why David Raffo's teaching certificate(s) should not be revoked as a result of the same accusation, that

he breached the security and confidentiality of the 2016 PARCC test. On July 26, 2017, the SBE transmitted this matter to the OAL as a contested case.

On August 24, 2017, the SBE and Raffo jointly filed a motion with the OAL to consolidate the SBE and Commissioner of Education matters, and for a predominant interest determination. The parties have agreed that the issue in both matters arises out of the same set of facts and, therefore, that consolidation is appropriate. On September 8, 2017, Administrative Law Judge (ALJ) John P. Scollo issued an Order for Consolidation and Determination of Predominant Interest, finding that the matters should be consolidated and that the SBE has the predominant interest.

The decision issued by ALJ Scollo was transmitted to the Commissioner of Education and the Director of the SBE on September 15, 2017. No exceptions to the recommended order were filed by the parties.

Having considered the ALJ's Order of Consolidation and Determination of Predominant Interest, the Commissioner of Education and SBE agree with the order of consolidation and the ALJ's predominant interest determination. While both entities have jurisdiction and the expertise to determine whether Raffo's actions constitute a breach of security and confidentiality of the 2016 PARCC test, the charge is more appropriately within the SBE's expertise. Accordingly, the SBE has the predominant interest in this matter and its findings of facts on the issue of whether Raffo did breach the security and confidentiality of the test, which are made or adopted in the final decision in this matter, will be binding on the Commissioner of Education. This decision does not affect the Commissioner of Education's ability to rule on certification matters or the possible remedies the Commissioner of Education can provide to Raffo if he is successful in his appeal of the SBE's determination.

Having independently evaluated the record and considered the ALJ's determination of predominant interest, the Commissioner of Education and the Director of the SBE, pursuant to their authority, make the following determination in the matter.

JOINT ORDER

Based upon a review of the record by both the Commissioner of Education and the Director of the SBE, it is ordered that the above-captioned matters are consolidated for hearing before the ALJ. The SBE has the predominant interest in this matter. The ALJ will first offer recommended findings of fact and conclusions of law, disposing of all issues in controversy through a single initial decision consistent with *N.J.A.C.* 1:1-17.8(a). The initial decision shall be filed first with the SBE, as it has the predominant interest in this matter, and it will determine whether the factual allegations against Raffo have been established by a preponderance of the competent and credible evidence. If the SBE determines that the allegations have not been so established, it will issue a final decision encompassing all the issues within its predominant interest and will transmit the decision to the Commissioner of Education to provide the relief to which Raffo may then be entitled. If the SBE decision concludes that the allegations of a breach have been established, the

SBE will transmit the decision and the record to the Commissioner of Education to decide any remaining education law issues.

DECISION ISSUED BY THE
COMMISSIONER OF EDUCATION
OCTOBER 17, 2017

Kimberley Harrington
Commissioner
Department of Education

DECISION ISSUED BY THE DIRECTOR
OF THE STATE BOARD OF EXAMINERS
OCTOBER 17, 2017

Robert R. Higgins
Director
New Jersey State Board of Examiners

314-17

STEVEN LE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

On August 16, 2017, petitioner – a taxpayer and former member of the Union Township Board of Education (Board) – filed a petition and motion for emergent relief seeking to enjoin the Board from spending an approximate $5,000,000 balance that remained unspent after a 2013 school renovation project. Petitioner contended that the funds in question had been transferred to an undesignated capital account in violation of applicable law and regulations. The Board argued that its actions were in all respects compliant with the law, and further asserted that the petition must be dismissed as untimely pursuant to *N.J.A.C.* 6A:3-1.3(i). A hearing was held in this matter on September 6, 2017, after which the record was closed.

The ALJ found, *inter alia*, that: the petitioner failed to meet the standard required for emergent relief under *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), codified at *N.J.A.C.* 6A:3-1.6, as he was unable to demonstrate a likelihood of success on the merits; further, as a threshold matter, the petitioner filed his appeal out of time, as he was aware as early as January 2017 that the Board was taking official action regarding the remaining capital reserves from the school renovation project, yet failed to file an appeal until August 2017; and petitioner's argument that the ninety day rule should be relaxed in the "interests of justice" is without merit. Accordingly, the ALJ denied the petitioner's motion for emergent relief and granted the Board's motion to dismiss the petition as untimely.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and found the petitioner's exceptions to be without merit. Accordingly, the Initial Decision was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 23, 2017

OAL DKT. NO. EDU 12190-17
AGENCY DKT. NO. 191-8/17

STEVEN LE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Steven Le. The petitioner filed a petition of appeal and a request for emergent relief seeking to enjoin the Union Township Board of Education (Board) from spending approximately $5,000,000 in funds that remained unspent after a 2013 school renovation project at the Central Five Jefferson School (Jefferson Project). The petitioner alleges that the funds were transferred to an undesignated capital account in violation of the applicable statutory and regulatory provisions. *N.J.S.A.* 18A:7G-5o; *N.J.A.C.* 6A:26-4.6(c). The Administrative Law Judge (ALJ) found that the petitioner did not meet his burden of establishing a right to emergent relief under *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. The ALJ also determined that the petition of appeal was untimely filed under *N.J.A.C.* 6A:3-1.3(i) and, as a result, the ALJ granted the Board's motion to dismiss.[1]

Upon review, the Commissioner concurs with the ALJ – for the reasons set forth in the Initial Decision – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe*, *supra* and *N.J.A.C.* 6A:3-1.6. The Commissioner is also in accord with the ALJ's determination that the petition of appeal was time barred under *N.J.A.C.* 6A:3-1.3(i).

[1] In response to the petitioner's motion for emergent relief the Board filed a motion to dismiss.

N.J.A.C. 6A:3-1.3(i) prescribes that an appeal to the Commissioner must be filed "no later than the 90th day from the date of the receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested hearing." The 90-day rule "provides a measure of repose, an essential element in the proper and efficient administration of the school laws." *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572, 582 (1993). In this case, even if the most lenient trigger date is utilized, it is clear that the petition was not timely filed. At three separate Board meetings – held on January 17, April 25 and April 26, 2017 – the Board took official action regarding the remaining capital reserve funds from the Jefferson Project.[2] Yet, the petitioner did not file the petition until August 16, 2017, 113 days after the April 26, 2017 Board action.

It is well recognized that the Commissioner may exercise her authority under *N.J.A.C.* 6A:3-1.16 to relax the application of the 90-day rule "where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." *Ibid.* "Exceptions to the 90-day rule should be granted sparingly, and only where there exist compelling circumstances to justify enlargement or relaxation of the time limit." *Sarah Dickerson v. Board of Education of the Township of Pittsgrove, Salem County*, OAL Dkt. No. EDU 8679-09 (Decided March 16, 2004) *aff'd Commissioner* (May 3, 2004) (citations omitted). In his exceptions, the petitioner maintains that the 90-day period should be relaxed because the proper expenditure of public funds is an issue of paramount public importance and the public is always harmed when a school board does not act with the requisite transparency regarding it expenditures of funds. The petitioner also contends that it is extremely important to proceed on the merits of the appeal based upon the Board's inability to justify its contradictory explanations regarding the amount of remaining bond proceeds

[2] The remaining Jefferson Project funds were also the subject of various meetings and discussions during the petitioner's tenure as a Board member between January 5, 2016 and December 30, 2016.

from the Jefferson Project. Finally, the petitioner argues that the ALJ failed to adequately explain why the timely filing requirement should not be relaxed in this case.

Despite his claim to the contrary, the Commissioner finds that the petitioner has failed to present any exceptional circumstances that might justify a finding that strictly adhering to the 90-day rule would result in injustice. *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572, 590 (1993); *N.J.A.C.* 6A:3-1.16. As the ALJ stated in the Initial Decision, the petitioner is a former Board member and, as such, was well aware of the transfer of funds as early as January 2017; he is not certainly not "an ill-informed or unsophisticated tax payer." Moreover, all of the Board's decisions in connection with the use and transfer of the remaining funds from the Jefferson Project have been made at public meetings and in consultation with the Board's auditors. Further, the Board has already awarded contracts and issued purchase orders using funds from the capital reserve that were allocated from the Jefferson Project. As set forth in *Kaprow*, *supra*, the "limitations period gives school districts security in knowing that administrative decisions regarding the operation of the school cannot be challenged after 90 days." *Kaprow*, *supra*, at 542. Therefore, the petitioner has not demonstrated that there is a compelling reason to relax the 90-day filing requirement, and an injunction preventing the use of the funds at this late juncture would adversely impact ongoing school projects.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[3]

Kimberley S. Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 10/23/17

Date of Mailing: 10/25/17

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO EDU 12190-17
AGENCY REF NO. 191-8/17

STEVEN LE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY.

Respondent.

Christopher K. Harriott, Esq., for Petitioner (Florio, Kenny, Raval, attorneys)

Paul E. Griggs, Esq., for Respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, attorneys)

Record Closed: September 6, 2017 Decided: September 6, 2017

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Steven Le, a taxpayer and resident of Union Township, filed a verified petition and motion for emergent relief with the Commissioner of Education (the

Commissioner) on August 16, 2017. Le seeks to enjoin the Union Township Board of Education (the Board) from spending an approximate $5,000,000 balance that remained unspent after a 2013 school renovation project. He contends that these funds were transferred to an undesignated capital account in violation of the applicable statute and regulations. N.J.S.A. 18A:7G-5(o); N.J.A.C. 6A:26.4.6(c). The Board replies that its actions were in all respects compliant with law. It additionally asks that the petition be dismissed as untimely. N.J.A.C. 6A:3-1.3(i).

The matter was transmitted to the Office of Administrative Law (OAL) as a contested case August 22, 2017. Oral argument took place on September 6, 2017, at which time the record closed.

FINDINGS OF FACT

The underlying facts are as set forth in the verified complaint and certification filed In opposition to the application, and I **FIND**:

Le is a former member of the Board and a taxpaying resident of Union Township. He served on the Board from September 16, 2014 until December 31, 2014, and again from January 5, 2016 through December 31, 2016. The petition of appeal concerns moneys initially raised and allocated for a renovation project at Central Five Jefferson School. This project was the subject of a 2010 referendum, which was approved by the voters and authorized expenditures not to exceed $23,972,072. Funding sources included $12,000 from capital reserves; $5,259,907 from a state grant; and, $6,712,165 from the issuance of bonds. The work took place in 2013 and came in under budget; some $5,078,252 remained unspent. It is these remaining moneys that are at issue, and that Le contends are now being improperly budgeted by the Board.

Le recounts that as late as December 15, 2015; the subject funds had not been released, but were the subject of Board discussion. He related ongoing attempts during the subsequent year to determine when and if the project punch-list had been completed; and what moneys remained in which account, to include moneys raised via the sale of bonds. On January 14, 2016, Le asked the Business Administrator, Manuel Vieira, for clarification. Vieira replied that the bond account had been exhausted. While Le appears to question the veracity of that reply, he offers no concrete evidence that it was either inaccurate or insecure. Indeed, Le himself avers that a dispute about punch list and moneys owed lingered until May 10, 2016, when the matter was finally resolved via a settlement with the contractor. It appears that in 2016 Le participated, as a Board member, in Finance Committee meetings where the controverted funds were discussed. Le alludes to a lack of candor by the Board, but his claims remain allusions, and nothing more.

In stark contrast, the Board offered correspondence from its auditors confirming that the moneys raised via the sale of bonds had been fully expended for the Jefferson School project, and thus were not transferred to its general capital account. Via letter dated February 12, 2016, auditors Suplee, Clooney and Company confirmed that only $165 remained in the bond account and stated that "the $165 would be canceled against the unissued bonds." The some $5,000,000 remaining after the project was completed represented moneys from the capital reserve, which the auditors directed "would be transferred back to the capital reserve account." At a December 2016 meeting, at which Le was a member of the Board and present, the Board's new auditor, Nisivoccia LLP, explained again that the controverted sum would be reverting back to the capital account. Le expressed no concerns and asked no questions at that meeting.

On January 17 2017, at a regularly scheduled public meeting, the Board transferred unexpended appropriations in the amount of $4,800,000 to the undesignated capital reserve account. On April 25, 2017, the Board transferred

$305,918.68 from the Jefferson School project account to the undesignated capital reserve account. April 26, 2017, the Board withdrew $5,000,000 and transferred it to the Capital Outlay account. All these actions took place via formal public resolution. Thereafter, and in reliance upon the advice of its auditors, the Board approved contracts with vendors selected via the formal bidding process for renovation projects at Union High School. The Board urges that granting the relief sought by this petition would force it to breach its duly entered contracts with these vendors, resulting in financial liability, and the possibility that the repairs to the high school will not be completed in time for opening of school.[i] Indeed, the contract for the high school renovations was awarded on June 13, 2017, and is more than fifty percent complete.

A letter dated August 9, 2017, from its auditors again confirmed the correctness of the Board's action in transferring the controverted funds. Nisivoccia LLP explained that guidance issued by the Department of Education entitled "Combined School District, Charter School and Renaissance School Audit Program" makes clear that "any unexpended transferred capital outlay and/or capital reserve funds remaining after completion of the school facilities project must be returned to the capital reserve account..."

LEGAL ANALYSIS AND CONCLUSION

In accordance with N.J.A.C. 1:1-12.6, emergency relief may be granted "where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case..." My determination in this matter is further governed by the standard for emergent relief set forth by our Supreme Court in Crowe v. DeGioia, 90 N.J. 126 (1982).

[i] The School opened for the current school year on September 5, 2017.

The New Jersey Supreme Court has set forth a four-prong test for determining whether an applicant is entitled to emergent relief. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982) (enumerating the factors later codified at N.J.A.C. 6A:3-1.6(b)).

The four factors ("the Factors") include:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b).]

The moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

I **CONCLUDE** that petitioner cannot meet its burden under the Crowe v. DeGioia standard.

Petitioner cannot demonstrate a likelihood of success on the merits of his claim. As a threshold matter, it appears that the petition is untimely filed. The time for filing an appeal before the Commissioner of Education is clearly set forth at N.J.A.C. 6A:3-1.3(i), which provides that a petition of appeal shall be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education ... which is the subject of the requested contested case hearing." Petitioner's appeal was filed well past the regulatory timeline.

Adequate notice has been defined as notice "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a

duty to communicate." Kaprow v. Bd. of Educ. of Berkeley Twp. 131 N.J. 572, 587 (1993). The ninety day period for commencing an action begins to run when the "plaintiff learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action." Ibid. The intent of the ninety day rule is to stimulate litigants to pursue a right of action within a reasonable time, so that the opposing party may have a fair opportunity to defend. The rule exists to "penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs." Ibid. Moreover, it is well established that the ninety day rule is to be strictly applied. See Kaprow, supra; Morris-Union Jointure Comm'n v. Bd. of Educ. of the Borough of S. River, 92 N.J.A.R. 2d, (EDU) 453; Markulin and the Neptune Educ. Ass'n v. Bd. of Educ. of the Twp. of Neptune, 92 N.J.A.R. 2d, (EDU) 406. This record offers no excuse or justification for the delay in perfecting Le's claim. He had notice that the controverted funds were being transferred to the capital account as early as January 2017. Nor is Le an ill-informed or unsophisticated local taxpayer. He has served on the Board himself and is ostensibly up to date on Board affairs.

Further, at oral argument, counsel does not dispute that the petition was not timely filed. Rather, counsel argued that the ninety day rule should be relaxed in the interests of justice.

Nor, based on the record developed for the emergent application does it appear that the facts will support Le's claim. He relies on N.J.S.A. 18A:7G-5(o), which states:

> In the case of a school facilities project of a district other than an SDA district, any proceeds of school bonds issued by the district for the purpose of funding the project which remain unspent upon completion of the project shall be used by the district to reduce the outstanding principal amount of the school bonds.

The Board agrees that it would have been obliged to use unspent bond proceeds to reduce its bond debt, but urges, persuasively, that the money at issue was not

generated by the sale of bonds. It buttresses that assertion with letters from two auditors.

Le likewise cites N.J.A.C. 6A:26-4(c) in support of the proposition that the moneys at issue, including capital reserve moneys, were improperly returned to the capital account. But Nisivoccia LLP shared guidance from the Department of Education that confirms that "unexpended transferred capital outlay and/or capital reserve funds remaining after completion of the school facilities project must be returned to the capital reserve account..." This is precisely what the Board did. It is thus clear that the law is not settled in petitioner's favor.

Moreover, a balancing of the equities requires denial of the application for relief. While Le argues that harm will come to the taxpayers if further spending of the controverted funds is not enjoined, the record reveals that just the opposite is true. In good faith reliance on its auditors, the Board has committed to using these moneys to make repairs to district facilities. Clearly, the public, and most especially the children of Union, will be harmed if their schools cannot open in a timely fashion this month; and, if moneys better directed toward staff salaries, books, and other instructional materials, are used to compensate vendors for potential breach of contract claims. It is noteworthy that the Board entered into a contract for the high school repairs on June 13, 2017, again via public resolution, but Le waited over two months to challenge the Board's decision; a challenge he now characterizes as an emergency.

Finally, harm is irreparable when there can be no adequate after the fact remedy in law or in equity; or where monetary damages cannot adequately restore a lost experience. Nabel v. Board of Education of the Township of Hazlet, EDU 8026-09 (June 24, 2009); Tomlin v. Lower Cape May Regional Board of Education, EDU 4952-09. This is a dispute only about the allocation of money, nothing more. Were Le to prevail at a plenary hearing, an order directing the Board to reallocate moneys in its budget will afford him, and the public, the relief he seeks.

Accordingly, I **CONCLUDE** that the request for emergent relief be **DENIED**; and, I further **CONCLUDE** that respondent's motion to dismiss the petition be granted.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that Petitioner's request for emergent relief is **DENIED**; and,

It is further **ORDERED** that Respondent's cross motion to dismiss is **GRANTED**, and the petition is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 6, 2017
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: September 6, 2017

Date Mailed to Parties: September 6, 2017

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APPENDIX

List of Moving Papers

For Petitioner:

Verified Petition

Motion for Emergent Relief

Brief in support of request for emergent relief

For Respondent:

Brief in opposition to motion for emergent relief

Certification of Gregory E. Brennan

Certification of Manuel E. Vieira

Certification of Paul E. Griggs

Notice of Cross Motion to Dismiss

OAL DKT. NO. EDU 362-17
AGENCY DKT. NO. 293-11/16

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE	:	COMMISSIONER OF EDUCATION
OF TIRA CLEGG, MARION P. THOMAS	:	DECISION
CHARTER SCHOOL, ESSEX COUNTY.	:	

The record of this matter, the parties' proposed Consent Order (Order), and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. According to the Order, "Tira Clegg's teaching certificate shall be suspended for a period of six (6) months commencing on August 1, 2017 and continuing through and including January 31, 2018." The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented certain terms contained in the Consent Order, or have agreed upon a mutually satisfactory alternate date for the effective date of those provisions. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the Consent Order. A copy of this decision is being forwarded to the State Board of Examiners.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 10/23/17
Date of Mailing: 10/25/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00362-17
AGENCY DKT. NO. 293-11/16

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF TIRA CLEGG, MARION P. THOMAS CHARTER SCHOOL, ESSEX COUNTY.

Bernice Martina Jalloh, Esq., for Marion P. Thomas Charter School (Jalloh & Jalloh, attorneys)

Joseph Maddaloni, Jr., Esq., for Tira Clegg (Lentz & Gengaro, attorneys)

Record Closed: August 11, 2017 Decided: September 7, 2017

BEFORE **KELLY J. KIRK**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on January 10, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Consent Order indicating the terms thereof, which is attached and fully incorporated herein.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives and statements made in the record.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 7, 2017
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: 9-11-17

Date Mailed to Parties: SEP 11 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

LENTZ & GENGARO, LLP
347 Mt. Pleasant Avenue, Suite 203
West Orange, New Jersey 07052
(973) 669-8900
Joseph Maddaloni, Jr.
(Attorney I.D. No.: 001561990
Attorneys for Respondent, Tira Clegg

RECEIVED
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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

IN THE MATTER OF THE SUSPENSION OF

THE TEACHING CERTIFICATE OF TIRA CLEGG,

MARION P. THOMAS CHARTER SCHOOL, NEWARK, ESSEX COUNTY, NEW JERSEY.

BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION

OAL Docket No.: EDU 00362-2017 N
Agency Docket No.: 293-11/16

CONSENT ORDER

THIS MATTER, having been opened to the Court through petition filed by Bernice Martina Jalloh, Esq., Jalloh & Jalloh, L.L.C., 21 W. Blancke St., Suite 2, Linden, NJ 07036, Counsel for Marion P. Thomas Charter School ("MPTCS") seeking to suspend the teaching certification of Tira Clegg ("Clegg") (collectively the "Parties"), and the Parties having resolved their differences, it is hereby agreed by and between the Parties as follows:

1. Suspension of Clegg's Teaching Certificate. Clegg's teaching certificate shall be suspended for a period of six (6) months commencing on August 1, 2017 and continuing through and including January 31, 2018. Clegg shall forfeit her teaching certificate to the New Jersey Board of Education and/or to the New Jersey Board of Examiners and Certification as may be required to effectuate the suspension. Clegg shall comply with any and all conditions and/or limitations that may be imposed upon her by law, rule or regulation during the term of the suspension.

2. Dismissal with Prejudice. The above-captioned matter is hereby dismissed with prejudice and without costs to either Party.

3. No admission of Liability. Clegg expressly denies having violated any contract, law, rule or regulation in this matter, and has accepted the suspension so as to resolve this matter and avoid further litigation costs, expenses and time.

4. Consultation with Counsel. The Parties acknowledge that each of them has consulted with, or had the opportunity to consult with, legal counsel of their own selection about this Agreement. The Parties each understand how this Agreement will affect their legal rights and voluntarily enter into this Agreement with such knowledge and understanding.

5. Non-Disparagement. Clegg agrees not to disparage MPTCS, including MPTCS's present and former officers, directors, employees, agents, or attorneys. MPTCS agrees that it will not disparage Clegg, including her agents or attorneys.

THE UNDERSIGNED HEREBY CONSENT TO THE FORM AND ENTRY OF THIS CONSENT ORDER:

LENTZ & GENGARO LLP
Counsel for Tira Clegg

By: _____
Joseph Maddaloni, Jr., Esq.

JALLOH & JALLOH, L.L.C.
Counsel for Marion P. Thomas Charter School

By: _____
Bernice Martina Jalloh, Esq

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316-17

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Commissioner

October 17, 2017

R. Taylor Ruilova, Esq.
Comegno Law Group, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057

Board Secretary
Trenton Board of Education
108 North Clinton Avenue
Trenton, New Jersey 08609

Re: *Board of Education of the Mercer County Special Services School District, Mercer County v. Board of Education of the City of Trenton, Mercer County, Agency Dkt. No. 239-9/17.*

Dear Parties:

Please accept this correspondence in response to your submission on behalf of the Mercer County Special Services School District ("MCSSSD"), dated September 25, 2017, regarding the above captioned matter.[1] Upon review of the submissions in this matter, and upon full consideration of the reasons set forth in support of MCSSSD's application to open this matter as a contested case, we have determined that there are no unresolved issues of school law, and the present dispute arises from Trenton's alleged non-payment for extraordinary services pursuant to a contractual agreement between the parties.

As you have previously been advised, parties seeking enforcement of Commissioner decisions shall generally bring an action in the Superior Court of New Jersey in accordance with New Jersey Court Rules, *R.* 4:67-6. Exceptions may be made in matters where there are issues of school law requiring the Commissioner's expertise to resolve the parties' adjudicated rights. *See N.J.A.C.* 6A:3-3.1(b)(1). In this matter, there are no unresolved school law

[1] The Trenton Board of Education ("Trenton" or "Trenton Board") has not responded to MCSSSD's submissions.

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issues requiring adjudication before the Commissioner because the crux of MCSSSD's request is as follows:

> [T]he Commissioner needs to enter a further determination that the September 20, 2016, Final Decision does not permit Trenton to dictate the amounts it will pay for its student's [sic] extraordinary services, and that Trenton is legally obligated to pay the full amounts of those services due and owing to MCSSSD.
>
> September 25, 2017 Ruilova Letter, pg. 3.

In the September 20, 2016 Final Decision ("Decision" or "Commissioner Decision"), the Commissioner explained that MCSSSD may directly bill the Trenton Board for the cost of extraordinary services provided to Trenton's students pursuant to *N.J.A.C.* 6A:23A-17.1(e)(5)(viii).[2] Nothing in the Decision or the subject regulation would suggest that Trenton could pay anything less than the *full* amount that MCSSSD has directly billed to the Trenton Board; and as such, it is improper to open this matter to reaffirm legal issues previously addressed by the Commissioner.

In the Decision, the Commissioner also noted that Trenton is billed separately for the cost of individual aides through MCSSSD's issuance of purchase orders pursuant to a "Personal Assistant Contract." The Commissioner further advised, "[t]o the extent that the parties may dispute the terms of or compliance with the personal assistant contract for individual aides, the Commissioner would not have jurisdiction over that contract dispute. . . ." Commissioner Decision, pg. 2-3, fn. 1. It is clear from MCSSSD's submissions that the parties had agreed upon the terms, conditions, and rates for the extraordinary services, which were memorialized in a Personal Assistant Contract. *See* September 12, 2017 Petition, pg. 7, ¶ 34; September 25, 2017 Ruilova Letter, pg. 2. Trenton's partial payments and non-payments of the specific (agreed upon) amounts sought in reimbursement by MCSSSD, therefore, arise from the parties' obligations under the Personal Assistant Contract.

The Commissioner has already decided that MCSSSD *may* seek direct reimbursement for the cost of extraordinary services from Trenton, and it follows that the Trenton Board is responsible for remittance of the amounts billed for the agreed upon rates. If Trenton has now failed to honor the Decision, the appropriate venue for enforcement of the Commissioner's decision is the Superior Court pursuant to *N.J.A.C.* 6A:3-3.1(b) and *R.* 4:67-6. Additionally, Trenton's failure to pay the rates set forth in the Personal Assistant Contract is also properly adjudicated in Superior Court.

As such, MCSSSD's petition seeking enforcement of the Decision will not be opened as a contested case before the Commissioner. MCSSSD is further advised to pursue its

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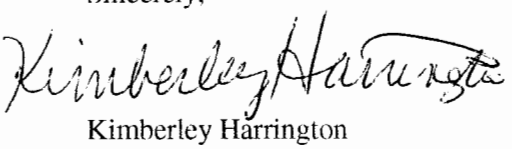
[2] The subject regulation further provides that a county special services school may receive reimbursement from the sending/resident district for the cost of extraordinary services provided to the resident district's students. *See N.J.A.C.* 6A:23A-17.5(a)(4).

claims against Trenton for alleged violations of the Decision and the terms of the Personal Assistant Contract – as it deems appropriate – in accordance with *R.* 4:67-6.

Sincerely,



Kimberley Harrington
Commissioner of Education

c: State Law Library

KH/SLP/ATA

VIA REGULAR MAIL

317-17

T.K., ON BEHALF OF MINOR CHILD, B.K.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Pro-se petitioner appealed the determination of the respondent Board that her child was ineligible for a free public education in respondent's school district. Petitioner enrolled her child in the Board's school district in 2014 using the Howell Township mailing address of the property that the family owns. Petitioner was unaware of any problem with her child's school registration until the family received a phone call two and a half years later from the Board, advising them that B.K. was enrolled in the wrong school district. The Board filed a counterclaim for tuition for the period of B.K.'s ineligible attendance.

The ALJ found, *inter alia*, that: based on the documentary and testimonial evidence presented, the petitioner is domiciled in Brick Township, which has its own school district; B.K. was enrolled in Howell Township schools for the entirety of the 2014-2015, 2015-2016, and 2016-2017 school years; petitioner provided the correct address of her property when enrolling B.K., and the school district accepted B.K.'s enrollment; the Board became aware of this issue when a neighbor of the petitioner attempted to register their child in Howell Township Schools, after which petitioner was notified by letter dated December 9, 2016 that B.K. was not eligible to attend Howell Township schools. The ALJ concluded that T.K. is domiciled in Brick Township and therefore B.K. is not entitled to a free public education in Howell Township. However, the ALJ concluded that an equitable determination is appropriate in this case, and assessed tuition only for the period after December 9, 2016, when petitioner received notice of the residency error. Accordingly, the ALJ ordered that petitioner reimburse the Board for tuition in the amount of $7,582 for the period of unauthorized attendance in Howell Township schools.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, but found that the present record lacks the information required to properly calculate the amount of tuition owed to the school district – specifically the number of days of ineligible attendance by the minor child. Accordingly, the matter was remanded to the OAL for calculation of tuition due to the Board.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 23, 2017

OAL DKT. NO. EDU 00360-17
AGENCY DKT. NO. 317-12/16

T.K., ON BEHALF OF MINOR CHILD, B.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Board.[1] The petitioner did not file a reply thereto.

In its exceptions, the Board disputes the Administrative Law Judge's (ALJ) determination regarding the amount of tuition owed to the Board by petitioner. The Board argues that it is owed more than $7,582.00 because B.K. is not an "affidavit" student, and thus, the one-year limit on tuition reimbursement set forth in *N.J.A.C.* 6A:22-6.2 does not apply.[2] Further, the Board argues that the ALJ improperly held that tuition is not owed prior to December 9, 2016, the date when petitioner became aware that even though her mailing address said Howell Township, she actually lived in Brick Township. The Board maintains that the error

[1] The Commissioner was not provided with a transcript of the July 19, 2017 hearing at the OAL.

[2] It is unnecessary to reach this argument as the ALJ limited the tuition reimbursement to December 9, 2016 – the date that T.K. was informed that the minor child was ineligible to attend school in the District. Nevertheless, the Commissioner notes that *N.J.A.C.* 6A:22-6.2 does not only apply to "affidavit" students. The regulation permits the Commissioner to assess tuition for the period that a residency appeal is pending, "and for up to one year of a student's ineligible attendance in a school district prior to the appeal's filing and including the 21-day period to file an appeal." *N.J.A.C.* 6A:22-6.2. Notably, this regulation applies when an appeal is filed by a "parent, guardian, adult student or a school district resident keeping an 'affidavit' student." *N.J.A.C.* 6A:22-6.2. As this appeal was filed by B.K.'s parent, the limitations of this regulation would otherwise apply.

was petitioner's, as she paid taxes in Brick Township and failed to disclose to the District in the enrollment packet that her mailing address and actual address were different. As such, the Board urges the Commissioner to assess tuition for each day of the minor child's ineligible enrollment for the 2014-2015, 2015-2016, and 2016-2017 school years.

Upon review, the Commissioner concurs with the ALJ's finding that petitioner failed to sustain her burden of establishing that she was a domiciliary of Howell Township for the 2014-2015, 2015-2016, and 2016-2017 school years. The Commissioner further concurs with the ALJ's conclusion that the minor child was, therefore, not entitled to a free public education in the District's schools during this time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in Howell Township. Here, the Commissioner agrees with the ALJ that, because petitioner only became aware by way of a letter dated December 9, 2016 that her home was in Brick Township rather than Howell Township – and that the District was partially at fault for the minor child's acceptance into the District – the Board is only entitled to reimbursement from December 9, 2016 to the end of the 2016-2017 school year.

The Commissioner does not find the Board's exceptions to be persuasive. The Commissioner agrees with the ALJ that part of the error in admitting B.K. to Howell Township's schools was the Board's fault. T.K. did not give a false address on her enrollment form, and the District did not realize that it admitted a child who lived outside the District. *N.J.A.C.* 6A:22-6.3(b) allows the Commissioner to make an equitable determination regarding whether tuition should be assessed, and "[i]n making the determination, the district board of education or Commissioner shall consider whether the ineligible attendance was due to a school district's

error." As such, the Commissioner agrees with the ALJ that an equitable determination was warranted in this case.

The ALJ ordered that petitioner reimburse the Board in the amount of $84.24 per day from December 9, 2016 to the end of the 2016-2017 school year. However, the present record lacks information required to calculate the amount of tuition owed to the District – specifically, the number of days of ineligible attendance by the minor child. The ALJ estimated the number of days of ineligible attendance at "about one-half" of the school year, but an accurate count of the number of ineligible days from December 9, 2016 to the end of the 2016-2017 school year is necessary in order to calculate the exact amount of tuition owed to the Board.

Accordingly, this matter is remanded to the OAL for calculation of tuition due to the District and supplementation of the record as warranted.

IT IS SO ORDERED.

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 10/23/17

Date of Mailing: 10/25/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00360-17
AGENCY REF. NO. 317-12/16

T.K., ON BEHALF OF MINOR CHILD, B.K.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY,
Respondent.

T.K., on behalf of minor child, **B.K.,** petitioner, pro se

Jan L. Wouters, Esq., for respondent (Bathgate, Wegener & Wolf, PC, attorneys)

Record Closed: July 19, 2017 Decided: September 8, 2017

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Petitioner, T.K., on behalf of minor child, B.K., appeals the residency determination, and tuition due associated with same, of the respondent, Board of Education of the Township of Howell, Monmouth County (Board), disallowing their minor child, B.K., from attending public school within the respondent's school District. The Board seeks to remove B.K. from its schools pursuant to N.J.S.A. 18A:38-1(b)(2), and demands tuition reimbursement.

PROCEDURAL HISTORY

Petitioner, T.K., on behalf of minor child, B.K., filed a pro se residency appeal with the Department of Education, Bureau of Controversies and Disputes, appealing respondent's determination that B.K. did not reside in the District, and in fact lived in Brick Township, New Jersey. On January 4, 2017, the Board filed an answer. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on January 10, 2017, for determination as a contested case pursuant to N.J..A.C. 6A:3-1 et seq. and N.J.S.A. 52:14B-1 to -15. A hearing was held on July 19, 2017, and the record closed. An order of extension was entered to extend the time for filing the initial decision in this matter.

FACTUAL DISCUSSION AND FINDINGS

Ronald Sanasac (Sanasac), Assistant Superintendent for Business, Administration/ Board Secretary, testified on behalf of the respondent. He stated that he oversees enrollment for the District, and identified and reviewed the Howell Township Board of Education's policy regarding eligibility for attendance at the Howell Township schools (P-1). Sanasac noted that the policy must be followed in determining if a student is eligible to attend. He advised that the policy provided admittance to all eligible students who were domiciled within the District as defined by the regulation. He noted that a student must reside in Howell Township, pursuant to N.J.A.C. 6A: 22-3.1. If a student is domiciled within the District, they may attend. Sanasac testified that if a student is located within two or more school districts, they attend the municipality to which the majority of their property tax is paid.

Sanasac also reviewed a deed for the property owned by B.K.'s parents (P-3), dated October 26, 2009, which notes that the municipality in which the petitioner's house exists is Brick Township, New Jersey. The property is on Bayberry Court, with a Howell Township mailing address, but a physical location of Brick Township, and Sanasac noted that this is not an uncommon situation.

Sanasac noted that the petitioner was enrolled in the school district in 2014. At that time, the District had a decentralized process by which registration and enrollment was performed at the school. Parents would go to the neighborhood school, register their children, and it was at that location where they would complete the enrollment packet. Sanasac

indicated that the system has changed, and that the enrollment process is now centralized in the administrative building. Software has been upgraded, and families go to the Administration building to finalize their packet.

Sanasac then reviewed a student enrollment packet that was completed for the petitioner (P-4), and identified Bayberry Court in Howell Township as the address. He noted that the packet has a mailing address field which was left blank. He also noted that the packet included an affidavit which is signed by the parent. In that affidavit it is stated that the parent acknowledges, and understands, that the child must be domiciled in Howell Township. It was noted that the affidavit was signed by B.K.'s mother on January 24, 2014. The affidavit also states that the signer acknowledges that if they make willfully false statements, they are subject to criminal penalties and back tuition. Sanasac also noted the District of Howell Township does not have a private parent-pay tuition program.

Sanasac described that when another resident recently presented themselves for central registration, they came up as residing in Brick Township. That family indicated that their neighbor had a child enrolled in Howell Township. At that point, the District checked the registration, and discovered the mistake that B.K. had been attending Howell Township schools while residing in Brick Township. The district notified the family, told the parents that they needed to disenroll B.K., and that if they did not, they would be responsible for tuition retroactive to September 2014, which included three school years, and a total amount of $44,433. In presenting his calculation, Sanasac referred to a statement that had been completed by the Board (P-5).

Sanasac stated that he believes that B.K. is not entitled to attend Howell Township schools because he is domiciled in Brick Township, a different town, in a different county than Howell Township.

On cross-examination, Sanasac noted that Bayberry Road does have addresses that do reside within the borders of Howell Township, and are eligible for attendance. He stated that the District had relied on the affidavit, and the truthfulness of the parent completing it.

Sanasac noted that on December 9, 2016, they sent notification to the parents, along with instructions for how to conduct an appeal. The District provided an opportunity for the parents to appeal, the parents appealed, and the Board of Education made its determination.

B.K.'s father J.K. testified on his behalf. J.K. stated that three years ago it was time to enroll their son in school. He did not know, and was not familiar with the District, and noted that they have a Howell Township mailing address. J.K. searched on the internet to determine that the Greenville School was the appropriate school in Howell Township. They went to register, provided the correct address and the District told him that they were in the right spot. J.K. stressed that the parents did not lie, and noted that his wife completed the packet. He stated that it is possible that they did not review all the fine print and made a mistake.

Two and one-half years later, B.K. was in the second grade, and they received a telephone call from the Board advising that they were in the wrong district. He noted that B.K. has an Individualized Education Program (IEP), and they did not want to change schools mid-year. However, the Board told J.K. that if they did not change schools by the following week, they would be charged for tuition. The parents asked if they could finish out the year, but were told no, at which time they decided to appeal the determination. They stated that they do know people who live in one school district, but send their children to schools in another district. They believe that they should not have to pay tuition because in this instance, it was also Howell Township Board's mistake.

Petitioner's mother, T.K., also testified. She stated that they did research on a website which identified the school they believed B.K. should attend. T.K. stated that they are a "by-the-book" family, and they do not want to fight the law. They understand where they live, but also note that their son has been in this District for three years, and has numerous friends. T.K. advised that they are selling their house so they can move into Howell Township to remain in the District, and are currently under attorney review for a pending sale. T.K. just wants her son to continue in the school where he has been. She believes that the District made a mistake as well in this matter, and does not understand why they should have to pay.

T.K. noted that the Board has been difficult to deal with, with the exception of Mr. Sanasac, who T.K. said was very nice and understanding. She said that while dealing with

the Board, when they registered the petitioner, the school saw the address and thought they should be in a different school in Howell than the one they had gone to, but did not say Brick Township. She stated that her son has educational needs, and that the Howell School District has been helping him. T.K. advised that she did not know much about Brick Township, and whether they could provide the same services. She also stated that neighbors will sign a petition on their behalf.

On cross-examination, T.K. stated that from 2009 to the present she has lived in Brick Township, and she pays taxes in Brick Township. When asked where she voted, she stated that she does not vote. T.K. noted that her son attended preschool at Goddard School in Brick Township, which is a private school. She never thought that she was a Brick Township resident; she always thought that she was in Howell Township. J.K. also noted that she does not pay the bills that identify service locations.

B.K.'s father stated that taxes are paid in Brick Township, but also noted that those taxes are escrowed, and are paid by the mortgage company.

Considering the documentary and testimonial evidence presented in this matter, I **FIND** that petitioner is domiciled in Brick Township, New Jersey. I further **FIND** that students domiciled in Brick Township do not attend Howell Township schools. I further **FIND** that B.K. has attended Howell Township Schools for the period consisting of the entirety of the 2014-15, 2015-16, and 2016-17, school years. I further **FIND** that when registering B.K. in Howell Township schools, petitioner provided their correct address and that the District accepted B.K.'s enrollment. I **FIND** that the present issue arose when the District became aware of the residency discrepancy in the first half of the 2016-2017 school year, when a neighbor of the petitioner's attempted to register their child in Howell Township schools, and that petitioner became aware of the discrepancy when the District provided notice to them by way of letter on or about December 9, 2016.

CONCLUSIONS OF LAW

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including individuals who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as

the place where a person has his true, fixed, permanent home, and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is the domicile of the parent, custodian or guardian. P.B.K. ex rel. minor child E.Y. v. Bd. of Educ. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001). Thus, a child would routinely attend school in the district where his or her parents live. N.J.A.C. 6A:22-3.1 provides that :

> (a) A student is eligible to attend a school district if he or she is domiciled within the school district.
>
> 1. A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.

In the present matter, the record reflects that petitioner, B.K.'s parents with whom he resides, are not domiciled in the Howell Township School District. Accordingly, I **CONCLUDE** that B.K. is not domiciled within the respondent School District, and is therefore not eligible to attend Howell Township schools while residing at their current address. Petitioner's appeal should be **DENIED.**

N.J.S.A. 18A:38-1(b)(1) provides that when the evidence does not support the claim of the resident, the resident shall be assessed tuition:

> for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.

The record reflects that the actual cost of B.K.'s attendance in-District was $78.36 per day for the 2014-15 school year, and $84.24 for the 2015-16 and 2016-17 school years, and that B.K. attended Howell Township schools for the entirety of the three school years in question. Consequently, respondent is seeking a total of $44,433 in tuition reimbursement for B.K.'s attendance.

N.J.A.C. 6A:22-6.3(a) provides that,

> Tuition assessed pursuant to this section shall be calculated on a per-student basis for the period of a student's ineligible enrollment, up to one year, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23A-17.1. The individual student's record of daily attendance shall not affect the calculation.

By its plain language, the regulation appears to limit the petitioner's exposure to a maximum of one school year's tuition, which would be $15,164 for the 2016-2017 school year.

However, N.J.A.C. 6A:22-6.3(b) provides that,

> Nothing in this chapter shall preclude an equitable determination by the district board of education or the Commissioner that tuition shall not be assessed for all or part of any period of a student's ineligible attendance in the school district when the particular circumstances of a matter so warrant. In making the determination, the district board of education or Commissioner shall consider whether the ineligible attendance was due to a school district's error.

In the present matter, the record reflects that petitioner provided their actual address where they resided to the District upon enrolling B.K. There was no attempt to conceal their domicile, and no staying with a relative. The District accepted B.K., and he attended school without incident, issue or allegation of improper attendance, until the District noticed the error when a neighbor of the petitioner's attempted to enroll their child in Howell Township Schools. The petitioner was made aware of the issue on or about December 9, 2016, when the District sent them a notice alerting them of such. The circumstances certainly lend credence to an understanding that while not entirely a school district error, B.K.'s ineligible attendance in Howell Township schools was due, at least in-part, to a shared error of the District and the parents.

Considering the foregoing, I **CONCLUDE** that an equitable determination is appropriate, and tuition shall not be assessed for the period of B.K.'s ineligible attendance prior to the error being brought to the attention of the petitioner by the District through the December 9, 2016 letter. With B.K.'s ineligible attendance, after notice was given, being about one-half of the school year, I **CONCLUDE** that the District is entitled to be reimbursed for tuition by petitioner in the amount of $7,582.

DECISION AND ORDER

It is, therefore, **ORDERED** that the Board's determination be **AFFIRMED** and that petitioner pay respondent tuition in the total amount of $7,582 for unauthorized attendance in the District's school for the periods stated above. Petitioner's appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 8, 2017
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: September 8, 2017

Date Mailed to Parties: 9/11/17

nd

APPENDIX

WITNESSES

For Petitioner:

J.K.

T.K.

For Respondent:

Ronald Sanasac

EXHIBITS

For Petitioner:

P-1 None

For Respondent:

R-1 Howell Township, Board of Education, Policy, 5111 Eligibility of Resident/ Nonresident Pupils

R-2 N.J.A.C. 6A:22-1.1 Education, Supp. 12-19-16, Subchapter 3, Eligibility to Attend School

R-3 Deed, and Supporting Documents, dated October 26, 2009

R-4 Student Enrollment Form

R-5 Tuition Breakdown for School Years 2014 to 2015 at $14,105; 2015 to 2016 at $15,164; and 2016 to 2017 at $15,164

318-17

318-17
OAL DKT. NO. EDU 06996-14
AGENCY DKT. NO. 28-2/14

IN THE MATTER OF THE SUSPENSION OF	:	
THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
TERRONIE ORTIZ, GARFIELD PARK	:	DECISION
ACADEMY, BURLINGTON COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

This matter was opened before the Commissioner of Education by petitioner Garfield Park Academy (Academy), seeking suspension of respondent Terronie Ortiz's teaching certificate pursuant to *N.J.S.A.* 18A:26-10. The Academy alleged that respondent resigned from her part-time teaching position without providing the requisite notice to petitioner. The Administrative Law Judge (ALJ) issued an Initial Decision wherein she found that the respondent is guilty of unprofessional conduct for failing to provide the Academy with the 60-day notice required under *N.J.S.A.* 18A:26-10 when she voluntarily accepted a full-time position with another District in order to obtain medical benefits. The ALJ further found that a one-year suspension of respondent's teaching certificate is the appropriate penalty.

Following the issuance of the Initial Decision, the parties entered into a consent judgment seeking to apply a one-month suspension of respondent's teaching certificate retroactively – from July 1, 2017 to August 1, 2017. The consent judgment contains an affidavit of respondent attesting that she has not worked as a teacher during the suspension period.

Upon a comprehensive review of this matter, the Commissioner concurs with the ALJ that the respondent is guilty of unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10. With respect to the appropriate penalty, the Commissioner may suspend a teacher's certificate for up to one year for wrongful cessation of performance of her duties, in accordance with *N.J.S.A.* 18A:26-10. As the parties in this matter have agreed to a retroactive suspension of respondent's certificate, the Commissioner may – at her discretion – consider the proposed suspension, provided that respondent remained unemployed as a teacher for the duration of the suspension, and has attested to same by way of an affidavit. As the consent judgment contains the requisite affidavit, the Commissioner approves the within terms.

Accordingly, the Initial Decision is modified as stated herein with respect to the appropriate penalty and the Commissioner approves the terms contained in the consent judgment. The matter is dismissed subject to compliance with the within terms. A copy of this decision is being forwarded to the State Board of Examiners to implement the consent judgment.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 10/23/17

Date of Mailing: 10/25/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6996-14
AGENCY DKT. NO. 28-2/14

IN THE MATTER OF THE TEACHING CERTIFICATE OF TERRONIE ORTIZ, GARFIELD PARK ACADEMY, BURLINGTON COUNTY.

Kenneth D. Roth, Esq., appearing for petitioner, Garfield Park Academy (Marchetti Law, PC, attorneys)

Keith Talbot, Esq., appearing for respondent, Terronie Ortiz (Legal Services of New Jersey, attorneys)

Record Closed: June 16, 2017 Decided: July 24, 2017

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

Petitioner, Garfield Park Academy (GPA), an approved private school for the disabled, seeks a one-year suspension of respondent Terronie Ortiz's (respondent or Ortiz) teaching certificate because she resigned from her part-time teaching position without providing sixty-days' notice, pursuant to N.J.S.A. 18A:26-10. Respondent

contends that she resigned due to medical issues and the lack of medical-insurance coverage.

PROCEDURAL HISTORY

On or about November 27, 2013, the petitioner filed an Order to Show Cause on behalf of GPA against the respondent with the Commissioner of Education (Commissioner). On December 16, 2013, the Commissioner ordered that the respondent show cause as to why an Order suspending the teaching certificate should not be entered for unprofessional conduct, and provided her with twenty days to respond. The respondent filed a response on or about April 12, 2014. On June 5, 2014, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On June 18, 2014, the petitioner filed a motion for summary decision. No response was filed by the respondent, who was then pro se. That motion was denied on August 1, 2014, and the matter was scheduled for hearing. Several scheduled hearing dates were adjourned at the request of either the petitioner or the respondent. In the meantime, the respondent retained counsel.

On April 6, 2017, the respondent moved for summary decision. On April 10, 2017, the petitioner cross-moved for summary decision. The last brief was received on June 16, 2017.[1]

FACTUAL DISCUSSION

In June 2013, Ortiz entered a contract with GPA as "a part-time Teacher of Computer Technology for the 2013–2014 school year beginning August 27, 2013 and concluding June 20, 2014."[2] The contract stated that "[e]mployment at GPA is 'at will' which means that any employee may voluntarily leave employment upon giving the

[1] A letter dated May 4, 2017, was received from the petitioner on May 17, 2017, requesting denial of respondent's motion.

[2] Ortiz had also worked for GPA under one-year contracts for the 2011–2012 and 2012–2013 school years.

required written notice and may be terminated by GPA at any time for any or no reason," and that "[a]ll Teachers . . . are required to provide not less than 60 days[']' written notice of resignation." The contract also indicated that Ortiz's "Certification/Degree is Prov. Teacher of Computer Technology."[3] Ortiz was required to work thirty hours per week in her part-time position, but her employment contract did not include GPA-provided health insurance for her or her family.

By letter dated November 7, 2013, Ortiz notified Steven A. Morse, Ed.D., who is the executive director/superintendent of GPA, of her resignation from her position.[4] In the letter, Ortiz wrote, "I have been offered a full time position with benefits with a tentative start date of **Nov 18, 2013**."[5] Ortiz further stated, "[t]his decision to leave is based strictly on my needs for full time employment and benefits," and, "[i]f you can offer me a full time position with benefits immediately I will reconsider the offer that is on the table."

On November 12, 2013, Dr. Morse met with Ortiz to discuss her resignation. Dr. Morse explained to Ortiz that "her contract with [GPA] requires 60-days[']' written notice and her abrupt resignation was in violation of N.J.S.A. 18A:26-10." In an email dated November 14, 2013, Ortiz told Dr. Morse that, "[a]fter meeting with the pending school of Hire on 11/12/13[,] [i]t was determined by the Principal and Director that unfortunately, they cannot afford me a 60 day waiting period. They are expecting me to start on 11/18/13." Shortly thereafter, Ortiz sent Dr. Morse another email, stating, "I am sadly [sic] to inform you of my resignation effective 11/15/13. . . . My family well-being and the opportunity to have health benefits to support my family are paramount in this situation."

On December 4, 2013, the Commissioner of Education received a request from GPA to suspend Ortiz's teaching certificate pursuant to N.J.S.A. 18A:28-10 for resigning from her position without providing GPA with the sixty-days' notice required by her employment contract. The Commissioner subsequently issued to Ortiz an Order to

[3] The papers submitted by the parties do not indicate whether Ortiz has since obtained a standard certificate.
[4] According to Dr. Morse, he did not receive the letter until November 11, 2013.
[5] It is not clear when Ortiz applied for or interviewed for this position.

Show Cause why her teaching certificate should not be suspended for unprofessional conduct.[6]

In her answer, Ortiz asserted that she resigned from her part-time position with GPA to accept a full-time position as a computer teacher with a different school because she needed the health benefits and extra hours included with the new position. She repeatedly asked GPA for "health care benefits and/or the possibility of becoming full time staff or even working extra hours to compensate my 30 hours a week earning to be able to provide for my family of 4 as the sole provider," but GPA did not grant her requests. When she received the job offer, Ortiz immediately notified GPA and asked if GPA could "grant me some form of medical benefits and/or full time."

According to Ortiz, Dr. Morse told her that GPA "could not give [her] medical and or full time" and that GPA needed sixty-days' notice before she could terminate her employment. However, the other employer "could not allow [Ortiz] the 60 days to start as they [were] in desperate need of a computer teacher." As a result, Ortiz "finally made the choice to go with the new school base[d] on the benefit package [and] full time employment."

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[6] Under N.J.A.C. 6A:3-3.1:

> (a) If in the course of supervising the schools, and following investigation, the Commissioner becomes aware of violation(s) of the school laws in school districts which if true would entitle the Commissioner to impose a sanction on the Commissioner's own initiative, the Commissioner may accord the district board of education or any other party subject to the Commissioner's jurisdiction an opportunity to present its views preliminary to imposing such sanction by issuing an order directing such board or party to show cause why such sanction should not be imposed. . . . An order to show cause shall be appropriate in the following circumstances . . . :
>
> > 4. Suspending teachers' certificates for wrongful cessation of duties (N.J.S.A. 18A:26-10 and 18A:28-8).

LEGAL ANALYSIS

The issue presented here is whether the teaching certificate of respondent Terronie Ortiz should be suspended for up to one year in accordance with N.J.S.A. 18A:26-10, which provides that

> [a]ny teaching staff member employed by . . . an approved private school for the disabled, who shall, without the consent of . . . the board of directors of the school, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may . . . suspend his certificate for a period not exceeding one year.

GPA alleges that because the respondent resigned from her part-time teaching position without providing GPA with sixty-days' notice, as required by her employment contract, her teaching certificate must be suspended for one year.

In support of its motion for summary decision imposing the suspension for one year, GPA argues that N.J.S.A. 18A:26-10 applies to part-time, at-will employees such as Ortiz, and that her certificate should be suspended for the one-year statutory maximum because Ortiz "clearly made the unilateral decision to resign with full knowledge that her notice did not satisfy the notice requirements and acted solely in her own self-interest and that of her family rather than in the interest [of] the students with whose education she was charged."

GPA has submitted the certifications of several GPA employees. In his certification, Dr. Morse asserts that "[a]t that point in the school year [November] it was extremely difficult to find a qualified replacement and Ms. Ortiz's departure . . . affected the educational continuity of her students." In another certification, Michele Heinz, GPA's business manager, maintains that Ortiz "did tell me that she needed health insurance for her family and also stated that she was ill and needed health insurance," but that "[o]n each occasion I told her that health insurance benefits were not available for part time employees." Ms. Heinz also asserts that "[t]he attendance and punctuality

record of Ms. Ortiz did not reflect any serious or chronic health issues that impacted her job performance."

In her motion, Ortiz argues that N.J.S.A. 18A:26-10 applies to "staff on a tenure type track and clearly does not apply to a temporary[,] part time[,] at will employee," and that, even if the statute did apply to Ortiz, her certificate should not be suspended because her GPA employment contract did not include any language indicating that her certificate could be suspended for failure to provide sixty-days' notice prior to resignation.

Ortiz also raises an affirmative defense under the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, alleging that:

> (1) Ms. Ortiz had a severe medical condition associated with fibroids, which required ongoing medical treatment and attention;[7] (2) Ms. Ortiz requested reasonable accommodation and interactive process because of her need for medical benefits regarding her disability; (3) [GPA] refused to engage in the interactive process; (4) Ms. Ortiz resigned in the face of this unlawful action in order to protect her health; and (5) [GPA] then engaged in retaliatory action for the resistance of Ms. Ortiz to its unlawful action of refusing to engage in the interactive process for a reasonable accommodation for a disability, by filing a license suspension action with the New Jersey Department of Education, for the appropriate response to unlawful conduct by the employer.

In support of her motion, Ortiz submitted a certification asserting:

> I have had fibroids and serious health pain as a result, which effects [sic] my ability to work and which is a serious health concern. Given the ongoing health issues, with this condition, I needed some form of health assistance or health insurance for my health issues. Even though I expressed these concerns to [GPA], the administrative and Human

[7] According to WebMD, "[u]terine fibroids are benign lumps that grow on the uterus. Symptoms may include heavy periods, cramping, painful sex, and an urge to urinate. Treatment options include hysterectomy, embolization, and hormone therapy." See <http://www.webmd.com/women/uterine-fibroids/>, last visited July 17, 2017.

> resources staff did not engage in the required interactive process. If there had been restructuring of my work hours, or assistance on health care, even short of health insurance, I would have liked to remain at [GPA].

Ortiz further asserts that she told several GPA administrative staff members about her health problems and need for health insurance, but that they told her that GPA could not offer her health insurance. According to Ortiz, "[i]f [GPA] had offered some extra hours, or some money towards health insurance, I may have been able to stay, especially since the job was very close to my house, and I wanted to stay if I could."

Standards for Summary Decision

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Such motion "shall be served with briefs and with or without supporting affidavits" and "[t]he decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). However, a motion for summary decision shall be denied if, by responding affidavit, an adverse party "set[s] forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

Suspension of Certificate

Here, the parties dispute whether Ortiz's teaching certificate should be suspended for unprofessional conduct in accordance with N.J.S.A. 18A:26-10.[8] A teacher may escape liability under the statute if she provides her employer with adequate notice, which "is dictated by the terms of the parties' employment contract" and is meant "to better enable the Board to find an adequate replacement for the teacher while protecting the educative process for the children."[9] Carrelle v. Bd. of Educ. of Bloomfield, Commissioner Decision No. 49-04 (February 10, 2004), <http://www.nj.gov/education/legal/commissioner/>; Boguszewski v. Bd. of Educ. of Woodcliff Lake, 1979 S.L.D. 727, 729.

Also, N.J.S.A. 18A:26-10 "does not dictate the automatic suspension of a teacher's certificate upon satisfaction of its terms but, rather, vests the Commissioner with the discretion to withhold such penalty if he feels the particular circumstances of the case so warrant." In re Falco, EDU 9283-98, Comm'r (May 24, 1999), aff'g Initial Decision (April 7, 1999), <http://njlaw.rutgers.edu/collections/oal/>.

Generally, the Commissioner will suspend the certificate of a teacher for the one-year maximum under N.J.S.A. 18A:26-10 if the teacher fails to provide adequate notice purely out of self-interest. For example, in Board of Education of Penns Grove-Carneys Point Regional School District v. Leinen, 94 N.J.A.R.2d (EDU) 405, the Commissioner

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[8] In 2005, the Legislature amended N.J.S.A. 18A:26-10 to cover teachers at approved private schools for the disabled. According to the sponsor of the bill that eventually became the new law,

> [s]taff members who leave before the expiration of their contracts disrupt services. In light of the current shortage of certified special education teachers, this behavior can be especially hard on pupils at schools for the disabled. The Department of Education requires approved private schools for the disabled to provide contracts for certified employees. It is therefore only appropriate to grant pupils at these schools the breach protection currently afforded public schools under N.J.S.A. 18A:26-10.
>
> [Statement to S1419 (March 29, 2004).]

[9] N.J.S.A. 18A:26-10 applies only to non-tenured teachers. Carrelle, supra, Comm'r Decision No. 49-04 (February 10, 2004), <http://www.nj.gov/education/legal/commissioner/>. In contrast, N.J.S.A. 18A:28-8 governs the suspension of tenured teachers who fail to provide a school board with "at least 60 days[']' written notice" of resignation.

imposed a one-year suspension on a teacher who provided less than half of the sixty-days' notice required under her employment contract due to "her desire to accept a position she wanted" with a different school district and who "did not cooperate with the Board or administration to ensure a smooth transition" upon her departure. Id. at 407, 408.

In another case, In re Creekmur, EDU 4041-11, Initial Decision (November 21, 2011) (quoting In re Capshaw, EDU 12318-06, Initial Decision (April 30, 2007), modified, Comm'r (June 12, 2007)), adopted, Comm'r (January 4, 2012), <http://njlaw.rutgers.edu/collections/oal/>, a teacher's certificate was suspended for one year due to "his abrupt resignation from his teaching position, without notice" in order to start another job that "presented a better opportunity" for his career, and "with nary a concern about the well-being of the . . . students in need of his assistance, [the school's] ability to find a suitable replacement on such short notice, or the increased workload for his co-workers."

In several cases where a teacher did not provide his employer with adequate notice of his resignation, the Commissioner either declined to impose a suspension or imposed a suspension for less than one year due to mitigating circumstances. For example, in Board of Education of Black Horse Pike Regional School District v. Mooney, 1984 S.L.D. 810, the Commissioner denied a school board's request to suspend a teacher's certificate under N.J.S.A. 18A:26-10 because the teacher resigned on short notice due to the compelling fact that her husband took a job in California and because she "gave immediate notice to the Board in writing and she assisted [her replacement] in the development of a program through the end of the school year." Id. at 811, 816.

In In re Rogers, 1989 S.L.D. 1962, 1964, 1966, the Commissioner suspended a teacher's certificate for only three months even though he gave his employer a day's notice of his resignation, because "it was not to feather his own nest that [the teacher] failed to fulfill his contract with the Board, but rather from honest and noble motivations" to "work with the severely and multiply handicapped" at a State development center.

Finally, in In re Bordon, EDU 12810-14, Initial Decision (June 18, 2015), adopted, Comm'r (July 29, 2015), <http://www.nj.gov/education/legal/commissioner/>, a teacher's certificate was suspended for three months, and not one year, because, although she gave her employer less than two-weeks' notice of her resignation, she did so in order to take a lower-paying teaching position at a school closer to her home after suffering a leg injury that made driving difficult. In that case, the administrative law judge concluded, and the Commissioner agreed, that, although the teacher violated N.J.S.A. 18A:26-10 by providing less than the sixty-days' notice required by her contract, a three-month suspension was appropriate because her "conduct was not motivated by personal gain [she took a $20,000 pay cut], but rather by a very real medical crisis," and "because the Board, through its administration, made no effort to acknowledge her medical concerns, or offer to discuss any constructive solution."

Despite such cases, the Commissioner has noted that "circumstances justifying relief to a teaching staff member who has violated the provisions of N.J.S.A. 18A:26-10 are rare." In re Falco, supra, EDU 9283-98, Comm'r (May 24, 1999), <http://njlaw.rutgers.edu/collections/oal/>.

Teaching Staff Member

The definition of "teaching staff member" at N.J.S.A. 18A:1-1 does not distinguish between full-time teachers and part-time teachers, and there is no case law to suggest that N.J.S.A. 18A:26-10 does not apply to part-time teachers at approved private schools for the disabled like GPA.

Moreover, in her answer to the Commissioner's order to show cause, Ortiz asserted that she worked thirty hours per week, which is very close to the thirty-five to forty hours per week generally considered full-time employment. An abrupt departure by a part-time teacher working thirty-hour weeks would be nearly as disruptive as the abrupt departure of a full-time teacher working thirty-five-hour weeks. Moreover, N.J.S.A. 18A:26-10 was amended in 2005 to specifically include teachers at private schools for the disabled because abrupt departures by teachers "can be especially hard on pupils at schools for the disabled."

Due-Process Rights

Ortiz also argues that GPA violated her due-process rights by failing to include in her employment contract a statement that her teaching certificate could be suspended under N.J.S.A. 18A:26-10 if she did not provide adequate notice of her resignation. However, as the Commissioner has stated, "there is nothing in the applicable statutes that requires a District to notify a teacher of its intent to seek suspension of the teacher's certification if the 60-day notice requirement is not fulfilled." In re Farran, Comm'r Decision No. 113-05 (March 29, 2005), <http://www.nj.gov/education/legal/commissioner/>.

As an initial matter, N.J.S.A. 18A:26-10 applies to a non-tenured teaching-staff member such as Ortiz. The notice required under that statutory provision is "dictated by the terms" of the employment contract between GPA and Ortiz. It is clear from the papers submitted that Ortiz's employment contract required her to provide GPA with sixty-days' notice, but that she resigned from her position with less than two-weeks' notice; that she did so without GPA's consent; and that, as a result, Ortiz violated the letter of N.J.S.A. 18A:26-10.

Here, summary decision in favor of GPA is appropriate.

Suspension of Teaching Certificate

The next issue is whether Ortiz's teaching certificate should be suspended, and if so, for how long.

As in Leinen and Creekmur, a suspension of Ortiz's teaching certificate is appropriate because she resigned from her position on very short notice to do what was best for her and "with nary a concern about the well-being of the . . . students in need of [her] assistance, [the school's] ability to find a suitable replacement on such short notice, or the increased workload for [her] co-workers." Indeed, Ortiz resigned from her

position two months into the school year. As Dr. Morse asserted, "[a]t that point in the school year it was extremely difficult to find a qualified replacement and Ms. Ortiz's departure . . . affected the educational continuity of her students."

Unlike in Mooney, in which the teacher had little choice but to resign from her position because her husband took a job in California, Ortiz could have chosen to stay at her job, which was close to her home, and looked for a full-time job at or near the end of her contract. Instead, two months into the school year, she "made the choice to go with the new school base[d] on the benefit package [and] full time employment." And although Ortiz did ask the new employer if she could start the full-time job at a time that would not violate the terms of her contract with GPA, when the new employer denied her request, Ortiz simply left her job at GPA and, unlike the teacher in Mooney, did not offer to help GPA fill the void created by her abrupt departure.

Moreover, unlike the teacher in Rogers, Ortiz did not leave her job at GPA for altruistic reasons but, again, because she simply wanted a full-time job with health benefits. And unlike the teacher in Bordon, whose "conduct was not motivated by personal gain, but rather by a very real medical crisis," Ortiz was motivated by personal gain and has failed to show that she resigned due to a "very real medical crisis." Also unlike Bordon, in which the teacher received a reduced suspension in part "because the Board, through its administration, made no effort to acknowledge her medical concerns, or offer to discuss any constructive solution," the papers show that GPA did acknowledge Ortiz's medical concerns, but that, as a part-time employee, she was not entitled to health insurance through her employer.

While Ortiz alleges that GPA discriminated against her by failing to reasonably accommodate her "disability," she has provided nothing that indicates that she had a disability; she has not shown that a reasonable accommodation includes the provision of health insurance for a part-time employee or that other part-time GPA employees

received health insurance; and she, in fact, asked for more, not fewer, hours from GPA.[10]

The facts do not indicate that Ortiz left her job because GPA discriminated against her, but instead show that Ortiz left her job because she wanted more money and health insurance. In her own words, Ortiz told GPA, "[t]his decision to leave is based strictly on my needs for full time employment and benefits," and, "[i]f you can offer me a full time position with benefits immediately I will reconsider the offer that is on the table." Ortiz has also stated, "[i]f [GPA] had offered some extra hours, or some money towards health insurance, I may have been able to stay, especially since the job was very close to my house, and I wanted to stay if I could."

In weighing the aggravating factors—leaving early in the school year with less than the required sixty-days' notice; loss of continuity in educating the students—against the mitigating factors—the position was an at-will employee who could have been terminated at any time; the position was part-time without tenure and carried no benefits; the petitioner attempted to reach an accord with the respondent regarding her departure—it is clear that the aggravating factors outweigh the mitigating ones.

Ortiz violated N.J.S.A. 18A:26-10 when she failed to provide GPA with sixty-days' notice of her resignation. She has failed to prove that GPA failed to participate in the interactive process; failed to demonstrate that she had a medical condition that required accommodation; and failed to prove that an employer has an obligation to provide medical insurance or to move a part-time employee to a full-time position because of a medical condition or the need for medical insurance. The unanticipated departure of a teacher working thirty hours per week with disabled children is a significant loss to a school in November when it is more difficult to find a replacement. Moreover, the respondent departed GPA after giving only two weeks' notice and did not provide assistance to any incoming instructor, unlike the respondent in Mooney, supra, 1984 S.L.D. 810.

[10] The only information Ortiz has provided with respect to her medical condition are a generic informational card for "patients diagnosed with uterine fibroids," which was issued to her by doctors in New York on January 17, 2012, and insurance documents indicating that she met with a gynecologist on June 22, 2014, and had an MRI taken of her pelvis on June 30, 2014.

While it is understandable that Ortiz would prefer a full-time job with health benefits over a part-time job without health benefits, this preference does not outweigh the need of the educational facility to have faculty prepared to teach the students. As in Leinen, supra, 94 N.J.A.R.2d (EDU) 405, the stated reasons for resigning without adequate notice are not sufficient to overcome the requirement to suspend Ortiz's teaching certificate for a period of one year.

CONCLUSION

Based on the uncontested facts and the applicable law, the GPA's motion for summary decision shall be granted and Ortiz's motion for summary decision shall be denied.

A one-year suspension of Ortiz's teaching certificate is appropriate because she violated N.J.S.A. 18A:26-10 by abruptly resigning from her position after the school year had begun to accept a full-time position with health benefits at a different school, and the mitigating factors presented do not warrant a reduced suspension.

ORDER

The motion for summary decision of the respondent, Garfield Park Academy, is **GRANTED**. The respondent, Terronie Ortiz, violated N.J.S.A. 18A:26-10 by leaving her teaching position without providing sixty-days' notice. Accordingly, it is **ORDERED** that her teaching certificate shall be suspended for a period of one year.

The respondent's motion for summary decision is hereby **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 24, 2017
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency: July 24, 2017

Date Mailed to Parties: July 24, 2017

SMS/cb

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

Brief and reply

For respondent:

Brief and reply

MARCHETTI LAW, P.C.
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GARFIELD PARK ACADEMY,	OAL DOCKET NO. EDU06996-2014S
Petitioner,	AGENCY DKT. NO. 28-2/14
vs.	
TERRONIE ORTIZ,	
Respondent .	

CONSENT JUDGMENT

THIS MATTER having come before the Court by Kenneth D. Roth, Esquire of the law firm Marchetti Law, PC, attorneys for Petitioner Garfield Park Academy and Keith Talbot, Esquire of Legal Services of New Jersey, attorneys for the Respondent, Terronie Ortiz and it being represented to the Court that the parties hereto have reached an amicable resolution of the issues raised in the Petition and the parties hereto having indicated their consent to the form and entry of this Order upon the stipulations set forth below;

1. Petitioner Garfield Park Academy seeks to protect its interest in having a stable workforce in serving its student clientele with disabilities and its substantial and fair interest in receiving 60 day notice of leaving from its employees; and

2. Respondent Terronie Ortiz sets forth good faith and mitigating reasons for failing to provide the requisite 60 day notice prior to leaving her position at Garfield Park Academy; and

3. Petitioner and Respondent have chosen to enter into this Consent Judgment in order to avoid further proceedings with respect to this matter, and that all claims made regarding this litigation are released.

4. Respondent agrees to release Petitioner, and unconditionally and irrevocably give up and release, to the full extent permitted by law, Petitioner and its past, present, and future, and direct and indirect parent organizations, subsidiaries, divisions, affiliated entities, and its and its partners, officers, directors, trustees, administrators, fiduciaries, employment benefit plans

and/or pension plans or funds, executors, attorneys, employees, insurers, reinsurers, and/or agents, and their successors and assigns, individually and in their official capacities (collectively referred to herein as "Released Parties" or "Released Party"), jointly and severally, of and from all claims, known or unknown, that Respondent has or may have against Released Parties and their Counsel as of the date of this Consent Judgment, including, but not limited to, issues in this litigation, or otherwise arising out of Respondent's employment or cessation of employment with Petitioner, or any alleged violation of:

- Title VII of the Civil Rights Act of 1964;
- Sections 1981 through 1988 of Title 42 of the United States Code;
- The Employee Retirement Income Security Act of 1974 ("ERISA") (as modified below);
- The Immigration Reform and Control Act;
- The Americans with Disabilities Act of 1990;
- The Age Discrimination in Employment Act of 1967 ("ADEA");
- The Worker Adjustment and Retraining Notification Act;
- The Fair Credit Reporting Act;
- The Family and Medical Leave Act;
- The Equal Pay Act;
- The Genetic Information Nondiscrimination Act of 2008;
- The New Jersey Law Against Discrimination;
- The New Jersey Civil Rights Act;
- The New Jersey Family Leave Act;
- The New Jersey State Wage and Hour Law;
- The Millville Dallas Airmotive Plant Job Loss Notification Act;
- The New Jersey Conscientious Employee Protection Act;
- The New Jersey Equal Pay Law;
- The New Jersey Occupational Safety and Health Law;
- The New Jersey Smokers' Rights Law;
- The New Jersey Genetic Privacy Act;
- The New Jersey Fair Credit Reporting Act;
- The New Jersey Statutory Provision Regarding Retaliation/Discrimination for Filing A Workers' Compensation Claim;
- The New Jersey Public Employees' Occupational Safety and Health Act;
- New Jersey laws regarding Political Activities of Employees, Lie Detector Tests, Jury Duty, Employment Protection, and Discrimination;
- any other federal, state or local law, rule, regulation, or ordinance;
- any public policy, contract, tort, or common law; or
- any basis for recovering costs, fees, or other expenses including attorneys' fees incurred in these matters.

5. The parties agree to this Consent Judgment with the New Jersey Department of Education to resolve this matter, and upon the approval and entry of the Consent Judgment and its terms this agreement shall become final. The terms of the Consent are as follows:

a. The teaching certificate of Respondent shall be suspended retroactively for the period of July 1, 2017 to August 1, 2017, during which time Respondent did not use her teaching certificate for income or teaching purposes as set forth in the certification attached hereto as Exhibit B.

b. Respondent had good faith and mitigating circumstances with regard to her departure from employment with Petitioner, including that i) that she had health issues which needed ongoing treatment, for which health insurance was needed, and due to her part time status, she did not have; ii) that the school management of the school with students with special needs, where Respondent accepted employment, had informed her that penalties would not be enforced against her due to temporary part time status.

c. Petitioner releases Respondent, and unconditionally and irrevocably gives up, to the full extent permitted by law, all claims, known or unknown, that Petitioner has or may have against Respondent and her Counsel as of the date of the entry of this Consent Judgment including, but not limited to, issues in this litigation, or otherwise arising out of Respondent's previous employment or cessation of employment with Petitioner.

The above is so ordered, this ___ day of ____, 2017 and this Consent Judgment shall be entered on the record of this proceeding and the record of the Respondent.

_____

Kimberley Harrington, Commissioner of Education

We hereby consent to the form and entry of this judgment.

8/29/17

Kenneth D. Roth, Esq. attorney for Petitioner

9/14/17

Keith Talbot, Esq., attorney for Respondent

GARFIELD PARK ACADEMY,	:	OAL DOCKET NO. EDU06996-2014S
Petitioner,	:	
	:	AGENCY DKT. NO. 28-2/14
vs.	:	
TERRONIE ORTIZ,	:	
Respondent .	:	

I, Terronie Ortiz, hereby certify as follows:

I did not utilize my teaching certification for the period of July 1, 2017 to August 1, 2017.

I hereby certify under penalty of perjury that this statement is true and correct.

Terronie Ortiz

Date:

319-17

AGENCY DKT NO. 203-9/17

IN THE MATTER OF THE TENURE	:	
HEARING OF JUDITH RUSSELL,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF	:	DECISION
THE CITY OF CAMDEN, CAMDEN COUNTY.	:	

The record of this matter and the proposed settlement agreement and general release have been reviewed. Upon such review, the Commissioner finds that the proposed settlement is consistent with established standards governing settlement of tenure matters. *N.J.A.C.*: 6A:3-5.6; *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 10/25/17
Date of Mailing: 10/25/17

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("this Agreement") is entered into by and between Judith Russell ("Russell") and the Camden City School District (the "District"). Together. Russell and the District may be referred to herein as "the Parties."

WHEREAS. Russell is a Teacher of the Handicapped with the District:

WHEREAS. the District served Russell with certain Tenure Charges and a Statement of Evidence (the "Tenure Charges") on August 8. 2017:

WHEREAS. the District certified the Tenure Charges against Russell with the Commissioner of Education on September 7. 2017:

WHEREAS. Russell wishes to resign effective September 30. 2017: and

WHEREAS. the Parties mutually desire to resolve the Tenure Charges and all other matters related to Russell's employment with the District and believe this resolution is in the public interest:

NOW, THEREFORE, IT IS HEREBY AGREED by and between the Parties as follows:

1. Effective Date: This Agreement shall take effect on the date it is fully executed by the Parties. and as such. deemed ratified by the State Superintendent as the authorized representative of the District in accordance with N.J.S.A. 18A:7A-35.

2. Separation from Employment:

   (a) Russell shall provide the District immediately. through its counsel. Brown & Connery. LLP with an irrevocable letter of resignation effective September 30. 2017. which shall be attached as Exhibit "A" to this Agreement:

   (b) In consideration for Russell's irrevocable letter of resignation effective September 30. 2017 and general release of claims and covenant not to sue in accordance with Sections 6 and 7 of this Agreement. the District agrees not to pursue tenure charges against Russell and Russell shall receive her wages in the normal course during the month of September 2017:

   (c) The District agrees not to pursue any disciplinary action including under N.J.S.A. 18A:28-8 against Russell as a result of her executing this Agreement:

   (d) Russell shall remain eligible for all District medical benefits through October 31. 2017. Her portion of the premium for those benefits for the months of September and October 2017 shall be deducted from her wages in September 2017 in the normal course as set forth in paragraph 4. She will be offered COBRA insurance coverage in the normal course: and

(c) The District shall provide Russell with a neutral reference of only what is required by law, namely, her employment time period, where she was employed, and her final annual salary.

3. Dismissal of Tenure Charges: the District shall take all necessary actions with the Commissioner of Education or her designee to withdraw the Tenure Charges against Russell bearing agency reference number 203-9 17.

4. Wages and Medical Benefits:

(a) The District shall pay Russell her wages in the normal course during the month of September 2017 less all applicable deductions withholdings, including Russell's portion of the premium for her District medical benefits for the months of September and October 2017 as set forth below in paragraph 3(c).

(b) Russell shall remain eligible for all District medical benefits through October 31, 2017.

(c) At the time of Russell's irrevocable resignation effective September 30, 2017, she will owe outstanding sums for her portion of the premium for her District medical benefits for the months of September and October 2017. Russell's portion of the premium for her District medical benefits is two hundred thirty one dollars and twenty two cents ($231.22) per paycheck or four hundred sixty two dollars and forty four cents ($462.44) per month. Accordingly, nine hundred and twenty four dollars and eighty eight cents ($924.88) shall be deducted from her wages for the month of September 2017.

(d) Upon the District's receipt and prompt verification and examination of District property as set forth in paragraph 4 below, Russell's wages for the month of September 2017, less all applicable deductions withholdings, including Russell's portion of the premium for her District medical benefits for the months of September and October 2017 as set forth in paragraph 4(c), shall be paid no later than September 29, 2017.

5. Safe Return of all District Property: Russell's receipt of the wages set forth in paragraph 3 above is expressly contingent upon her safely returning all District property in her possession without damage and in proper working order.

(a) Upon execution of this Agreement, Russell must immediately provide Brown & Connery, LLP (360 Haddon Avenue, Westmont, New Jersey 08108) with all District property in her possession. Brown & Connery, LLP, within two (2) days of receipt of the property, will then submit the property to the District for prompt verification and examination. If the District property is not damaged and is in proper working order, the District will ensure Russell receives payment for her wages as set forth in paragraph 3 above.

(b) In the event Russell fails to return all District property in her possession and or the property returned is damaged and not in proper working order, the District shall determine its total loss and deduct this amount from her wages as set forth in paragraph 3 above.

6. General Release: Russell releases the District from all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever that Russell has, ever had, or may have had, against the District, whether or not apparent or yet to be discovered, or which may hereafter develop, for any acts or omissions relating to or arising from anything that has happened up to the Effective Date of this Agreement. This includes, but is not limited to, any claims that Russell asserted, or may have asserted, under the following: the National Labor Relations Act; the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Employment Retirement Income Security Act; the Immigration Reform Control Act; the Americans with Disabilities Act; the Age Discrimination & Employment Act; the Fair Labor Standards Act; the Occupational Safety & Health Act; the Family & Medical Leave Act; the Equal Pay Act; the New Jersey Law Against Discrimination; the New Jersey Wage Payment Law; The New Jersey Minimum Wage Law; the Equal Pay Law for New Jersey; the New Jersey Worker Health & Safety Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; N.J.S.A. 18A; The Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act; N.J.A.C. 6A; any constitution, statute, regulation, ordinance, executive order, public policy or common law; any written, verbal or implied contract; and any other authority or basis for seeking damages or relief of any kind. This release is intended to be broadly construed and applies to any and all claims and potential claims whatsoever, including those of which Russell is not aware, resulting from anything that has happened up to the Effective Date of this Agreement.

7. Covenant Not to Sue: Russell warrant she has not commenced any legal proceedings of any type (including but not limited to charges filed with any governmental agency) against the District. Further, Russell agrees that she will not commence any legal proceedings against the District arising from or relating to anything that has happened up to the Effective Date of this Agreement. Should any such legal proceedings be commenced on Russell's behalf, Russell agrees that she will not seek or accept any relief or recovery therefrom. In the event of a violation of this paragraph, Russell agrees that the District shall be entitled to immediate dismissal of the legal proceedings, and that she shall be responsible for the District's attorneys' fees and costs incurred in connection with those legal proceedings. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Section 6, Russell agrees not to seek or accept any resulting relief whatsoever, in accordance with this section.

8. Claims Not Released: Notwithstanding Sections 6 and 7 of this Agreement, it is understood and agreed that Russell is not waiving: (a) claims that were filed or could be filed under

any state workers' compensation or unemployment law or any claim arising from a breach of this agreement; or (b) challenges to the validity of this Agreement under the Older Workers Benefits Protection Act. Russell represents that she is not aware of any present basis for such claims. Should any entity, agency, commission, or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Section 6, Russell agrees not to seek or accept any resulting relief whatsoever, in accordance with Section 7, above.

9. Older Workers Benefit Protection Act: The releases in section 6 above include a waiver and release of all claims under the Age Discrimination in Employment Act ("ADEA") and the Older Workers Benefit Protection Act ("OWBPA"). Therefore, pursuant to the requirements of the ADEA and OWBPA, Russell specifically acknowledges that:

(a) She has been advised to consult with an attorney of her choosing concerning the legal significance of this Agreement and has done so;

(b) This Agreement is written in a manner that she understands;

(c) The consideration set forth this Agreement consists of benefits to which she is not otherwise entitled and is adequate and sufficient to support her promises, covenants and releases as set forth in this Release;

(d) She has been afforded **twenty-one (21) days** to consider this Agreement before executing it, that any changes thereto subsequently agreed upon by the parties, whether material or immaterial, do not restart this period for consideration, and that by signing and returning this Agreement before the end of the **twenty-one (21) day** period she will have knowingly and voluntarily waived the right to consider this Agreement for the full consideration period; and

(e) She has been advised that during the **seven (7) day** period following her execution of this Agreement, she may revoke her acceptance of this Agreement by delivering written notice to counsel for Company (as identified below), and that this Agreement shall not become effective or enforceable until after the revocation period has expired:

Louis R. Lessig, Esquire
Brown & Connery, LLP
360 Haddon Ave.
Westmont, NJ 08108

10. Not Eligible for Rehire: Russell acknowledges and agrees that her employment with the District is irrevocably severed upon the effective date of this Agreement and that she is ineligible for re-hire as an employee of the District. Russell agrees not to apply for re-employment with the District. If, for some reason, the District receives an application for Russell's employment, the District shall have no obligation to consider or review her application for employment.

11. No Admission of Liability: This Agreement is not, and may not be construed as, an admission of liability by either Party.

12. Entire Agreement: This Agreement encompasses the sole and entire agreement between the Parties and fully supersedes any and all prior agreements or understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to represent an amendment or supersession to this Agreement.

13. Severability: If any portion of this Agreement is deemed unenforceable, the remainder will be fully enforceable.

14. Applicable Law and Construction: This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey; however, since each party to this Agreement and their counsel have reviewed and negotiated this Agreement, the general rule of construction that any ambiguity or uncertainty in a writing shall be interpreted against the party drafting the writing shall not apply to any action relating to this Agreement. Any action to enforce or interpret this Agreement shall only be brought in a court of competent jurisdiction in Camden County, New Jersey.

15. Counterparts: This Agreement may be exercised in more than one counterpart and each counterpart shall be considered an original, but all of which together shall constitute one and the same.

16. Individuals Bound: This Agreement is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, personal or legal representatives, successors and or assigns.

17. Breach: Russell understands that if she breaches any provision of this Agreement, the District will file an action to enforce this Agreement. Likewise, the District understands that if it breaches any provision of this Agreement, Russell will file an action to enforce this Agreement. Any action to enforce this Agreement shall be brought in Camden County Superior Court.

18. Notices: Any notice given or demand made pursuant to this Agreement shall be made by certified mail, return receipt requested, to the following persons at the following addresses:

If to Russell:

Ms. Judith Russell
106 Hopewell Road
Marlton, New Jersey 08053

RECEIVED BY
CONTROVERSIES & DISPUTES

2017 OCT -2 A 10: 38

With a copy to:

Amy L. Gillette. Esquire
Zeller & Wieliczko. LLP
120 Haddontowne Court
Cherry Hill. New Jersey 08034

If to the District:

Camden City School District
Business Administrator Board Secretary
201 N. Front Street
Camden. New Jersey 08102

With a copy to:

Louis R. Lessig. Esquire
Brown & Connery. LLP
360 Haddon Avenue
Westmont. New Jersey 08108

19. Facsimile or Electronic Signature Fully Binding: The Parties agree that a facsimile or electronic signature herein shall be deemed to have the same force and effect of an original.

BY SIGNING THIS AGREEMENT, THE PARTIES ACKNOWLEDGE:

A. THEY HAVE READ IT;

B. THEY UNDERSTAND IT AND KNOW THEY ARE GIVING UP IMPORTANT RIGHTS;

C. THEY AGREE WITH EVERYTHING IN IT;

D. THEIR RESPECTIVE ATTORNEYS NEGOTIATED IT WITH THEIR KNOWLEDGE AND CONSENT;

E. THEY HAVE CONSULTED WITH THEIR RESPECTIVE ATTORNEYS ABOUT IT; AND

F. THEY SIGN IT KNOWINGLY AND VOLUNTARILY.

September 22, 2017

Paymon Rouhanifard, State District Superintendent
Camden City School District
201 N. Front Street
Camden, New Jersey 08102

Dear Superintendent Rouhanifard:

I, Judith Russell, hereby submit this irrevocable letter of retirement from my position as Teacher of the Handicapped with the Camden City School District. This irrevocable letter of retirement from my position will become effective on September 30, 2017.

Sincerely,

Judith Russell

Judith Russell

320-17

320-17

E.W. and D.W., on behalf of minor child, A.W., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioners challenged the determination of the respondent Board that their child, A.W., engaged in behavior that constituted an act of Harassment, Intimidation and Bullying (HIB) pursuant to the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 *et seq.* This case stems from an incident in March 2014 between two seventh graders – A.W. and J.S. – during social studies class. Following an investigation by the school's HIB specialist, the Board determined that a statement made by A.W. to J.S., which could be perceived as disparaging of J.S.'s religion, met the definition of HIB. The Board thereafter imposed upon A.W. the penalty of a one-day, in-school suspension and an HIB writing project. Petitioners contested the designation of the incident as an HIB violation, and instead contended that the incident was a conduct violation. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: while there could be diverging opinions as to the final determination in this case, there are no material facts at issue here, and the matter can be decided on summary decision; the Board found that A.W.'s statement could reasonably be perceived as being motivated by J.S.'s religion; it is a long-standing doctrine that Board decisions are entitled to a presumption of correctness and may not be disturbed unless they are found to decisively flawed, *see Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960); and petitioners' arguments challenging the validity of the HIB statute are not appropriately before this tribunal. Accordingly, the ALJ granted the Board's motion for summary decision, and dismissed the petition.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, with modification regarding the threshold requirements for a finding of HIB. The petition was dismissed with prejudice.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 23, 2017

320-17
OAL DKT. NO. EDU 09963-14
AGENCY DKT. NO. 176-7/14

E.W. and D.W., on behalf of minor child, A.W.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Petitioners challenge the Board's determination that their minor child, A.W., engaged in an act of Harassment, Intimidation, and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act). *See N.J.S.A.* 18A:37-13 *et seq.* In granting summary decision in favor of the Board, the Administrative Law Judge (ALJ) concluded that A.W.'s statement met the definition of HIB and that the Board's determination was proper. The ALJ further found that this tribunal is not the appropriate venue for petitioners' arguments relating to the validity of the Act. Upon comprehensive review of the record in this matter, the Commissioner concurs with the ALJ's findings, as modified herein.

As a preliminary matter, the Commissioner clarifies that HIB does not "only" require "that the student making the comment be reasonably aware of its potential impact and that the recipient reasonably perceive the comment as insulting." *See* Initial Decision, pgs. 2-3. In order for conduct to constitute an act of HIB, there must be present other factors beyond a

reasonable awareness of the impact of one's action and how it will be perceived by the recipient. The Act defines HIB as follows:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> *N.J.S.A.* 18A:37-14.

Therefore, the threshold requirement is that the conduct be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic, and that such conduct substantially disrupts or interferes with the rights of other students or the orderly operation of the school. In addition to this threshold requirement, one of the three criteria enumerated in the Act must also be satisfied.

In this matter, the Board found that A.W.'s statement could reasonably be perceived as being motivated by J.S.'s religion, interfered with J.S.'s rights, and had the effect of insulting or demeaning him. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an

affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *See Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration[,]" the Commissioner will not substitute her judgment for that of the board. *Bayshore Sewage Co. v. Dep't. of Envtl. Prot.*, 131 *N.J. Super.* 37 (App. Div. 1974). Nothing in the record indicates that the Board – in determining that A.W.'s statement constituted an act of HIB – operated in an arbitrary, capricious or unreasonable manner; therefore, the Commissioner finds no basis to reverse the Board's decision.

Accordingly, the Initial Decision is adopted as modified herein, and the petition is hereby dismissed with prejudice.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 10/23/17
Date of Mailing: 10/25/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9963-14
AGENCY DKT. NO. 176-7/14

E.W. and D.W., on behalf of minor child,
A.W.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,

Respondent.

E.W. and D.W. on behalf of A.W., petitioners, pro se

Nicholas Celso, Esq., for respondent (Schwartz, Simon, Edelstein, Celso, LLC, attorneys)

Record Closed: August 4, 2017 Decided: September 6, 2017

BEFORE **SOLOMON A. METZGER**, ALJ t/a:

This matter arises out of a determination by the Bridgewater-Raritan Board of Education that a comment by A.W. to a classmate constituted an act of Harassment, Incitement, or Bullying (HIB) under N.J.S.A. 18A:37-13 to – 32.1 and school policy. Petitioners sought review and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. The Board has filed a motion for summary decision, N.J.A.C. 1:1-12.5; Brill v. Guardian Life Ins. Co. of Amer. 142 N.J. 520 (1995)

The incident arose on March 5, 2014, between two seventh graders, A.W. and J.S., during social studies class. The class had earlier been studying a book on the Holocaust. Subsequently, while working on a project together requiring some cutting and pasting, J.S., who is Jewish, reported that A.W. said, ". . . if you throw those scissors at me you are going back to the concentration camps." He then stabbed her water bottle with his scissors and explained later that he did this because he was, ". . . so angry and couldn't think straight." A.W. acknowledged making a statement to this effect. There is a factual dispute as to what J.S. might have said, or done to precipitate A.W.'s comment. In one of her statements A.W. suggests that J.S. was twirling scissors near her in a potentially menacing way. She became frightened and just blurted out the offending comment. Investigation by the HIB specialist on staff led initially to a recommendation that this was a conduct violation, not HIB, but this view was ultimately rejected by the Interim Superintendent and the Board agreed in a 6-3 vote. A one-day in-school suspension and an HIB writing project were imposed. Petitioners do not contest the penalty as a conduct violation; they oppose designation of the incident as an HIB violation. This is the substance of the motion record.

Under Brill, the motion record must be understood in a light most favorable to the non-moving party. Thus, I accept as true that A.W. was reasonably in fear that J.S. would harm her with scissors immediately before her comment. The initial question then is whether this is a relevant consideration needing fact finding. The anti-bullying statute at N.J.S.A. 18A:37-14, requires only that the student making the comment be

reasonably aware of its potential impact and that the recipient reasonably perceive the comment as insulting. There is no debate on this score; the comment was not opaque. A.W. understood her remark; her written statements acknowledge as much and she apologized repeatedly. Neither is there any debate that J.S. had reason to take offense and did take offense. The issue then is whether the Board's decision can stand on this reading of the motion papers. I conclude that it can. One can disagree with the decision, indeed the vote on the Board was 6-3. Nonetheless, a plain reading of the HIB definition suggests that the Board's outcome was not strained. This is so even if it recognized a precipitating event. In that case the Board might have considered the dual wrongs a wash, or disciplined both students; these too would have been exercises of discretion. Petitioners argue that the typical deference owed Board decisions should here be accorded to the investigator who gathered the evidence, but this is without precedent. It is longstanding doctrine that Board decisions may not be disturbed unless decisively flawed, Kopera v. W. Orange Bd. of Educ., 60 N.J. 288 (1960).

The main thrust of petitioners' brief is that the statute is infirm under due process and first amendment principles, citing inter alia, State v. Pomianek, 221 N.J. 66 (2015) and Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969). Stated briefly, petitioners believe that the statute cannot create fault without intent and in any case, cannot inhibit A.W.'s comment as it is protected speech. Attacks of this nature are more appropriately addressed on judicial review. Public agencies function to administer statutory policy and are not designed to assume this check and balance. That said it is worth pointing out that Pomianek, involved a criminal law statute, and that schools, having a responsibility to transmit norms of good conduct, enjoy flexibilities respecting speech not available in the public square, see e.g., Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986). I do not venture beyond noting these few contours of debate in the briefs.

Based on the foregoing, the Board's motion for summary decision is **GRANTED** and this petition is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 6, 2017
DATE

SOLOMON A. METZGER, ALJ t/a

Date Received at Agency: 9/6/17

Date Mailed to Parties: 9/6/17

mph

321-17M

321-17

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Commissioner

October 23, 2017

O[redacted] R. W[redacted]
P.O. Box [redacted]
Newark, New Jersey 07107

Arsen Zartarian, Esq.
The Newark Public Schools
Office of the General Counsel
2 Cedar Street
Newark, NJ 07102-3091

Frances L. Febres, Esq.
Cleary Giacobbe Alfieri Jacobs, LLC
169 Ramapo Valley Road
Upper Level 105
Oakland, NJ 07436

Re: *O.W. on behalf of minor child, I.W. v. State-Operated School District of the City of Newark, Essex County and Board of Education of the Township of West Orange, Essex County, Agency Dkt. No. 243-9/16, OAL Dkt. No. EDU 16479-16, Commissioner's Decision No. 170-17*

Dear Parties:

I have reviewed the materials filed in connection with petitioner O.W.'s Motion for Reconsideration of the Commissioner's decision, dated June 20, 2017, dismissing the petition for lack of jurisdiction and as out of time.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)2, a motion for reconsideration shall be considered based upon the following:

i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

Upon review and consideration of the submissions, I find that petitioner's request for reconsideration of the Commissioner's decision was filed significantly out of time, which alone serves as a

basis for denying petitioner's request.[1] Notwithstanding, petitioner has also failed to satisfy any of the requisites for granting such relief specified in *N.J.A.C.* 6A:3-1.15(b)2.

In her papers, petitioner appears to argue that the Administrative Law Judge (ALJ) erred in deciding the matter on the papers by way of motions to dismiss, rather than holding a hearing. Petitioner contends that this is unfair and seeks to have this matter remanded to the Office of Administrative Law (OAL) for a hearing on the merits. In her reply submissions, petitioner also argues that the Commissioner and ALJ erred in finding that the petition was out of time as she was never given the contact information for the Bureau of Controversies and Disputes. Further, petitioner argues that the time for her to file exceptions to the Initial Decision should have been relaxed, because by the time she received the decision, there were only two days left to submit exceptions.

Although couched as a mistake, I find that the ALJ acted in accordance with the rules when she decided this matter by way of a motion rather than a hearing. *N.J.A.C.* 1:1-12.1 *et seq.* Petitioner had the opportunity to challenge the Initial Decision and the procedures at the OAL, but did not file timely exceptions with the Commissioner.[2] Further, the issue of whether the petition was out of time was fully and fairly considered. Petitioner is merely expressing her disagreement with the Commissioner's June 20, 2017 decision, which does not equate to a mistake warranting reconsideration of the matter.

Accordingly, the Motion for Reconsideration is hereby DENIED.[3]

Sincerely,

Kimberley Harrington

Kimberley Harrington
Commissioner

c: County Superintendent
State Law Library

KH/SLP/BCM

Via Regular Mail

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[1] *N.J.A.C.* 6A:3-1.15(b) provides that a motion for reconsideration must be filed within 10 days of the filing of the Commissioner's decision. Petitioner's motion to reconsider the June 20, 2017 Commissioner's decision was filed on August 8, 2017.

[2] Petitioner's exceptions to the Initial Decision were received on July 17, 2017, nearly a month after the June 20, 2017 Commissioner's decision was issued and more than two months after the May 9, 2017 Initial Decision was mailed.

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

322-17

COMMISSIONER, NEW JERSEY DEPARTMENT OF EDUCATION

IN THE MATTER OF THE PROCEEDING BETWEEN:

Christopher Luskey, "Respondent" or "Tenured Custodian"

- and -

Carteret Board of Education, "Petitioner" or "Board"

Agency Docket No: 169-7/17

AWARD AND OPINION

Hearings: Sept. 25 and Sept. 26, 2017

Posthearing Briefs: Oct. 16, 2017

Date of Award: Oct. 24, 2017

Arbitrator: Perry A. Zirkel

APPEARANCES:

For the Carteret Board of Education
Arlene Quinones Perez, Esq.
DeCotiis, Fitzpatrick, Cole & Giblin, LLP
500 Frank W. Burr Blvd., Ste. 31
Teaneck, NJ 07666

For Tenured Custodian Christopher Luskey
David DeFillippo, Esq.
Detzky, Hunter & DeFillippo, LLC
45 Court Street
Freehold, NJ 07728

Factual Findings[1]

On June 30, 2004, the Board appointed Christopher Luskey as custodian for the term of one year.[2] On or about June 2007, after the completion of two more one-year contracts,[3] Luskey obtained statutory tenure as a custodian.[4]

During the following seven years, as during the previous three, Luskey's work performance was below the midpoint of, but well within, the broad average range for this nonprofessional role,[5] with occasional "write ups" for deficient work[6] and less frequent documentation of praiseworthy performance.[7] This seven-year period also included two incidents of substance abuse while at work.

First, in June 2010, a group of parent volunteers at the Nathan Hale Middle School Fun Fair complained to Rosa Diaz, who was the building principal at the time, that Luskey appeared to be under the influence of drugs or alcohol and they did not want him near their children. More specifically, they reported that he was holding on to the school fence with obvious difficulty

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[1] As a matter of conventional legal style, this decision uses after the first, full reference to each individual solely his or her surname without titles or other prefixes and without any intent of discourteousness. Moreover, the exhibits are identified as "P" (for those admitted into evidence from the Respondent-Board), "R" (for those admitted into evidence from the Respondent-Tenured Custodian), and "Jt." for those submitted jointly. Finally, the footnotes use "*infra*" and "*supra*" for cross references to parts of this decision respectively below or above that footnote.

[2] R-11. Luskey had previously worked in this capacity for the Board on a substitute basis.

[3] R-12 and R-13.

[4] R-14; N.J. STAT. ANN. § 18A:17-3.

[5] See periodic evaluations R-26 (June 2015); R-8 (June 2013); R-23 (June 2011); R-22 (June 2010); R-7 (May 2009); R-10 (June 2008); R-21 (Mar. 2007); R-20 (Feb. 2007). Some of his evaluations had limited areas for "needs improvement." R-6 (May 2006); R-19 (Feb. 2006); R-18 (Nov. 2005); R-17 (Mar. 2005); R-16 (Jan. 2005); R-15 (Nov. 2004). Less frequent other evaluations noted corresponding areas that were "above average." R-25 (May 2014); R-24 (May 2012).

[6] P-1, at 32 (May 2013); P-1, at 26 (Mar, 2013); P-1, at 24 (Mar. 2009); P-1, at 38 (Feb. 2009); P-1, at 30 (May 2008); P-1, at 29 (Oct. 2006); P-1, at 23 (May 2006); P-1, at 22 (Apr. 2006); P-1, at 28 (Feb. 2006); P-1, at 33–34 (Jan. 2006). Most of these write-ups were from his the supervisor of buildings and grounds, although the most recent one was from the principal of his then-assigned middle school, who shared supervisory authority for the work in her building.

[7] P-30 (June and Sept. 2005).

walking or standing on his own and with slurred speech.[8] The principal met with him, instructed him to go to the nurse's office, and called the superintendent, Kevin Ahearn. The substance abuse coordinator left with Luskey. A few days later upon returning to the school, he informed Diaz that he had tested positive but that it was for medications prescribed by his physician. Immediately thereafter, the central administration transferred Luskey to another school.

Second, on December 9, 2014, a crossing guard at Columbus Elementary School reported to Christian Zimmer, who was then the principal at Columbus, that Luskey was acting in an erratic manner during his duties at the school.[9] The principal met with him and Drew Packard, the long-time supervisor of buildings and grounds. Observing Luskey to be flushed, sweaty, and with slurred speech, Zimmer drove him to the local MediCenter for screening. Upon being informed that Luskey had failed the drug test,[10] Zimmer drove him home and had another custodian drive his car there. Zimmer reported the matter to the superintendent's office. Soon thereafter, Luskey was granted FMLA leave.[11]

During the school year 2015–16, Luskey's performance became more problematic. On October 28, 2015, the next principal of Columbus School issued to him a written reprimand for making sarcastic comments in the presence of students and staff and for deficient cleaning of the main office's bathroom.[12] On the afternoon of November 10, 2015, Packard sent him a "second warning" about continued problems with bathroom cleaning[13]; however, Luskey left

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[8] P-1, at 10.

[9] The crossing guard reportedly commented that Luskey was leaning on a fence looking totally "out of it." P-1, at 13.

[10] P-2 (Medtox Laboratories report that Luskey tested positive for methadone and benzodiazepines).

[11] According to Luskey, at the superintendent's initiative, he first participated in outpatient drug rehabilitation and, after insufficient attendance, went to approximately three months of out-of-state residential treatment starting in early March 2015.

[12] P-1, at 35.

[13] P-1, at 27.

approximately an hour after starting his shift that day, upon injuring his shoulder lifting tables as part of his lunchroom duties. As a result of his injury, he was out for most of the ensuing six months on Worker's Compensation leave until May 2, 2016.[14] On May 18, Packard issued an official warning to him for smoking on school grounds[15] and a separate write-up for a clear violation of the sign-in policy.[16] Underlying some of these performance issues was further evidence of suspected substance abuse.[17]

These problems came to a head during summer 2016. The day before the culminating incident, on July 14 the Columbus principal reported to central administration that when his secretary went to the school social worker's office to retrieve a file, she was startled upon turning on the light to find Luskey sitting with his head down on the desk in the dark without an explanation; he was supposed to be working on another floor at the time.[18]

Then, on Friday morning, July 15, students and staff at his assigned elementary school, which housed a summer program for special education pupils who qualified for extended school year (ESY) programming, saw Luskey kneeling face down on the pavement outside the entrance

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[14] His attendance record for that year showed that the days he worked were far less than those that he was out for not only this reason but also vacation, sick, and personal days as well as family or funeral leave. R-1.

[15] P-1, at 39.

[16] P-1, at 31. The Columbus School principal reported that Luskey's failure to sign in properly had been on ongoing problem that he had reported to Packard. P-1, at 16.

[17] First were the records that Luskey released to the Board: R-27 (June 19, 2016 report from JFK Emergency Department in the wake of head laceration in an auto accident, noting that Luskey "is recovering from drug abuse" although separately reporting that he "denies drug abuse"); R-28 (May 19, 2016 report from RWJUH Rahway Emergency Department in the wake of head laceration in bat accident with brother, noting "past street drug/inhalant/medication abuse"). Second, although apparently prescribed by his physician (R-32), the 3-4 drugs that Luskey reportedly took regularly to alleviate drug-craving, stress, and sleep problems appeared to be for high amounts (P-4, including 170 prescription tablets purchased in the 32 days before July 15, 2016 and refilled during the following month). Finally, the principal at his then-assigned school (Columbus Elementary) reported to Packard and the superintendent more than once during that school year his suspicion that Luskey at times appeared, via slurred speech and staggering walking while at work, to be under the influence of drugs or alcohol.

[18] Additionally, the Columbus School principal credibly testified that other staff members had complained about Luskey's increasingly erratic behavior.

of the school. He was rubbing his face on the graveled surface apparently trying, unsuccessfully, to get back up. One of the teachers, who helping to escort approximately 20 of the students back from a field trip to a nearby creativity center, ran over to him. He told her, in a "confused" state that he had borderline sugar and was resting his head on the ground. She helped Luskey into the building and called both the police and the principal. Upon their arrival, the two police officers reported finding him sitting on a chair inside the school hallway, "dazed but ... alert and aware of his surroundings" and declining medical attention.[19] The principal, who arrived soon after the police officers, heard only his jumbled and slightly slurred references to hitting his head, low blood sugar, something about his leg, and not wanting medical attention. He observed that Luskey appeared disoriented when he hurried upstairs to continue work. Upon arriving at the next floor, he proceeded down the hall, visibly disoriented, and walked directly into one of the students, aged 5 or 6.[20] An hour or so later, Luskey came to the principal's office and received permission to go home, complaining that his leg was bothering him. The principal stopped at the central administration office about 3 pm and, not finding superintendent Ahearn, reported the incident to the business manager. That evening he sent a phone-text notification to Packard, who was on vacation at the Jersey shore.

On Monday, July 18, Packard met with superintendent Ahearn, and they concluded that they had to have Luskey drug tested. However, they did not succeed in contacting him, likely because he was on vacation.

On Tuesday, July 19, Packard reached Luskey, who was still on vacation, on his cellphone at approximately 9:30 am, and summoned him to his office. Upon Luskey's prompt

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[19] R-2.

[20] The paraprofessional who was standing near the student testified credibly that his eyes were glazed and bloodshot; he said "Ooops, I didn't see her"; and, based on their respective positions in the hallway, he clearly should have seen the student. *See also* P-1, at 18–19.

arrival, Packard asked him to take an immediate drug test. Luskey replied that he was still on vacation and would do so instead the next day upon his return to work. Packard and Ahearn acquiesced, and Luskey agreed to meet Packard at the Medi-Center at 9 am on July 20 for this purpose.[21]

However, on the morning of July 20, Luskey went to Columbus School at the start of his shift at 7 am and remained there rather than showing up at 9 am at the Medi-Center. Packard, who was at the agreed-upon location at 9 am, waited there for approximately 45 minutes, and then went to superintendent Ahearn's office. Ahearn instructed him to go to Columbus School, get Luskey's keys, and tell him that he was suspended. He did so, with the principal and assistant principal in attendance. Given the opportunity to tell his side of the story, Luskey asserted that he had thought the administrators would make arrangements to transport him to the Medi-Center from Columbus School, because he was unable to do so himself.[22] Ahearn responded that this was the first time Luskey had raised this issue. Superintendent Ahearn sent Luskey a letter later that day confirming the suspension.[23]

On Friday, July 22, Luskey took the drug test at the Medi-Center and tested positive for benzodiazepines. Approximately a week later, in response to the administration's request for verification of a prescription for this substance, he submitted a July 29 prescription form from his

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[21] Packard's certification, or affidavit, specifically stated: "Luskey agreed to be at the Medi-center at 9:00 am. Superintendent Ahearn asked again, and Luskey agreed again. Luskey never asked to be taken to the drug-test, or mentioned that his license was suspended." Luskey's testimony did not provide a persuasive rebuttal.

[22] Although he did not share this information with Packard or the superintendent on or before the July 19 meeting, Luskey testified at the arbitration hearing that his brother had totaled his car and, for a separate reason, the state had revoked his license.

[23] P-1, at 31. This notification was for suspension "indefinitely without pay" and subject to a school board hearing. On September 28, after further communications between the parties, the suspension was changed to "with pay."

physician that stated that he "is prescribed Suboxin, Klonopin, and Trazodone."[24]

On June 26, 2017,[25] the Board served Luskey with notice of tenure charges. Charge #1 was for unbecoming conduct, listing (a) various write-ups during the period from 2006 to 2013, (b) the aforementioned[26] incidents in October-November 2015, and the (c) culminating acts and omissions from July 15 to July 20, 2016. Charge #2 was for insubordination, listing purportedly willful (a) failure to follow attendance policies[27] and (b) failure to follow supervisory directives.[28]

On July 19, 2017, the Board voted to suspend Luskey and determined that the tenure charges were, if true, sufficient to warrant termination.[29]

On July 28, the Board, as Petitioner, submitted the tenure charges against him to the Commissioner of Education.

On August 17, the Commissioner notified the parties of the requisite sufficiency of the charges[30] and appointed the undersigned arbitrator to hear and decide the matter.

On September 6, in response to a dismissal motion from Respondent-Luskey based on jurisdiction and after having received briefs from both parties, the arbitrator issued an interim, prehearing decision denying the motion. For the sake of a complete record, a copy of that decision is attached to this Award as an appendix.

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[24] P-32. According to publicly available sources, Klonopin is a brand name for benzodiazepines.

[25] During the interim, Diaz became the superintendent in the wake of Ahearn's resignation.

[26] *See supra* text accompanying notes 12–13.

[27] This subcategory listed an incident on 1/31/06 not in the referenced supporting material. An incident on 2/26/09 regarding call-in procedures, and the aforementioned 5/18/16 incident regarding sign-in procedures.

[28] This subcategory listed a 6/5/08 directive to all four custodians, a 7/15/16 sign-out incident not in the referenced supporting material, and the 7/19/16–7/20/16 drug test "refusal[s]."

[29] P-1, at 9. For the applicable statutory (and related regulatory) requirements, see N.J.S.A. § 18A:6-11 (in the "Applicable Statutes" section of this decision).

[30] *See infra* N.J.S.A. § 18A:6-16 (in the "Applicable Statutes" section of this decision).

Applicable Statutes[31]

N.J.S.A. § 18A:17-3:

> Every [tenured] public school janitor of a school district . . . . shall not be dismissed . . . , except for neglect, misbehavior or other offense and only in the manner prescribed by . . . this title.

N.J.S.A. § 18A:6-10:

> No person shall be dismissed or reduced in compensation, . . . if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing . . . by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges . . . shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

N.J.S.A. § 18A:6-11:

> Any charge made against any employee of a board of education under tenure . . . shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. . . . [T]he board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary.[32] The board of education shall forthwith notify the employee . . . . In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner . . . .

N.J.S.A. § 18A:6-16:

> If [the Commissioner] shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 18A:6-17.1.

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[31] The collective bargaining agreement (Jt. 1) does not effectively add to or narrow the applicable grounds in its broad "just cause" clause.

[32] The corollary regulation requires, inter alia, that (1) the employee have the opportunity to provide the board with a statement of his position and evidence within 15 days of receiving the tenure charges and (2) the board take this probable-cause vote within 45 days of receipt of this statement or, if not received by then, the expiration of the 15-day period. N.J. ADMIN. CODE § 6A:3-5.1(b)-(c).

N.J.S.A. § 18A-6-17.1:

(b)(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

(b)(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses. Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

(c) The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

(d) Notwithstanding the provisions of . . . any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

Discussion

The two tenure charges are addressed here in reverse order based on their relevant significance. More specifically, because it is of lesser significance, this Discussion first addresses tenure charge #2.

Insubordination

As specified above,[33] charge #2 is for insubordination. New Jersey case law has established that insubordination requires a willful refusal or disregard of supervisory authority.[34] For the various specified incidents for the relatively remote period of the Respondent's initial employment, the requisite willfulness is clearly absent. More specifically, although far from stellar, the aforementioned[35] findings for his performance for his first ten years did not come close to the opposite pole of willful refusal or disregard of supervisory instructions. As his supervisor credibly testified,[36] although some of the cited write-ups were slightly longer than for other custodians, his walk-throughs typically identified items for improvement, and if his resulting periodic evaluations had been largely unsatisfactory ratings, he would have lost half his custodial staff, presumably via termination or resignation. Moreover, Packard's certification observed: "If you instruct Luskey to do something, he will get it done but not necessarily right away."[37]

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[33] *See supra* notes 27–28 and accompanying text.

[34] In re Tenure Hearing of Zisnewski, 2012 WL 1231874 (N.J. Super. Ct. App. Div. Apr. 13, 2012) ("'Insubordination' has been found in an employee's 'willful refusal of submission to the authority of [his or] her superiors' [citing N.J. precedent] [and] a 'willful disregard of an employer's instructions ...' or an 'act of disobedience to proper authority' [citing *Black's Law Dictionary*]").

[35] *See supra* text accompanying notes 6–7.

[36] I found Packard's testimony to be quite credible with the limited exception of notable evasiveness with regard to the Respondent's familial relationship to the former school board president.

[37] P-1, at 12. However, this source provided to clarifying caveats: (1) the same item in the certification made clear that he had provided warnings to Luskey that to improve his choices and actions so as to avoid his personal life affecting his work performance; and (2) an additional item also clarified that he orally informed Luskey of any first-time performance problems, only including them in the write-ups upon repetition or continuation of the problem. *Id.*

Although the incidents of within the school year ending in June 2016 were weightier in regard to both charges,[38] they did not suffice for the requisite preponderant proof of insubordination.[39] However, the most recent cluster of incidents, during the July Columbus School extended school year program for students with disabilities, constitute a close call with regard to charge #2. Most specifically, the Respondent's failure to appear at the designated site and time for the July 20 drug test arguably constituted, in effect, a refusal, just as the superintendent's acquiescence the previous day constitute, in effect, an agreement. Moreover, it alternatively fit the definitional criterion of willful disregard, especially because (1) he apparently had the ability to arrange the requisite transportation, as he had to get to school that day and, according to his testimony,[40] from school during the morning of the triggering event; (2) if, for some reason, he was unable to make such arrangements despite the previous day's agreement, he should have contacted Packard or the superintendent before 9 am to make alternative arrangement; and (3) even if one were to accept his not sufficiently credible claim that he misunderstood the agreed-upon site,[41] it was reckless for him not to contact either of these administrators, or at least the Columbus School principal, very soon after 9 am to resolve

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[38] *See supra* text accompanying notes 12–16.

[39] In contrast, the findings for the broader intermediate period have no evidentiary bearing except, as explained below, as additional support for reasonable suspicion of possible substance abuse. *See supra* notes 8–10 and accompanying text.

[40] Specifically, he testified that he arranged for a summer helper to drive him on the morning of July 15 to the bank before his pavement incident. Regardless of the credibility of this assertion, he obviously had available ways that he arranged for to get to and from school for his work-related duties.

[41] In general, his testimony was not credible, particularly his continued pattern of not accepting responsibility for his actions, including repeatedly referring to purported misunderstandings and diverting attention to others. For example, he claimed that the Packard or other administrators implicitly agreed to arrange transportation; however, the proof was preponderant that they did not know or have reason to know of his driver license revocation and lack of other alternatives to get to the Medi-Center on his own. His reliance on the 2014 incident with principal Zimmer was similarly not reasonably credible, because Zimmer drove him based on his immediately impaired condition, which is clearly distinguishable from the July 19–20, 2016 situation.

the matter.[42]

However, the arbitrator need not definitively decide this close question, because the determination of the other charge resolves the larger issue of whether the board had the requisite basis for its decision. More specifically, New Jersey's highest court has made clear that the charge of unbecoming conduct, if sustained, suffices alone regardless of the disposition of any other charges.[43]

Unbecoming Conduct

New Jersey case law also defines "unbecoming conduct," establishing broad boundaries in terms of relevant alternatives of district efficiency and public confidence.[44] Moreover, unlike insubordination, a finding of unbecoming conduct "need not 'be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.'"[45]

The evidence is preponderant that the Respondent's conduct in July 2016 adversely affected the efficiency of the school district and/or had a tendency of destroying public respect and confidence in the district's employees and operations. The primary foundation for this conclusion consists of two connecting support beams. The first one was his blatantly impaired position on the pavement in full view of students, staff, and nearby members of the public and soon thereafter, evidencing such impairment, walking into one of the young special education

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[42] Indeed, not arranging to take the ordered drug test until two days later further reflected poorly not only n the complete accuracy of the results but also his willful choices in response to the obviously high-stakes directive.

[43] E.g., Bound Brook Bd. of Educ. v. Ciripompa, 153 A.3d 931, 938 (N.J. 2017) ("the failure of a school board to prove a different offense does not preclude a finding of unbecoming conduct").

[44] E.g., *id.* at 937 (defined as "conduct 'which adversely affects the morale or efficiency of the [district] or has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services' [citations omitted]").

[45] *Id.* [citations omitted].

students in the presence of one or more staff members. The second, connecting beam was his aforementioned[46] failure to show up for the drug test after being allowed to postpone it on the previous day.

Related Considerations

The analysis for the foregoing two tenure charges requires additional conclusions for the final award. These related considerations are several and sequential.

First, the determination with regard to charge #2 only intersects with one aspect of the applicable board substance abuse policy, which is the requirement to submit to a drug test upon reasonable suspicion that the employee is under the influence of a substance during work hours, with the concomitant provision that refusal will equate to a positive test.[47] Here, the conclusion is that the Petitioner, based on not only the latest incident[48] but also the previous ones,[49] had the requisite reasonable suspicion of such impairment to warrant a drug test. At that point, it was not clear whether the latest impairment-related behavior of the Respondent was attributable to the proper use of prescribed medication (which is not within the definition of "substance"[50]) or the improper use of such medication or the use of un-prescribed controlled substances (which each

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[46] *See supra* notes 21–22 and accompanying text.

[47] The specific wording is as follows:

> A support staff member shall be required to submit to an immediate medical examination to include a **substance** test if the support staff member's supervisor has reasonable suspicion to belief a support staff member is under the influence of a **substance** during work hours. Refusal of a support staff member to consent to the medical examination and **substance** test will be determined to be a positive result.

R-3 (emphasis in original).

[48] *See supra* notes 19–20 and accompanying paragraph.

[49] *See supra* text accompanying notes 8–10. For additional indications, which are surplus for this purpose, *see supra* note 17 and text accompanying note 18.

[50] The specific wording is as follows:

> For the purposes of this Policy, "**substance**" … means alcoholic beverages, any controlled dangerous **substances**, including … over-the-counter and prescription medications that are improperly used to cause intoxication, inebriation, excitement, stupefaction, or dulling of the brain or nervous system.

R-3 (emphasis in original).

are within this definition).[51] Moreover, the evidence in this case does not resolve that question, which is not the crux of this case. Even if he did not violate the substance abuse policy in terms of the specific refusal or specific results, the culminating combination of his publicly impaired condition and his inexcusable failure to show up for the drug test adversely affected the efficiency of the school district and/or had a tendency of destroying public respect and confidence in the its operations.

Second and similarly, the Board's discipline policy has only carefully circumscribed applicability in this case. More specifically, rather than a strict step-by-step progressive discipline system, the policy not only defines discipline broadly to include the various "write-ups" that the Respondent received,[52] but also provides that "[t]he Superintendent shall deal with disciplinary matters on a case-by-case-basis."[53] Moreover, the policy's qualified requirement for "progressive penalties" is limited to "repeated violations."[54] Here, the two critical violations were sufficiently significant for the superintendent's case-by-case consideration, but the second was not a repetition of the first. More generally, the applicable case law clarifies that "progressive discipline is not 'a fixed and immutable rule to be followed without question' because 'some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record.'"[55]

Third, the Respondent's posthearing brief ended with a procedural-noncompliance argument that was not raised during the hearing and that was apparently appropriate for the

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[51] Any confidentiality argument about the Respondent's participation in treatment for drug abuse appears to fail for lack of sufficient evidence that, per the policy (*id.*), he "voluntarily sought and participated" in such treatment. *See supra* note 11. In any event, none of the conclusions in the Discussion section *infra* rely on this information.

[52] The specific definition is as follows: "Discipline will include, as appropriate, verbal and written warnings." R-5.

[53] *Id.*

[54] *Id.*

[55] In re Stallworth, 26 A.3d 1059, 1067–68 (N.J. 2011) [citations omitted]..

response at the Commissioner's sufficiency step. More specifically, the Respondent argued that "Petitioner failed to establish that the Board's vote on July 19, 2017 was rendered within the 45-day period [required] by N.J.A.C. 6A:3-5.1(b)(4)." However, the applicable regulation starts the 45-day period for the board vote with the receipt of the Respondent's statement after serving him with notice of the tenure charges.[56] Although the record in this case does not reveal the date of the receipt, it is clear that the board served the Respondent with notice on June 26, 2017.[57] Thus, to whatever extent that the Respondent's final argument may have survived not only waiver but also the requisite prejudicial effect for procedural violations,[58] the board's July 19, 2017 clearly complied with the required 45-day period.

Fourth, the factual basis for the arbitrator's conclusion with regard to unbecoming conduct relies on neither hearsay nor precluded evidence. The Respondent's posthearing brief took issue with the June 2010 incident not being included in the various incidents specified in the tenure charges. However, the use of this incident is not primary here, being only a limited part of the reasonable suspicion determination, and, in any event, the Respondent did not allege, much less prove, lack of due advance notice under the statute specific to this arbitration.[59] Similarly, the other errors in the tenure charges that the posthearing brief emphatically identified, such as attributing to Packard letters that were from principals Peters and Bollinger, were red herrings; such imperfections were far from prejudicial to the Respondent. Overall, the tenure charges document was sufficient in the context of the other safeguards for notice, although certainly not optimal.

Finally, it is not clearly settled whether the arbitrator has authority to address the

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[56] *See supra* note 32.
[57] *See supra* text accompanying note 25.
[58] E.g., Carteret Bd. of Educ. v. Radwan, 790 A.2d 248, 250 (N.J. Super. Ct. App. Div. 2002).
[59] *See supra* "Applicable Statutes": N.J.S.A. § 18A-6-17.1

appropriateness of the penalty, or discipline, after sustaining the board's basis for its termination decision. Here, the parties failed to agree on a submission statement of the issues in this case, although their posthearing briefs both addressed this penalty issue. Other arbitration awards in this statutory context have reduced terminations to lesser levels of discipline in some cases that sustained charges of unbecoming conduct[60] or other applicable grounds.[61] However, neither party has identified, and I have not found, any published case law in New Jersey where a court specifically decided whether such arbitration awards are permissible under the applicable legislation.[62] In other jurisdictions, some courts have held that once an arbitrator sustains the statutory grounds for the board's termination decision, public policy precluded his or her authority to reduce the discipline.[63] Moreover, the underlying statutes in this case appear to significantly restrict the relevant discipline, not extending, for example, to suspensions.[64] In any event, the arbitrator need not definitively determine this issue because the flagrancy of the Respondent's recent conduct[65] and the lack of a mitigating long stellar record warrant his

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[60] E.g., Tenure Hearing of State Operated School District of the City of Newark, Essex County and Elizabeth Corbacho-Musngi, Agency Docket No. 314-10/14 (May 12, 2015),

[61] E.g., In the Matter of: Gilda Nicole Harris, State Operated School District of the City of Jersey, Agency Docket Nos. 324/11/14 and 379/12/14 (October 2, 2015); In re Tenure Hearing of Jill Buglovsky, Randolph Township Board of Education, Agency Docket No. 265-9/12 (December 21, 2012).

[62] Both parties cited *In re Fulcomer*, 225 A.2d 30 (N.J. Super. Ct. App. Div. 1967). However, the statutory basis for that decision was an earlier tenure statute that provided the Commissioner with the exclusive authority to render a decision, which is not necessarily the same as the present statute's delegation to the arbitrator to render a decision. Moreover, the fatal error in the 1967 case was the commissioner's remand to the local school board to determine the penalty, which was not at issue in the instant case.

[63] E.g., Manheim Cent. Educ. Ass'n v. Manheim Cent. Sch. Dist., 572 A.2d 31 (Pa. Commw. Ct. 1990); *cf.* Sch. Comm. of Chicopee v. Chicopee Educ. Ass'n, 953 N.E.2d 236, 242 (Mass. 2011) ("an arbitrator may not 'ignore the limits imposed by statute'").

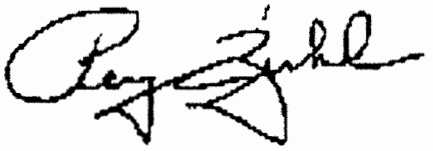
[64] *See supra* "Applicable Statutes": N.J.S.A. § 18A:17-3 (dismissal); N.J.S.A. § 18A:6-10; N.J.S.A. § 18A:6-11; N.J.S.A. § 18A:6-16 (dismissal or reduction in salary).

[65] For the overall extent of severity, the accumulation of lesser performance problems during the 2015–16 year (*supra* text accompanying 12–16 and *supra* note 18 and accompanying text) played a secondary role to the major culminating conduct from July 15 to July 20 (*supra* notes 19–22 and accompanying text).

termination.[66]

Award

In sum, after careful attention to the parties' arguments, the applicable law, and the case evidence, the arbitrator concludes that the Board's tenure charge for conduct unbecoming is sustained. The termination of Christopher Luskey is upheld.



10/24/17

Perry A. Zirkel, Arbitrator — Date

[66] Moreover, although not at all a primary equitable factor, the Respondent's suspension during the long intervening period in this case was on a paid basis.

Appendix: Interim Decision re Jurisdiction

COMMISSIONER, NEW JERSEY DEPARTMENT OF EDUCATION

IN THE MATTER OF THE PROCEEDING BETWEEN:

Christopher Luskey, "Respondent" or "Tenured Custodian"

- and -

Carteret Board of Education, "Petitioner" or "District"

Agency Docket No: 169-7/17

Interim, Prehearing Decision

Date of Decision: Sept. 6, 2017

Arbitrator: Perry A. Zirkel

APPEARANCES:

For the Carteret Board of Education	For Tenured Custodian Christopher Luskey
Arlene Quinones Perez, Esq. DeCotiis, Fitzpatrick, Cole & Giblin 500 Frank W. Burr Blvd. Teaneck, NJ 07666	David J. DeFillippo, Esq. Detzky, Hunter & DeFillippo, LLC 45 Court Street Freehold, NJ 07728

Facts[1]

On July 6, 2004, the School Board approved the initial employment contract for Christopher Luskey[2] as a custodian for the fixed term of one year.[3] On May 22, 2007, after he continued to work on a fixed-term contracts for the next two years,[4] the Board provided him with a contract "from July 1, 2007 ... with tenure."[5] Both the 2002–05 and the 2005–08 collective bargaining agreements (CBAs) contained the following provision:

> Tenure rights shall be acquired for all employees after three (3) consecutive years of services and the commencement of the fourth year, or, the equivalent of more than three (3) years of service within a period of four (4) consecutive years.[6]

The current CBA, which covers the period July 1, 2016 to June 30, 2020, contains the identical provision along with a just cause clause and a five-step grievance procedure that culminates in submission to the New Jersey Public Employees Relations Commission (PERC) for binding arbitration.[7]

On July 19, 2017, the Board certified tenured charges against Luskey for conduct unbecoming and insubordination.[8]

On or about July 28, the Board filed the charges with the Commissioner of Education, thus becoming the Petitioner in this case. On August 3, the Respondent filed his answer to the

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[1] Per dismissal motions generally, these facts are allegations in the light most favorable to the nonmoving party. Most, perhaps, all of them appear to be effectively stipulated or at least not disputed.

[2] As a matter of conventional legal style, this decision uses after the first, full reference to each individual solely his or her surname without titles or other prefixes and without any intent of discourteousness. Moreover, the exhibits are identified as "Petitioner" (for those from the Board) and "Respondent" (for those from the tenured custodian)

[3] Petitioner exhibit B. The board had previously appointed him as a substitute on an as-needed basis on May 28, 2003, and his administrative appointment for this first full-time year was June 30, 2004. District Exhibits A and C.

[4] Petitioner exhibits D and E.

[5] Petitioner exhibit F.

[6] Respondent exhibit 8, at 18; Respondent exhibit 9, at .

[7] Petitioner exhibit H/Respondent exhibit 2, at 16; *id.* at 6-7 and 10.

[8] See, e.g., Petitioner exhibit G.

charges, including the assertion that the Department lacked jurisdiction for the dispute.

After review, the Commissioner deemed the charges for sufficient for arbitration and appointed me as the arbitrator for this case.

As the result of a prehearing conference call on August 16, the parties submitted letter briefs with regard to the dismissal motion by the agreed-upon deadline of September 1, with the understanding that I would promptly issue a written decision well in advance of the hearing scheduled for September 25 - 27.

On August 18, the Carteret Education Association filed a grievance on behalf of the Respondent.[9]

Discussion

In support of its dismissal motion, Respondent argued that he had tenure as a result of the CBA and, thus, that the board's action was subject to the CBA's grievance arbitration and just cause clauses[10] rather than the Commissioner's arbitral authority under New Jersey statutes.[11]

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[9] Respondent exhibit 3. This filing is the second step in the aforementioned five-step procedure.

[10] *See supra* note 7 and accompanying text.

[11] N.J. STAT. ANN. § 18A:6-9:

> The Commissioner shall have jurisdiction to hear and determine ... all controversies and disputes under the school laws .... Notwithstanding the provisions of this section to the contrary, an arbitrator shall hear and make a final determination on a controversy and dispute arising under [N.J. STAT. ANN. 18A:6:10].

N.J. STAT. ANN. 18A:6:10:

> No person shall be dismissed ... if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state ... except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided....

Put simply, this subject matter jurisdictional argument is that the Respondent's tenure is contractual, not statutory, and is subject to the contractual, not the statutory, arbitration mechanism.

The Petitioner counter-argued that Luskey's tenure was instead statutory as a result of the following legislation, which dates back to well before the Respondent's employment:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed . . . , except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by ... this title.[12]

Resolution of this issue warrants a brief overview of tenure. More specifically, tenure in this context refers to (a) an indefinite term of employment that, rather than having a fixed ending date, continues until a supervening event, such as resignation (including retirement), reduction in force, or termination, and (b) in the event of termination, requires specified due process, often including certain reasons (e.g., insubordination) and procedures (e.g., impartial hearing). Usually but not always,[13] the status of tenure requires completion of a probationary period. For example, the probationary period for New Jersey public school teachers was three years but, as a result of the 2012 TEACHNJ legislation, changed to four consecutive years.[14]

As the aforementioned[15] provision of the parties' CBA illustrates for both janitors and teachers, statutory tenure and contractual tenure may overlap. For janitors, the applicable statute, § 18A:17-3, provides school boards with the otherwise unlimited discretion to determine the

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[12] N.J. STAT. ANN. § 18A:17-3. This act went into effect on Jan. 11, 1967. *Id.*
[13] For example, federal judges receive tenure upon appointment without any probationary period.
[14] N.J. STAT. ANN. § 18A:28-5(a)-(b).
[15] *See supra* note 6 and accompanying text.

length of the probationary period via the use of fixed term contracts.[16] However, this CBA limits the board's prerogative to the use of fixed term contracts for a total of three years, thus serving as the maximum probationary period. As a result, a custodian whom the board accorded tenure either immediately or, more likely, after fixed term contract(s) of either one year or totaling two years, that tenure would be purely statutory during the initial three-year period,[17] whereas custodians whom the district continued to employ after three years would have tenure as a result of the combination, or intersection, of the CBA and the statute, thus being in a hybrid category.[18]

Here, as the party moving for dismissal, the Respondent is effectively arguing that the parties' CBA, per their exercise of the public employment relations act (PERA), preempts the commissioner's broad authority for arbitration of tenure disputes under the school laws of New Jersey. In addressing the distinguishable and largely obverse issue of whether § 18:7-3 preempts a CBA provision that provides for their tenure after three years of employment, the New Jersey Supreme Court clearly rejected the respondent's all-or-nothing interpretation of § 18A:17-3[19] and at least indirectly supported the hybrid conclusion.[20] Specifically, the court reasoned:

> [E]ven though the statute provides mechanisms for immediate tenure and complete denial of tenure, these are not the only alternatives contemplated by the statute. By using the word *unless* to modify the

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[16] *See supra* note 12 and accompanying text. Absent an intersecting CBA provision, the discretion is so unlimited that a district may avoid tenure for a custodian by continuing his or her employment solely via consecutive fixed term contracts.

[17] Although so unlikely to be theoretical, the board could at the extreme of this purely statutory category grant tenure immediately. The Respondent's interpretation that §18A:17-3 only applies to janitors who are granted tenure immediately upon commencement of employment neither squares with the general application of tenure to school employees. Custodians do not fit with the exceptional circumstances of federal judges.

[18] As an accompanying illustration of the overlap as a result of this intersecting CBA provision for all employees, teachers hired after the 2012 TEACH NJ legislation whose employment continues after three years have contractual tenure for the fourth year, but they have hybrid, or combined, contractual and statutory tenure after successful completion of the fourth year. *See supra* text accompanying notes 6 and 14.

[19] *See supra* note 17.

[20] *See supra* note 18 and accompanying text.

> word *shall,* the legislature has signaled its intention to leave employing boards with some flexibility. Accordingly, boards may, without contravening the terms of the statute, permissibly pick and choose between the statutory minimum of no tenure for any custodial employee and the statutory maximum of instant tenure for all custodians. [The CBA provision] that grants tenure after three years of employment, is but one example of a clause that falls between N.J.S.A. 18A:17-3's outer limits without derogating the statute's intent.[21]

Although not specifically addressing the instant issue, New Jersey's highest court subsequently provided additional indirect support for the overlap by recognizing the sweeping authority of the Commissioner's authority except where the dispute arises exclusively outside the school laws.[22] Similarly supporting this interpretation from the converse side, New Jersey's PERA authorizes binding arbitration via CBAs with the express exception that it "may not replace or be inconsistent with any alternate statutory appeal procedure."[23] The respondent's theory would, contrary to this overriding exception, replace the alternate statutory appeal procedure, which in this case is the Commissioner's legislatively specified broad authority.[24]

Limited to deciding the Respondent's dismissal motion, this interim or interlocutory arbitration decision does not extend to the issue of the choice between the two arbitration mechanisms in this overlapping area. That issue is not before me and is better addressed as a

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[21] Wright v. Bd. of Educ. of E. Orange, 491 A.2d 644, 647 (N.J. 1985). In affirming the appellate division's ruling that § 18A:17-3 does not foreclose the disputed CBA provision, the holding was limited to the negotiability of this provision, specifically that "[this] subject is a proper topic for collective negotiations." *Id.* at 649. Thus, other than its cited reasoning, the *Wright* decision did not address the jurisdictional issue of this dismissal. The other decision upon which the respondent relied was a scope, or negotiability, ruling, and it was at the administrative agency, not judicial, level. Elizabeth Bd. of Educ. v. Elizabeth Educ. Ass'n, 1996 NJ PERC LEXIS 229; 22 NJPER ¶ 27221 (1996). It was one of a long line of PERC decisions that refused to restrain grievance arbitration of nonrenewals and terminations of classified school personnel, including custodians in the hybrid category. Even if these agency determinations were binding here, they do not address the opposite situation, which is the respondent's attempt to restrain statutory arbitration based on the convergence or intersection of the CBA.

[22] See, e.g., Bd. of Educ. of E. Brunswick Twp. v. Twp. Council of E. Brunswick Twp., 223 A.2d 481, 485 (N.J. 1996).

[23] N.J. STAT. ANN. § 34:13A-5.3.

[24] *See supra* note 11.

policy matter by the legislature[25] or perhaps the two administrative agencies (i.e., the N.J. Department of Education and the N.J. PERC).[26] Moreover, in this case it is undisputed that my appointment preceded the level 2 grievance, which may or may not reach the fifth level of the CBA's multi-step process; thus the effect of this proceeding on contractual arbitration and vice versa are merely speculative at this point.

In conclusion, the Respondent's motion is denied. The CBA does not preempt or the undersigned arbitrator's subject matter jurisdiction of this dispute.

Perry A. Zirkel, Arbitrator

9/06/17
Date

[25] For example, in the Pennsylvania legislation for tenured professional staff members, the employee has the initial choice of CBA arbitration, if exercised within 10 days, with the statutory hearing mechanism otherwise being preemptive. 24 PA. STAT. § 11-1133.

[26] For example, using the *Collyer* doctrine as a partial analogy, one possible alternative is for PERC to adopt a deferral posture, effectively restraining CBA arbitration where the matter is undergoing a hearing under the statutory arbitration mechanism. *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971) (abstaining from unfair labor practice proceedings for refusal to bargain where the issue is subject to arbitration).

325-17

IN THE MATTER OF THE CERTIFICATES : COMMISSIONER OF EDUCATION

OF MICHAEL J. MARTINO. : DECISION

SYNOPSIS

Appellant Michael J. Martino challenged the determination of the New Jersey State Board of Examiners (Board) that his criminal indictment – on charges of sexual assault, endangering the welfare of a child, and official misconduct involving a former student – warranted the suspension of his teaching and supervisory certificates, effective immediately, pending resolution of the criminal proceedings against him. On appeal, Martino maintained that the Board's decision should be vacated, arguing, *inter alia*, that his due process rights were violated when the Board took summary action to suspend his teaching certificates during the pendency of his criminal case.

The Board maintained, *inter alia*, that the decision to suspend the appellant during the pendency of the criminal case against him was not arbitrary, capricious or contrary to law. Further, the Board contended that the appellant was afforded due process, as his underlying conduct was not in dispute, and appellant was given the opportunity to present evidence both in writing and in person. The Board argued that there was sufficient justification for appellant's suspension, and urged the Commissioner to affirm same.

Upon review, the Commissioner – whose scope of review in matters involving decisions of the Board, including determinations to suspend teaching certificates, is appellate in nature – concurred with the Board that just cause exists for suspension of appellant's certificates during the pendency of the criminal case against him. Accordingly, the decision of the Board was affirmed for the reasons expressed therein.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 3, 2017

STATE BOARD OF EXAMINERS DOCKET NO. 1516-133
AGENCY DOCKET NO. 2-6/17A

IN THE MATTER OF THE CERTIFICATES	:	COMMISSIONER OF EDUCATION
OF MICHAEL J. MARTINO.	:	DECISION

Order of Suspension by the State Board of Examiners, May 12, 2017

For the Respondent-Appellant, Nicholas Poberezhsky, Esq.

For the Petitioner-Respondent State Board of Examiners, James M. Esposito, Deputy Attorney General (Christopher S. Porrino, Attorney General of New Jersey)

Appellant challenges the determination of the New Jersey State Board of Examiners (Board) that his criminal indictment warranted the suspension of his Teacher of Mathematics Certificate of Eligibility with Advanced Standing, and his Teacher of Mathematics and Supervisor certificates – effective immediately – pending resolution of the criminal proceedings against him.

On appeal, Martino maintains that the Board's decision to suspend his certificates should be vacated.[1] Appellant argues that the Board violated his due process rights when it took summary action to suspend his teaching certificates during the pendency of his criminal case. Furthermore, appellant argues that the Board acted without knowledge of the truthfulness of the charges filed, and therefore, has no legitimate basis upon which it can suspend his certificates. Finally, Martino notes that he has resigned from his teaching position and will not be performing any work related to his certificates until the criminal case is resolved; he argues that there is no practical benefit or public policy consideration that would justify the suspension, especially since

[1] Martino relies on his prior submissions to the Board in support of his appeal.

the Criminal History Review Unit would alert any prospective employer of appellant's indictment if he applied for a teaching position in the State.

In opposition, the Board maintains that the decision to suspend appellant pending the resolution of the criminal case against him was not arbitrary, capricious or contrary to law, and should be affirmed by the Commissioner. The Board submits that there was sufficient justification for the suspension and that it acted reasonably in suspending appellant's teaching certificates, based on applicable law and the public interest in protecting the safety of school children. The Board further maintains that the appellant was afforded due process, as appellant's underlying conduct was not in dispute, and he was given the opportunity to present evidence both in writing and in person.

The Commissioner's scope of review in matters involving decisions of the Board, including determinations to suspend teaching certificates, is appellate in nature. *N.J.A.C.* 6A:4-4.1(a). In other words, absent a demonstration by appellant that the Board acted in an arbitrary, capricious or unreasonable manner, the Commissioner may not overturn the Board's decision.[2] *See id.*; *see also B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration." *Bayshore*, 122 *N.J.Super.* at 199-200. As such, the Commissioner may not substitute her own judgment for that of the Board where due process has been afforded and where exists sufficient credible evidence in the record to serve as a basis for the decision rendered by the Board.

[2] Arbitrary and capricious means "willful and unreasoning action, without consideration and in disregard of circumstances." *Bayshore Sew. Co. v. Dep't of Envt. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

As a preliminary matter, the record reflects that appellant was afforded the necessary due process throughout the proceedings before the Board: appellant was provided notice, and he was given an opportunity to submit evidence for the Board's consideration and to appear before the Board. *See N.J.S.A.* 52:14B-9. In fact, prior to the hearing, appellant notified the Board that he was waiving his right to appear before the Board and would rely on his previous written submissions.

Upon consideration of the record and all submissions, the Commissioner concurs with the Board – for the reasons set forth in the May 17, 2017 Order of Suspension – that just cause exists to suspend appellant's certificates during the pendency of the criminal case. It is undisputed that the appellant has been indicted on charges of Sexual Assault in the Second Degree, Endangering the Welfare of a Child in the Second Degree, and Official Misconduct in the Second Degree. The allegations related to these charges include appellant knowingly engaging in acts of sexual penetration with his student on numerous occasions while she was a minor. It is further undisputed that if appellant is found guilty of the charges, he will be disqualified from public employment. The record also reveals that Martino admittedly developed and maintained a relationship with his student that extended beyond a typical student-teacher relationship, which was inappropriate and unbecoming of a teaching staff member. Therefore, the Board's determination – in connection with the pending charges – is fully supported by the record, and consistent with applicable law and public policy. It is evident that the Board has considered the issues presently on appeal, and there is nothing in the record to suggest that the Board's decision was arbitrary, capricious or unreasonable; as such, the Commissioner finds no basis upon which to disturb the Board's decision to suspend appellant's teaching certificates for just cause pending resolution of the criminal matter.

Accordingly, the decision of the State Board of Examiners is affirmed for the reasons expressed therein.[3]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 11/03/17

Date of Mailing: 11/06/17

[3] This decision may be appealed to the Superior Court, Appellate Division, pursuant to P.L. 2008, c. 36 (*N.J.S.A.* 18A:6-9.1), and applicable Appellate Division rules.

367-17 L

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

KIMBERLEY HARRINGTON
Commissioner

December 20, 2017

Katherine A. Gilfillan, Esq.
Schenck, Price, Smith & King, LLP
220 Park Avenue
Florham Park, New Jersey, 07932

Re: *Board of Education of the Township of Parsippany-Troy Hills, Morris County, Agency Dkt. No. 280-11/17.*

Dear Ms. Gilfillan:

I have reviewed the petition in the above-captioned matter, wherein the Board seeks a determination from the Commissioner as to the following: (1) whether an immediate vacancy was created when a Board member submitted his resignation, and if so, what is the effective date of the vacancy for purposes of the Board filling said vacancy; and (2) whether the Board member's subsequent "retraction" of his resignation is effective absent any statutory or regulatory authority or Board policy.

Upon review of the request, I have determined not to entertain this matter – pursuant to *N.J.A.C.* 6A:3-2.1 – as the issues raised are not appropriate for declaratory ruling, and the Board's decision can be sufficiently guided by the legal authority cited in its petition. The issues raised by the Board in this matter are within the scope of authority and responsibility of a local board of education, with the Commissioner's role being limited to adjudication of appeals taken from adverse actions. The Commissioner cannot permit declaratory judgments to become a vehicle for prospectively deciding potentially contested cases.

Please note that my decision to deny this petition in no way forecloses the filing, or affects the adjudication, of any contested matter that may arise from actions taken in conjunction with the situation described in the Board's papers.

Accordingly, pursuant to *N.J.A.C.* 6A:3-2.1, your request for declaratory judgment is denied.

Sincerely,

Kimberley Harrington

Kimberley Harrington
Commissioner

KH/SLP/ATA
c: Nicholas Kumbaris, *pro se*
Board Secretary
Clerk, OAL

326-17

CHRISTOPHER LOMBARDI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the decision of the Eligibility Appeals Committee (EAC) of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying his request for a waiver of the Eight Semester Rule that would have allowed him to participate in baseball at New Providence High School for the 2017 season. Petitioner had played baseball for New Providence during the 2012-2013, 2013-2014, and 2014-2015 school years, but was placed on extended home instruction midway through his senior year (2015-2016) and not permitted on school grounds following behavioral incidents that the District deemed threatening, including taking a "selfie" with a gun and telling another student that he wanted to "shoot up the school." In June 2016, after having been declassified for 11th grade, the petitioner was reclassified by the District pursuant to an IEP for Attention Deficit Hyperactivity Disorder (ADHD) and learning disabilities, and was given a 5th year of educational services to address his academic deficiencies. Petitioner contended, *inter alia*, that the EAC's decision to deny his waiver request was arbitrary, capricious and unreasonable. He argued that the EAC's decision was discriminatory as it essentially concluded – with no evidentiary basis – that any actions that arise from a behavioral or psychological disability, as opposed to a learning disability, were within the petitioner's control.

On appeal, the NJSIAA contended, *inter alia*: that the petitioner was provided with due process; that, while not disputing that petitioner may have had academic difficulties which were exacerbated or caused by his ADHD, what led to the petitioner's inability to participate in baseball in 2016 were his disciplinary problems, not academic issues; further, the EAC considered all relevant evidence, including all medical reports and petitioner's 5th year IEP, but determined that they did not support a finding that the petitioner required an extra year of athletic eligibility due to circumstances beyond his control. The NJSIAA requested that the Commissioner affirm the decision of the EAC.

The Commissioner upheld the NJSIAA's decision and dismissed the petition, finding that petitioner did not meet his burden to show that the EAC's denial of his waiver request was arbitrary, capricious or unreasonable. In so deciding, the Commissioner – who may not substitute her judgment for that of the NJSIAA on appeal – noted that the record in this matter is devoid of any evidence that the EAC's application of NJSIAA's eligibility rules and waiver requirements in this case was discriminatory in nature. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 3, 2017

AGENCY DKT. NO. 73-4/17

CHRISTOPHER LOMBARDI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

For Petitioners, Laura A. Siclari, Esq. (McCusker Anselmi Rosen Carvelli)

For Respondent, Michael W. Herbert, Esq. (Parker McCay, P.A.)

This case involves an appeal of a decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying petitioner Christopher Lombardi's request for a waiver of the Eight Semester Rule that would have allowed him to participate in baseball at New Providence High School for the 2017 season.[1]

Athletic competition in New Jersey's public schools is overseen by respondent, NJSIAA, a voluntary, non-profit organization which promulgates the rules and regulations governing high school athletics. *See, B.C. v. Cumberland Reg. Sch. Dist.*, 220 *N.J. Super.* 214, 234 (App. Div. 1987). Article V, Section J of NJSIAA's Bylaws, Rules and Regulations restricts a student's eligibility to play sports to four years. Specifically, the provision known as the Eight Semester Rule provides that, "[n]o student shall be eligible for high school athletics after the expiration of eight consecutive semesters following his or her entrance into the 9th grade. A student becomes ineligible for high school athletics when the class in which he/she was

[1] Petitioner requested emergent relief in this matter and on April 24, 2017 the Commissioner issued a decision denying the petitioner's request for emergent relief. Despite the fact that the 2017 baseball season is over, the petitioner has requested that the matter move forward because he is seeking a determination from the Commissioner that the NJSIAA discriminated against him based on his behavioral disability.

originally enrolled has graduated." The NJSIAA Guidelines set forth the reasons for the Eight Semester Rule in the NJSIAA Handbook:

> This rule is intended to prohibit "red shirting," and is also aimed at preventing athletically gifted pupils who are not meeting academic standards from replacing other students who are maintaining their academic standards but who might not have the same athletic prowess. The rule is also aimed at maintaining a uniform progression among all member schools within a four-year cycle and equalizing competition within these schools.

In appropriate cases, the NJSIAA may grant a waiver of the eligibility rules if the overall objectives of the association and its member schools will not be undermined. The Eight Semester Rule can be waived when a student proves that he or she cannot comply with the rule due to circumstances beyond his or her control.

The underlying facts in this matter are not in dispute. The petitioner participated in baseball at New Providence High School during the 2012-2013, 2013-2014, and 2014-2015 school years. The petitioner received special education services pursuant to an Individualized Education Plan (IEP) during 9th and 10th grade at New Providence High School but was declassified for 11th grade. The petitioner did not play baseball during the 2015-2016 school year because midway through his senior year he was placed on extended home instruction and was not permitted on school grounds based on several behavioral incidents that the New Providence School District (District) deemed to be threatening.[2] Prior to his graduation, in June 2016, the District re-classified the petitioner pursuant to an IEP for Attention Deficit Hyperactivity Disorder (ADHD) and learning disabilities, and provided him with a 5th year of

[2] In one incident, petitioner took a "selfie" with a gun. In a second incident, petitioner told another student that he wanted "to shoot up the school," and advised the student to wear red so that petitioner could easily identify him and avoid taking aim at him.

educational services to address his academic deficiencies. In January 2017, the petitioner was placed at the Shepard School, an out-of-district placement for his 5th year of high school.

The petitioner applied to the NJSIAA for a waiver of the Eight Semester Rule so that he could participate on the New Providence High School baseball team in the spring of 2017 while he was receiving educational services at the Shepard School.[3] On February 7, 2017, the Eligibility Committee denied the petitioner's waiver request. The waiver request was then appealed to the Eligibility Appeals Committee (EAC). Following a hearing on March 6, 2017, at which sworn testimony was taken, the EAC determined that the petitioner did not qualify for a waiver of the eligibility rules.

In reaching its decision to deny the waiver request, the EAC recognized that the petitioner may have academic difficulties that have been exacerbated or caused by his ADHD; however, what led to the petitioner not playing baseball in the spring of 2016 were his disciplinary problems. As such, the EAC determined that the circumstances were not entirely beyond the petitioner's control – thereby making him ineligible for a waiver. The EAC also noted that because disciplinary problems contributed to the petitioner's inability to play baseball in 2016, it would not be appropriate to displace another student by giving the petitioner a waiver to play baseball.

On appeal, the petitioner contends that the EAC's decision to deny his waiver request is arbitrary, capricious and unreasonable, arguing that the decision was discriminatory because it attaches a negative inference to any non-academic related disability. The petitioner asserts that the EAC essentially concluded that any actions that arose from a behavioral or

[3] The Shepard School does not offer athletic teams so the petitioner would have to play for New Providence High School if he was granted a waiver. It should be noted that New Providence High School did not participate in the petitioner's appeal before the NJSIAA.

psychological disability, as opposed to a learning disability, were within the petitioner's control. Yet there is no medical or evidentiary basis for the EAC to have made such distinction.

The petitioner also contends that the EAC failed to consider all of his medical reports and the Shepard School IEP for the spring 2017 semester, which establish that his difficulties were disability-based and outside of his control, and resulted in him having to attend schooling beyond his senior year. The highly unusual decision of the District to reclassify the petitioner before graduation and retain him for an extra year of educational services should have been afforded significant weight by the EAC in establishing that the petitioner's circumstances were outside of his control. Therefore, based on the petitioner's diagnoses of ADHD, learning disabilities and lack of control over his behavior, the EAC should have determined that having to repeat 12th grade was not within his control. As a result, the petitioner should have been granted an eligibility waiver and allowed to participate in baseball during the spring of 2017.

In reply, the NJSIAA asserts that the petitioner received full and fair due process, noting that two separate committees – the Eligibility Committee and the EAC – convened to carefully consider the petitioner's waiver request. The NJSIAA further stresses that the eligibility rules are designed to ensure that all students have an equal opportunity to play high school sports, and limits that opportunity to four years. The Interpretive Guidelines make clear that waivers of the Eight Semester Rule should only be granted "where it is determined that a student cannot comply because of circumstances beyond his/her control."

In this case, the evidence presented to the EAC demonstrates that the circumstances that led to the petitioner's ineligibility were not entirely beyond his control. Specifically, the petitioner engaged in multiple threatening behaviors that led to his removal from school during the spring semester of his fourth year of high school, thereby causing him to

miss the 2016 baseball season. The NJSIAA does not dispute that the petitioner may have had academic difficulties that were exacerbated or caused by his ADHD; however, what led to the petitioner's inability to participate in baseball in 2016 were his disciplinary problems, not his academic problems. Contrary to the petitioner's assertions, the EAC considered all relevant evidence, including all medical reports and the Shepard School IEP, but determined that they did not support a finding that the petitioner required an extra year of athletic eligibility due to circumstances beyond his control. Therefore, the NJSIAA requests that the Commissioner affirm the decision of the EAC.

It is well-established that the Commissioner's scope of review in matters involving NJSIAA decisions, including determinations made by the EAC, is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a)(2); *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Nor may the Commissioner substitute his own judgment for that of the NJSIAA, where due process has been provided and where there is sufficient credible evidence in the record as a whole to serve as a basis for the decision reached by the NJSIAA. *N.J.A.C.* 6A:3-7.5(a)(1); *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259. Petitioners seeking to overturn decisions of the NJSIAA therefore bear a heavy burden.

Considering the record of this matter in light of the prescribed standard of review, the Commissioner affirms the decision of the EAC. After the petitioner was afforded the

requisite due process, the EAC determined that a waiver of the eligibility rules should not be granted in this case because the circumstances that caused the petitioner to miss a semester of high school athletics were not beyond his control. Specifically, the EAC found that the petitioner's actions, i.e. taking the gun "selfie" and threatening "to shoot up the school" that led to his removal from school grounds for the spring 2016 semester, were not beyond his control. The petitioner has not demonstrated on appeal that the EAC's assessment of those circumstances was arbitrary, capricious or unreasonable. The District's decision to provide the petitioner with a 5th year of educational services does not mean that the events that led to the petitioner being out on extended home instruction for the spring 2016 semester were beyond his control. Moreover, the record is devoid of evidence that the EAC's application of the NJSIAA's eligibility rules and waiver requirements in this case was discriminatory in nature.

Accordingly, the EAC's decision denying the request for waiver is upheld and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 11/03/17

Date of Mailing: 11/06/17

[4] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

327-17

327-17

R.M. AND K.M., ON BEHALF OF MINOR CHILDREN, M.M., E.M., AND T.M.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged the decision of the Franklin Township Board of Education (Board) to assign a school bus stop 0.9 miles from petitioners' home, in lieu of allowing the bus driver to pick up the children in their driveway. Petitioners contend that a previous bus driver picked the children up at their home, which involves making a "K- turn" in petitioners' driveway. Petitioners contended that the approved bus stop .9 miles from their house requires the children to walk along the shoulder of a narrow and winding country road, which they argue is especially dangerous in winter weather. The Board asserted that the assigned bus stop was appropriate under the District's policies governing the assignment of transportation routes and services, and the District policy governing transportation safety standards. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; local school boards are given broad discretion to determine appropriate bus routes and stops for school children; the decisions of local boards will only be overturned if those decisions are shown to be arbitrary, capricious or unreasonable; here, the district assigned a bus stop .9 miles from petitioners' home that it determined to be appropriate and safe; a previous bus company or driver had customarily picked up petitioners' children at their home, using a private driveway to make a K-turn on a public road (in violation of the District's policy governing transportation safety standards) in order to avoid navigating over a narrow bridge for which the school bus exceeds the weight limit; a new bus driver assigned to petitioners' route was unwilling to pick up the children at their residence, and instead stopped at the District-assigned bus stop; after filing their appeal, petitioners were twice provided opportunity to be heard by the Board; after the petitioners' first appearance before the Board, the Board determined the bus stop in question to be appropriate under its policies and regulations, and further directed an investigation to ensure the safety of the assigned bus stop and the logistics of possibly rerouting the bus; following the investigation, the Board affirmed its decision to maintain the assigned bus stop. The ALJ concluded that petitioners did not meet their burden to demonstrate that the decision of the Board to maintain the present bus stop was arbitrary, unreasonable or otherwise discriminatory. Accordingly, the ALJ denied petitioners motion for summary decision, and granted the Board's motion for summary decision.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 3, 2017

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND DENYING PETITIONER'S APPLICATION FOR SUMMARY DECISION
OAL DKT. NO. EDU 14237-16
AGENCY DKT. NO. 240-9/16

R.M. AND K.M. ON BEHALF OF M.M., E.M., AND T.M.,
Petitioners,
v.
TOWNSHIP OF FRANKLIN, BOARD OF EDUCATION, HUNTERDON COUNTY,
Respondent.

Paul N. Barger, Esq., for petitioners (Barger & Gaines, attorneys)

Janelle N. Winters, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: August 18, 2017 Decided: September 26, 2017

BEFORE **JOSEPH A. ASCIONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioners, R.M. and K.M. o/b/o M.M., E.M., and T.M. (petitioners), challenge the Franklin Township Board of Education's ("Board,") decision to maintain a school bus stop 0.9 miles from petitioners' home in lieu of allowing the bus driver to pick up the children at their home and make a "K-turn" in petitioners' private driveway as arbitrary, capricious or unreasonable.

On September 23, 2016, the New Jersey State Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-8.2. On May 19, 2017, the petitioners moved for summary decision, seeking to reverse the Board's determination. On May 25, 2017, respondent opposed said motion and filed a cross motion for summary decision. The record closed on August 18, 2017.

FACTS

The parties submitted a motion and cross motion for summary disposition. There is no discrepancy between each's factual presentations and accordingly, the matter is ripe for a summary decision application. The parties submitted a twenty-two paragraphs statement of undisputed facts with attached Exhibits A to G; and a Joint Exhibit List containing Exhibits J-1 through J-26, inclusive. Both documents are accepted and are marked as CT-1 and CT-2, respectively. The tribunal also accepts CT-3, a CD-Rom of images of the roadway in evidence. Although River Road is not a formal two-lane road, it appears wide enough to allow cars to pass by one another. There are grassy shoulders along the road which are obviously not unsafe for pedestrians to use. The road itself is relatively flat and unremarkable in character. Although there is a twenty-five mile-per-hour speed limit posted near the bridge there is no indication in the record of the speed limit along River Road itself. I **FIND AS FACT** the following:

1. M.M., aged five, E.M., aged nine, and T.M., aged twelve, all reside within the Franklin Township School District ("District"), Hunterdon County.

2. District Policy 3541.1 and Regulation 3541.1R govern the assignment of transportation routes and services.

3. District Policy 3541.33 governs the transportation safety standards.

4. The District assigned a bus stop that is 0.9 miles from their residence.

5. Previously, the bus company or prior driver, picked up the petitioners at their home by navigating over a bridge, and traveling down a paved uncovered road without sidewalks. The driver used the petitioners' private driveway to make a K-turn and return over the bridge.

6. The tonnage capacity of the bridge is lower than the tonnage of the bus.

7. The use of a private driveway to make a K-turn on a public road is against the District policy 3541.33.

8. The new bus driver assigned to petitioners' route would not drive down to petitioners' residence.

9. Petitioners challenged the Board's designated bus stop. Petitioners were afforded an opportunity to be heard on September 29, 2014. The Board determined the bus stop to be appropriate under the Policy and Regulations identified above.

10. Petitioners again raised the bus stop issue in April 2016. The Board directed an investigation which was conducted. The investigation revealed the logistics of rerouting the bus route.

11. On May 31, 2016, the petitioners' request to move the bus stop was denied, and petitioners were advised of their appeal rights. Petitioners took an appeal and were again heard by the Board on June 20, 2016.

12. On July 26, 2016, the Board affirmed their prior decision.

LEGAL DISCUSSION

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). Herein, there is no dispute as to any material fact.

N.J.S.A. 18A:39-1 provides that for "elementary school pupils who live more than two miles from their public school of attendance or secondary school pupils who live more than 2 ½ miles from their public school of attendance, the district shall provide transportation to and from school...." However, local school boards are given broad discretion to "make reasonable classifications for furnishing transportation, taking into account differences in the degree of traffic and other conditions existing in the various sections of the district." Buonocore v. Hillsdale Bd. of Educ., 92 N.J.A.R.2d (EDU) 655, 658 (internal citations and quotation marks omitted). "It is well-settled that a local school board's action lying within their discretion will not be overturned unless it is arbitrary, without rational basis, or induced by improper motives." Lemma v. Bd. of Educ. of Twp. of Branchburg, EDU 8953-97, Initial Decision (July 22, 1998) (citing Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288 (App. Div. 1960)), adopted, Comm'r (August 28, 1998) < https://njlaw.rutgers.edu/collections/oal/ >.

Further, "responsibility for the removal of traffic safety hazards belongs to the municipal governing authority rather than to the school boards." Mr. & Mrs. T.F.S. ex rel. J.R.S. v. S. Brunswick Twp. Bd. of Educ., EDU 10118-05, Initial Decision (June 29, 2006) (citing Schrenk v. Ridgewood Bd. of Educ., 1961 S.L.D. 185, 187)), adopted, Comm'r (August 4, 2006), < https://njlaw.rutgers.edu/collections/oal/ >. That maxim notwithstanding, both "the manner in which the Board designs a walk route and student

safety are factors to be considered in assessing whether the Board acted in an arbitrary, capricious, or unreasonable way." Ibid. (citations omitted). Thus, "[w]hether a walk route is safe depends on the surrounding facts." Ibid. (internal citations omitted).

Herein, petitioners argue that the instant case is similar to Shrewsbury v. Holland Twp. Bd. of Educ., 96 N.J.A.R.2d (EDU) 795; 97 N.J.A.R.2d (EDU) 416, in which the State Board of Education ultimately concluded that a school board's decision to not provide minibus service to the petitioners' home was arbitrary, capricious and unreasonable because the petitioners offered to construct, at their own expense, a minibus turnaround on their property, which "would [have] alleviate[d] the Board's concerns regarding a sight distance and turnaround problem" and saved the minibus from having "to navigate the sharp 'S' curves located beyond petitioners' home."

In Shrewsbury, the petitioners sought to relocate a bus stop 0.3 miles south of their home on the top of a hill. 96 N.J.A.R.2d (EDU) 795, 796. The road in question had no sidewalks or shoulder to walk on. Ibid. For this reason, it was necessary at times for the children to walk in the roadway. Ibid. Alternative paths would have involved land leased to a hunting club or trespassing onto a neighbor's property. Ibid. The petitioners provided a video showing how the district's buses made K-turns on other township roads where it was impossible both to see and be seen by oncoming traffic during the turn. Ibid. Petitioners had unsuccessfully tried for many years to pay for the construction of a turnaround on their property if the district agreed to extend minibus service closer to their home. Id. at 797. The ALJ found the argument that the bus stop could not be relocated for safety reasons rang hollow, in light of the use of more dangerous maneuvers on similar routes—citing to the video as highly persuasive. Id. at 798.

The ALJ's initial decision was, however, rejected by the Commissioner on the basis that the safety of the bus stop was not in doubt, the safety of the route to the bus stop was a municipal concern and other similarly situated students were not being treated differently. Id. at 799. On appeal, the State Board overturned the decision of the

Commissioner. 97 N.J.A.R.2d (EDU) 416. According to the State Board, "our review herein is not limited to the safety of the existing bus stop or the Board's jurisdiction over safety conditions on the Township's roads. Rather, the standard is whether the Board abused its discretion in refusing to extend minibus service to petitioners' home." Id. at 417. The State Board, agreeing with the ALJ, found the decision to not extend service arbitrary and capricious especially because the petitioners had offered to finance a turnaround, a study by respondent's engineer had found placing a turnaround on the property a feasible solution and the persuasive use of the video by the petitioners to make their case.

In opposition, the Board cites Lemma, supra, and T.F.S. ex rel. J.R.S., supra, among other cases, to argue that its decision was reasonable and within its discretionary authority. In Lemma, the petitioner sought to relocate a bus stop approximately one mile from his home. Lemma, supra. The petitioner's children at the time were ages six and nine respectively and, to get to their bus stop, they had to walk through "a half-mile uninhabited area with no sidewalks or street lighting and along an often foggy 50 MPH road with blind curves." Ibid.

However, the school board in Lemma successfully argued that its decision was "based on information leading them to believe that the bus stop met the requirements for the [petitioner's] children's safety," and that accommodating petitioner's request would put other children's safety at risk because the bus would have to navigate and make a K-turn on a narrow, dead-end road. The ALJ contrasted the case to Shrewsbury, noting the persuasive factors present in that case were not present in Lemma.

Likewise, in T.F.S. ex rel. J.R.S., the district implemented a plan to eliminate bussing and establish a walking route from petitioner's home to the school. T.F.S. o/b/o J.R.S., supra. Therein, petitioners challenged the plan based on the speed limit of forty-five miles per hour and other traffic safety concerns. Ibid. Although there were

sidewalks along the walking route, petitioners raised concerns about students walking in the road after snow storms—because neighbors did not consistently shovel their portion of the sidewalk. The ALJ concluded, however, that the "Board literally spent years studying and deliberating the merits of requiring students ... to become walkers" and made its decision only after the police department approved the walking route. For that reason, the ALJ found the decision did not rise to the level of arbitrary and capricious, nor did the district abuse their discretion in discontinuing some bussing routes for financial reasons. Ibid.

Here, petitioners' children have been asked to walk along a winding country road to their assigned bus stop. Petitioners assert that the road is narrow and questions the usability of the shoulder, especially in winter weather. However, based on a review of the images provided in the attached exhibits, the road contains no obvious safety concerns and a relatively wide shoulder. There is no indication of the speed limit along River Road in the portions the children must walk and petitioners have not claimed that anyone travels the road at dangerously high speeds.

The Board's investigation was thorough and involved experts, physical inspections of the route and ultimately a determination that the path to the bus stop was safe as a walking route. Petitioners have not shown that the Board ignored obvious dangers in making their determination. Indeed, the Board followed the established policy in rejecting both the use of K-turns and similar maneuvers in private driveways. This case is unlike Shrewsbury, where the respondent allowed other busses to take unsafe risks and official policy permitted the district's engineer to consider the use of private property for the construction of a turnaround—even finding it feasible to do so.

Further, River Road is comparatively safer than the roadway approved as sufficiently safe in Lemma because there are no apparent blind turns, claims of regular visual impairment or high speed limits. Likewise, while petitioners have pointed to weather conditions comparable to those in T.F.S. ex rel. J.R.S., that route was

approved after the safety of the route was investigated and approved. Snow and other infrequent extreme weather are insufficient to make approval of a walking route by a district, especially after an investigation into its safety, arbitrary and capricious.

Finally, although petitioners use the word "discriminates" in their supporting brief, there is no indication or claim that other similarly situated individuals have been treated differently by the school district. Thus, petitioners have not shown the refusal to relocate the bus stop and use their private driveway is discriminatory and therefore arbitrary, capricious or unreasonable.

Local boards have wide discretion to determine appropriate bus routes and stops for school children. The decisions of local boards will only be overturned if arbitrary, capricious or otherwise unreasonable.

The Board herein thoroughly investigated the possibility of moving the bus stop, but determined that the route would require the bus to make risky or otherwise dangerous maneuvers and found that the walking route from petitioners' home to the established bus stop was non-hazardous. Petitioners, however, have not shown that the roadway was unreasonably dangerous or that the Board had otherwise acted in an arbitrary or discriminatory fashion in denying their bus stop proposal.

CONCLUSION

I **CONCLUDE** petitioners have not met their burden to demonstrate that the decision of the Board, in maintaining the present bus stop in lieu of having the school bus execute a K-turn in Petitioners' private driveway in order to avoid driving over a bridge for which the school bus exceeds the weight limit, was arbitrary, capricious, unreasonable or otherwise discriminatory.

I **CONCLUDE** petitioners' motion for summary decision should be **DENIED**.

I **CONCLUDE** as the record is sufficiently ripe for a determination, the respondent's motion for summary decision dismissing the petition should be **GRANTED**.

ORDER

Based on the foregoing, it is **ORDERED** that the petition's motion for summary decision is **DENIED**; and the respondent's motion for summary decision is **GRANTED,** and the petition is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey**

08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 26, 2017
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 9/26/17

Date Mailed to Parties: 9/26/17

/tat

APPENDIX
LIST OF WITNESSES

For Petitioner:

None

For Respondent:

None

LIST OF EXHIBITS

For Petitioner:

P-1 Summary Decision Motion and attachments

For Respondent:

R-1 Cross Motion for Summary Decision and Opposition to Summary Decision

Court Exhibits

CT-1 Statement of Undisputed Facts (Twenty-Two Paragraphs)

CT-2 Joint Exhibit List (J-1 to J-26, inclusive)

CT-3 Roadway Images on CD-Rom

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OAL DKT. NO. EDU 14237-16
AGENCY DKT. NO. 240-9/16

R.M. AND K.M., ON BEHALF OF MINOR CHILDREN, M.M., E.M., AND T.M.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ) – for the reasons thoroughly set forth in the Initial Decision – that the Board did not act in an arbitrary, capricious, or unreasonable manner when it maintained the present bus stop .9 miles from petitioners' home, rather than permitting the school bus to drive over a bridge, for which it exceeds the weight limit, or make a K-turn in petitioners' driveway. The Commissioner further concurs with the ALJ that there are no apparent safety concerns on the route from petitioners' home to the bus stop, as River Road has not been designated a hazardous roadway.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 11/03/17
Date of Mailing: 11/03/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

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OAL DKT. NO. EDU 07125-17
AGENCY DKT. NO. 90-5/17

S.F., ON BEHALF OF MINOR CHILD, A.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, it is noted that the settlement makes reference to a monthly payment schedule, intended to begin on October 1, 2017. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

Subject to the foregoing, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed – subject to compliance with the terms of the settlement – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 11/06/17

Date of Mailing: 11/08/17

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07125-17

AGENCY DKT. NO. 90-5/17

S.F. on behalf of minor child, A.M.,

Petitioner,

v.

BOARD OF EDUCATION OF UNION TOWNSHIP UNION COUNTY,

Respondent.

S.F. o/b/o minor child, A.M., pro se

Stephen J. Christiano, Esq. (Sciarillo, Cornell, Merlino, McKeever & Osborne, LLC, attorney)

Record Closed: September 26, 2017 Decided: September 29, 2017

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 19, 2017, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The matter was scheduled for a hearing on August 17, 2017, but the date was adjourned because the parties reached a settlement of all issues in dispute. The signed Settlement Agreement indicating the terms of settlement was forwarded to the undersigned on September 27, 2017 and is attached and fully incorporated herein.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

9/29/17

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: 10-4-17

Date Mailed to Parties: OCT 4 2017

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SCIARRILLO, CORNELL, MERLINO, MCKEEVER & OSBORNE, LLC
238 St. Paul Street
Westfield, New Jersey 07090
(908) 481-5000
Attorneys for Respondent, Union Township Board of Education

S.F., on behalf of minor child, A.M. Petitioner, -vs- BOARD OF EDUCATON OF THE TOWNSHIP OF UNION, UNION COUNTY Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY DOCKET NO. EDU 07125-2017 AGENCY REF. NO. 90-5/17 **SETTLEMENT AGREEMENT**

The parties, having amicably resolved their differences, hereby stipulate as follows:

1. S.F., the mother of A.M., has relocated with her daughter to Georgia, where A.M. now attends school.

2. After a residency investigation of S.F. this past school year, the Union Township Board of Education ("Board/District") determined that S.F. was not legally domiciled in Union Township and that A.M. was thus not eligible to attend school in the District.

3. S.F. then filed the instant residency appeal with the Commissioner.

4. The Board counterclaimed for tuition for the period of A.M.'s ineligible attendance.

5. The period of A.M.'s ineligible attendance was 84 school days at a tuition rate of $77.56 per day, making for a total due the Board of $6,515.

6. S.F. has agreed to pay the above amount in installments. Her first payment of $500 is due October 1, 2017. On the first day of each succeeding month, S.F. will make a payment of $300. Monthly payments shall continue until the amount of $6,515 is paid in full. S.F. shall have fifteen (15) days from the first day of each month to make the required payment. If payment is not made by the 15th day of the month, S.F. will be declared in default, which shall permit the Board to begin the process of having the unpaid tuition amount entered as a judgment against S.F. All checks/money orders for payment shall made payable to the Union Township Board of Education and mailed/delivered to this office.

7. The parties have entered into this Settlement Agreement to avoid the expense and inconvenience of a residency hearing in the Office of Administrative Law.

8. In reliance upon S.F.'s representation that she and her daughter are now domiciled in Georgia, the Board will not continue legal proceedings for the removal of A.M. from its District.

9. S.F.'s residency appeal is dismissed with prejudice and in consideration of the settlement of this matter, S.F. shall release the District from any and all claims, rights and liability, including but not limited to any and all claims for attorneys' fees, compensatory education, money damages, civil liability, or any other legal and equitable relief to which S.F. may be entitled through the date of the execution of this Settlement Agreement.

10. This Agreement contains the entire agreement and understanding between the parties and constitutes a full and final agreement on any and all issues.

11. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. The parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they have reviewed this Agreement in detail with their counsel or representative and fully understand the requirements and limitations.

12. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.

13. This Agreement is subject to ratification by the Union Township Board of Education and approval by the New Jersey Commissioner of Education.

_____ Date:_____
Petitioner

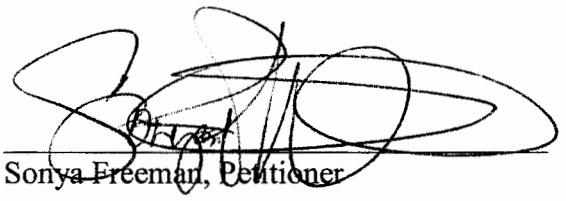
UNION TOWNSHIP BOARD OF EDUCATION

By:_____ Date: 9/13/11

11. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. The parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they have reviewed this Agreement in detail with their counsel or representative and fully understand the requirements and limitations.

12. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.

13. This Agreement is subject to ratification by the Union Township Board of Education and approval by the New Jersey Commissioner of Education.



Sonya Freeman, Petitioner

Date: 9/15/17

UNION TOWNSHIP BOARD OF EDUCATION

By:_____

Date:_____

E-5. APPROVE SETTLEMENT AGREEMENT FOR A.M.

Approve Settlement Agreement for A.M., in accordance with the information appended to the non-public minutes.

I certify that the foregoing resolution was adopted by the Township of Union Board of Education at its worksession meeting on September 12, 2017.

(SEAL)

GREGORY E. BRENNAN
BOARD SECRETARY

330-17

330-17

IN THE MATTER OF THE TENURE HEARING OF PETER ELBERT, JOSEPH ARMENTAL, JOSEPH BELL, NOEL GORDON, NICOLE CARTWRIGHT, VENUS ROSE, LUIS SANCHEZ, AND JAMAYLA SCOTT, SCHOOL DISTRICT OF THE CITY OF ENGLEWOOD, BERGEN COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In September 2017, the School District of the City of Englewood filed tenure charges against eight teaching staff members, together with a motion for a protective order because of personally identifiable student information contained therein; consequently, the charges and accompanying statement of evidence were temporarily sealed. Subsequently, counsel for the respondents in this matter filed motions to dismiss, arguing that the charges were not sufficient under statute and regulation because petitioner had filed one set of charges against all of the above named individuals.

The Commissioner found, *inter alia*, that: this matter rolls tenure charges against eight individual teaching staff members into a single case, contrary to the entire statutory scheme of *N.J.S.A.* 18A:6-10, et seq., which speaks in singular terms such as "person" or "individual"; in filing the charges in the present manner, petitioner has usurped the function of the Commissioner or an assigned arbitrator to issue a decision on consolidation; and the charges as filed also deprive respondents of their fundamental due process rights to a clear statement describing the precise nature of the charges against him or her, and a description of the evidence which allegedly supports the charges. The Commissioner concluded that the matter must be dismissed as procedurally defective. Accordingly, the petitioner was directed to reinstate the respondents to their tenured positions with full back pay and benefits. In so doing, the Commissioner noted that dismissals for procedural reasons are considered dismissals without prejudice; if petitioner chooses to re-file tenure charges based upon any of the allegations herein – against any or all of the individuals named in the within matter – it must comply with each of the statutory and regulatory requirements for certifying tenure charges. The Commissioner permanently sealed the present tenure charges and statement of evidence, which had previously been temporarily sealed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 8, 2017

330-17

AGENCY DKT. NO. 216-9/17

IN THE MATTER OF THE TENURE HEARING OF PETER ELBERT, JOSEPH ARMENTAL, JOSEPH BELL, NOEL GORDON, NICOLE CARTWRIGHT, VENUS ROSE, LUIS SANCHEZ, AND JAMAYLA SCOTT, SCHOOL DISTRICT OF THE CITY OF ENGLEWOOD, BERGEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For the Petitioner: Mark A. Tabakin, Esq.

For Respondents Cartwright, Rose, Sanchez and Scott: Sheldon H. Pincus, Esq.

For Respondents Elbert, Bell, Armental and Gordon: Andrew L. Schwartz, Esq.

This matter commenced on September 20, 2017, when the School District of the City of Englewood (hereinafter petitioner) filed tenure charges against eight teaching staff members, together with a motion for a protective order asserting that such an order was required because of personally identifiable student information; opposition to the motion having been filed by counsel on behalf of each of the individual respondents, the charges and accompanying statement of evidence were temporarily sealed, pending resolution of the motion by an arbitrator to be assigned pursuant to *N.J.S.A.* 18A: 6-17.1

On October 4, 2017 and October 5, 2017, however, counsel for the respondents each filed a motion to dismiss the charges, in lieu of answer, pursuant to *N.J.A.C.* 6A:3-5.3(a)(1). Both motions argued, *inter alia*, that the charges were not sufficient under statute and regulation because petitioner had filed one set of charges against all of the above named individuals, who include two principals, a vice principal, a director of guidance, three guidance counselors, and a social worker functioning as a guidance counselor. Petitioner filed a response to both motions to

dismiss on October 20, 2017, and replies were filed by both counsel for respondents on October 25, 2017.

Having reviewed all of the papers filed in conjunction with the motions to dismiss, the Commissioner concludes that the motions must be granted.

This is a matter of first impression. Every other set of tenure charges filed with the Commissioner, memory of man runneth not to the contrary, has charged a single tenured teaching staff member with inefficiency, incapacity, unbecoming conduct or other just cause in accordance with *N.J.S.A.* 18A:6-10, *et seq.* The respondents correctly point out that the entire statutory scheme speaks in singular terms, "person", "individual", etc., with the sole exception being the final sentence of *N.J.S.A.* 18A:6-10, which advises: "Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law." That sentence, however, is not a prescription for the filing of tenure charges, but merely clarification that persons under tenure may nevertheless be subjected to a reduction in force under appropriate circumstances. Furthermore, *N.J.A.C.* 6A:3-5.1 also speaks exclusively in the singular voice, e.g. "employee and the employee's representative," and although multiple respondents may be named in other contested cases filed with the Commissioner, the first sentence of the tenure regulations specifically states: "*N.J.A.C.* 6A:3-1.3, Filing and service of petition of appeal, shall not apply in a case of tenure charges filed with the Commissioner against an employee of a district board of education or a school district under full State intervention."

Petitioner argues in response that even if individual charges were required to be filed, the charges as filed nevertheless should be permitted because the charges meet the legal standards for consolidation of cases. Even if that were true, there is no motion for consolidation

pending and there are not eight individual cases such that some or all could be subject to an order of consolidation. In essence, what petitioner has done by filing in the manner it has is to usurp the function of the Commissioner or an assigned arbitrator to issue a decision on consolidation.

Severance is also not an option since the charges as written deprive respondents of their fundamental due process rights to a clear statement describing the precise nature of the charges against him or her, and a description of the evidence which allegedly supports the charges. In this matter as it currently stands, there are 750 paragraphs in thirty-three counts and each count realleges and incorporates the previous counts, such that the allegations against respondent Rose also include the allegations against respondent Cartwright; the allegations against respondent Scott also include the allegations against respondents Rose and Cartwright, etc.; the allegations against respondent Armental therefore include the allegations against all seven of the other respondents. There is simply no way this matter may be determined sufficient to require that answers be filed; consequently, it must be dismissed as procedurally defective. Accordingly, petitioner is directed to reinstate all of the respondents to their tenured positions with full back pay and benefits.

It should be noted that dismissals for procedural reasons are considered dismissals without prejudice. *See, In the Matter of the Tenure Hearing of Sabino Valdes, Union City School District*, OAL Docket No EDU 3620-01, confirmed *Valdes v. City of Union City Board of Education*, Docket No. A-1337-04T32007 *N.J. Super.* Unpub. LEXIS 622 (App. Div. 1/22/07), certif. den. 191 N.J. 317, 5/15/07. If petitioner chooses to again file tenure charges based upon any of the allegations in the within matter – against any or all of the individuals named in the within matter – it must comply with each of the statutory and regulatory requirements for certifying tenure charges.

The present tenure charges and statement of evidence, having been previously temporarily sealed, are hereby permanently sealed. They will not be returned to petitioner.

IT IS SO ORDERED.

Kimberley S. Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 11/08/17

Date of Mailing: 11/09/17

331-17

In the Matter of the Tenure Hearing of Michael Coe, School District of the City of Trenton, Mercer County, Agency Dkt. No. 43-3/17

DECISION

Before
Robert C. Gifford, Esq.
Arbitrator

Appearances:

For the School District:
Adam S. Herman, Esq.
Adams Gutierrez & Lattiboudere

For Michael Coe:
Arnold M. Mellk, Esq.
Edward A. Cridge, Esq. (On the Brief)
Mellk O'Neill

The City of Trenton Board of Education ["Board" or "Petitioner"], pursuant to N.J.S.A. 18A:6-10 *et. seq.*, certified tenure charges with the Commissioner of Education alleging that the Respondent Michael Coe had committed acts of conduct unbecoming and/or other just cause for dismissal based upon 41 counts of willful and intentional conduct of submitting weekly work records and payroll vouchers for extra duty work he did not actually perform but for which he was paid. The Board seeks to remove the Respondent from his tenured position.

On May 27, 2017, I received notice from M. Kathleen Duncan, the Director of the Bureau of Controversies and Disputes, New Jersey Department of Education, that this matter was referred to me pursuant to *N.J.S.A.* 18A:6-16 as amended by *P.L. 2012, c. 26.*

On March 28, 2017, I notified the parties that an informal settlement conference was scheduled for April 27, 2017. Settlement/pre-hearing conferences were held on April 27, May 12 and June 8, 2017. Although the conferences were productive, the parties were unable to reach a resolution to this matter.

The evidentiary proceedings were held at the Board's offices in Trenton, New Jersey on June 9, 15, 16, 22, 23 and 28, 2017.[1] A stenographic recording of

[1] The transcripts for the hearing dates shall be referred to in chronological order as T1 through T6.

the proceedings was taken. During the proceedings, the parties were given the opportunity to argue orally, examine and cross-examine witnesses and submit documentary evidence into the record.[2] Testimony was received from Lissa Johnson – Assistant Superintendent for the Office of Talent Acquisition and Development; Monique Harvey – Supervisor of Special Education, Home Instruction and Homeless Services; Leodito Yanogacio – Assistant Comptroller; Paula Bethea – Principal of Joyce Kilmer School; Jayne Howard – Business Administrator/Board Secretary; SGB – parent of student SB; Respondent Michael Coe; and Shawn Mitchell – Assistant Business Administrator/Comptroller.[3] Time extensions to hear and decide this matter were timely requested and granted.

The parties submitted post-hearing briefs on or before August 22, 2017. The Board submitted a reply brief on August 29, 2017.[4] The record was closed on August 30, 2017. With the consent of parties' Counsel, Director Duncan granted an extension of time until November 10, 2017 to issue this Decision.

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[2] Respondent's request to proceed with a Counterclaim was denied. [T5:6].
[3] Lisa Johnson's testimony is located at T1:12-92; Harvey's at T2:4-40; Yanogacio's at T2:40-85; Bethea's at T3:4-51; Howard's at T3:51-93; SGB's at T4:4-50; Respondent Coe's at T5:6-51, T6:4-166; and Mitchell's at T6:168-175.
[4] Respondent Coe did not file a reply brief.

RELEVANT PROVISIONS OF THE NEW JERSEY STATUTES

N.J.S.A. 18A:6-10. **Dismissal and reduction in compensation of persons under tenure in public school system**

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or

(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner;

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

STIPULATED ISSUE

Whether the City of Trenton Public Schools has proven that Michael Coe, a tenured teaching staff member, is guilty of conduct unbecoming and other just cause sufficient to warrant his dismissal from employment by the District? If not what shall be the appropriate remedy? [T1:5].

BACKGROUND

The parties submitted proposed findings of facts as part of their post-hearing briefs. I have adopted the findings of facts as modified herein.

Respondent Coe has been employed by the Board as a tenured teaching staff member for 17 years. The Respondent has never received a negative performance evaluation, and he has no prior formal discipline in his personnel file. [T5:50]. At all relevant times, the Respondent has been a member of the Trenton Education Association ["TEA"]. During the 2015-2016 and 2016-2017 school years, the Respondent was employed as Special Education Teacher assigned to the Joyce Kilmer Middle School.

For the 2015-2016 and 2016-2017 school years, the Respondent received a salary to perform his teaching duties during regular school hours. He was also approved by the Board to perform extra duty assignments, which include

AM/PM Supervision, Home Instruction and Extended School Year. AM/PM Supervision involves teachers or support staff members supervising pupils prior to the school day during the breakfast program and after school as pupils are waiting for transportation. [T1:15-16]. Home Instruction involves instructional services provided by certified teachers in a child's home where the child is unable to attend school for a certain reason, such as behavioral difficulties, medical issues or other physical limitations. [*Id.* at 14]. Extended School Year involves instructional services provided to classified students during the summer to prevent regression. [*Id.* at 15]. In accordance with the collective negotiations agreement between the Board and the TEA, the Respondent was paid an hourly rate of $42 for these extra duty assignments.

The Respondent also attended meetings as part of the School Leadership Council, School Leadership Team, and Advisory Council.[5] In accordance with the collective negotiations agreement between the Board and the TEA, the Respondent was paid an hourly rate of $36 for these meetings.

As an employee of the school district, the Respondent was responsible for completing and submitting "Weekly Work Records" and/or "Payroll Vouchers" after performing his extra duty assignments. Weekly Work Records are completed after a teaching staff member performs home instruction duties that

[5] Throughout the proceedings, the parties used various references to these meetings: "SLT", "SLC", "SLD", "ESEA Council", etc.

usually take place at a child's home. The Weekly Work Record for Home Instruction requires the employee's name, employee's payroll identification number, student's name, student's school, student's grade, subject/course assigned, date and week worked, description of job, location worked, time in and time out, hours worked, total hours, name of home instructor, signature of home instructor, name of parent/guardian, signature of parent/guardian and date. Payroll Vouchers are completed after a teaching staff member performs AM/PM Supervision, Home Instruction and Extended School Year duties. Payroll Vouchers set forth an employee's names, payroll identification numbers, home school, full time or part time designation, phone number, Board approval date, account number, date submitted, dates worked, description of job, location worked, time in and time out, hours worked daily/hourly rate, total hours, rate of pay, total earnings, employee signature, supervisor/principal signature, date and approval.

During the 2015-2016 and 2016-2017 school years, the Respondent completed, signed and submitted multiple Weekly Work Records and Payroll Vouchers. As will be more fully discussed below, the Board contends that the Respondent was paid by the Board with public funds for time that he did not actually work and for services that he did not provide. The Board claims that Respondent falsified time sheets, committed theft of time, services and public funds. The Board contends that Respondent's inappropriate and unprofessional

conduct violates law and Board Policy. The Board contends that Respondent's actions were sufficiently flagrant and egregious to warrant termination. Further, his actions demonstrate that he is not fit to serve as a teacher, and that his willful and intentional misconduct constitutes conduct unbecoming sufficient to warrant dismissal from employment. The Respondent denies these claims.

The Board proceeded to file tenure charges against the Respondent. Board Secretary/School Business Administrator Jayne Howard sent the Respondent a written copy of tenure charges against him as well as the written statement of evidence. The written charges were sworn to under oath by Assistant Superintendent Lissa Johnson on February 7, 2017. [Ex. B-39]. The Respondent did not submit a written response to the Charges.

On February 27, 2017, the Board held a closed session and determined by a unanimous vote of six (6) to zero (0) in favor that there was probable cause to credit the evidence in support of the Charges, and that Charges, if credited, to sufficient to warrant the dismissal of the Respondent. [Ex. B-41]. The Board suspended the Respondent without pay beginning February 28, 2017. The Board served the information upon the Respondent's Counsel. On March 7, 2017, the Board filed with the Commissioner of the Department of Education the written tenure charges and supporting evidence against the Respondent. [Ex. B-39].

On March 15, 2017, the Respondent, through his attorney, submitted an Answer in which he either admitted or denied the allegations contained in the Board's written statement of the charges. [Ex. R-15].

On March 27, 2017, the matter was referred to me pursuant to *N.J.S.A.* 18A:6-16 as amended by *P.L. 2012, c. 26.*

Testimony was received from several witnesses during the tenure proceedings. Testifying on behalf of the Board were Lissa Johnson – Assistant Superintendent for the Office of Talent Acquisition and Development; Monique Harvey – Supervisor of Special Education, Home Instruction and Homeless Services; Leodito Yanogacio – Assistant Comptroller; Paula Bethea – Principal of Joyce Kilmer School; Jayne Howard – Business Administrator/Board Secretary; and Shawn Mitchell – Assistant Business Administrator/Comptroller. Testifying on behalf of the Respondent were the Respondent and SGB, the parent of SB, the student who received Home Instruction from the Respondent. Their testimony is summarized below.

Monique Harvey is the Supervisor of Special Education, Home Instruction and Homeless Services. [T2:4]. Part of her responsibilities include assigning home instructors to pupils and monitoring and approving the home instructor time sheets. [*Id.* at 6]. Harvey testified that home instructors provide instruction to

students that are at home due to medical issues or waiting for a special education placement. [*Id.*]. Harvey indicated that home instructors receive $42 per hour for direct contact with the students. [*Id.* at 8]. Harvey testified that home instructors are not compensated for preparation time or travel time. [*Id.*].

Harvey testified that home instructors submit Payroll Vouchers for her review and approval. [T2:12]. The vouchers must include the date that the Home Instruction was provided, the location of the Home Instruction, the time in and out, the number of hours, the hourly rate, and the home instructor's signature. [*Id.*]. Harvey indicated that there are Weekly Work Records for Home Instruction that must include similar information, but they also require the signature of the child's parent to confirm that Home Instruction services were performed in accordance with the information that the home instructor provided therein. [*Id.* at 13]. Harvey testified that she compares the Payroll Vouchers and Weekly Work Records to verify that the dates match, the hours are calculated correctly, and the Home Instruction services were provided on a school day rather than a weekend or a holiday. [*Id.* at 13-14]. She also confirms that the documents include the appropriate signatures. [*Id.*]. Harvey testified that she is responsible for reviewing the Home Instruction payroll documents, but she does not review any other Payroll Vouchers that the Respondent may have submitted for his other extra-compensation duties in 2015-2016 and 2016-2017. [*Id.* at 18-19].

On cross, Harvey was asked "whether any the Director of Special Education within the last five years issued any policies or procedures to be followed in home instruction". [T2:27]. Harvey replied, "I'm not sure". [*Id.* at 28].

Paula Bethea is the Principal for the Joyce Kilmer Middle School. [T3:4]. Bethea has been the school principal since 2010 and has been employed by the Board since 2001. [*Id.*]. Bethea is responsible for reviewing and approving extra-duty assignments for her staff. Bethea testified that AM/PM Supervision consists of monitoring students during breakfast and recreational activities that take place prior to the start of the regular student day, or supervising students after school as they wait for their transportation home. [*Id.* at 8-9]. Bethea indicated that the morning supervision is usually from 7:50 a.m. to 8:20 a.m., and the afternoon supervision usually begins at 2:55 p.m. and ends between 3:30 p.m. and 4:30 p.m. [*Id.* at 10-11]. As to SLT/SLC meetings, Bethea indicated that the meetings are usually held with the school principal once a month and last about an hour. [*Id.* at 15-16].

Bethea testified that teaching staff members are responsible for submitting Payroll Vouchers for their extra-duty assignments. [*Id.* at 17]. Bethea reviews and approves these vouchers by verifying that the staff member was in attendance on the particular date, and ensures that the documents are fully

completed and signed. [*Id.* at 18-20]. Bethea relies upon the staff member's signature to verify that the work was actually performed. [*Id.* at 20-21].

Jayne Howard is the Board's Business Administrator and Secretary. [T3:52]. Howard has served in that capacity since 2009 and has been employed by the Board since October 2001. [*Id.* at 52-53]. Howard testified that the State's Office of Legislative Services ["OLS"] conducted an audit of the school district's Home Instruction programs, before and after school duties, and other activities for the 2007-2008 and 2008-2009 school years.[6] [*Id.* at 54-60]. Howard indicated it was her understanding that the audit was based upon "received complaints that our home instructors were basically frauding the District with false documentation and time sheets." [*Id.* at 55]. Howard indicated that the audit revealed a number of discrepancies (i.e. duplicate hours, inflated hours) in the time sheets submitted by a number of home instructors. [*Id.* at 58; *see* Ex. B-32]. It was her understanding that the discrepancies led to personnel actions that included paid restitution, dismissal, resignation, non-renewal, and the Superintendent's loss of license. [T3:60].

Howard testified that based upon her prior experience as an auditor that she anticipated that the Office of Legislative Services would conduct a similar

[6] The OLS audit report ["Report"] was admitted into evidence. [Ex. B-32]. The Report included a summary of the scope of the audit, objectives, methodology, conclusions, findings and recommendations, and the auditee response. The auditee response was not included as part of the Report that was admitted into evidence.

audit in 2017-2018. [*Id.* at 60-61]. In preparation for this audit, Howard authorized Assistant Comptroller Leodito Yanogacio in November 2016 to conduct an internal audit of the home instructor time sheets for 2015-2016 and those submitted up to that point for 2016-2017. [*Id.* at 65-67]. Howard testified that the initial review revealed discrepancies in the Respondent's time sheets. [*Id.* at 68].

Based upon Yanogacio's initial review of the home instructor time sheets, Howard requested Yanogacio to audit the Respondent's time sheet submissions for his before and after school programs as well as his school leadership team programs. [*Id.* at 70-71]. Based upon the more detailed audit, Howard concluded that there were thirty-nine (39) occasions that the Respondent's time sheets either failed to account for a break between his duties (i.e. the times that the Respondent marked on his time sheet for PM supervision reflected an end time of 4:00 p.m. and his time sheet for Home Instruction at a different location that required travel reflected a start time of 4:00 p.m.) or included an overlap in time (i.e. the times that the Respondent recorded on his time sheets indicated that he was performing and paid for more than one task at the same time, some of which may have required the Respondent to be in more than one location). [Exs. B-1 through B-28]. As part of the audit, the discrepancies were marked on a spreadsheet. [Ex. B-33]. Howard testified that there were other time sheets that the Respondent submitted that included a break between his

duties at the Joyce Kilmer Middle School and his Home Instruction assignments. [T3:78-79, 88].

Howard instructed Yanogacio to drive from the Joyce Kilmer Middle School to locations that the Respondent performed home instruction in 2015-2016 and 2016-2017. Yanogacio testified that each trip took at least 10 minutes. [T2:64-68]. Howard testified that home instructors are not compensated for travel time. [T3:80].

Lissa Johnson is the Assistant Superintendent for the Office of Talent Acquisition and Development. [T1:13]. Johnson oversees the District's human resources processes. [*Id.*]. Johnson testified that Howard notified her of the Respondent's time sheet issues. [*Id.* at 16]. Johnson sat down with Howard to review the Respondent's extra-duty time sheets. [*Id.* at 17]. Johnson also reviewed the audit performed on the Respondent's time sheets that included the Respondent's AM/PM Supervision vouchers, Home Instruction vouchers, Home Instruction weekly summaries ("Weekly Work Records"), and Payroll Vouchers for meetings. [*Id.* at 20]. Johnson testified that the audit showed there were occasions where the start and end times for separate extra-duty assignments were the same, the second extra-duty assignment started before the end of the first assignment, or the assignments occurred at the same time.

[*See generally* Johnson's testimony]. In addition, there was an overlap of three (3) extra-duty assignments. [*Id.*].

Johnson testified that she and Howard met with the Respondent on January 10, 2017, to discuss the audit findings incident by incident. [*Id.* at 18-19]. Johnson testified that the Respondent was afforded with the opportunity to have a representative present during the meeting and to respond to each issue raised in the time sheets. [*Id.* at 19]. Johnson indicated that the Respondent did not have a representative present and based upon the advice of his counsel he would not provide responses. [*Id.*]. Johnson testified that she provided the Respondent with a conference summary memorandum at the conclusion of the meeting that indicated that the Respondent was immediately excluded from performing extra-curricular duties and that she was referring the matter "to Board Counsel to determine all other applicable policy and legal violations and to begin preparing tenure charges". [*Id.* at 18; *see* Ex. B-34].

Johnson testified that Howard conducts an annual training session on the Board's finance procedures, but she did not provide specific detail as to what is discussed during the annual training. [T1:89-90].

The Board's decision to dismiss the Respondent from his tenured teaching position was based predominantly upon the Respondent's timesheet records

and the conclusions that were drawn therefrom during the Administration's internal audit.

Respondent Coe testified that he has been employed by the Board for 17 years, that he provided Home Instruction for the past 10-11 years, AM/PM Supervision for approximately the past 7 years, and SLC/SLT/SLD services in 2016. [T5:7-8]. The Respondent indicated that in providing such services he was responsible for filling out Payroll Vouchers, Weekly Work Records, invoices, etc. [*Id.* at 8]. The Respondent during his testimony was asked to review a Weekly Work Record for Home Instruction form. [Ex. B-3, Coe 104]. The Respondent indicated that the form expressly indicated to "round hour to the nearest quarter hour". [T5:9]. The Respondent testified that he understood this language to mean that he was supposed to round his time up to the next quarter hour. [*Id.* at 9, 13; T6:117, 122]. He also understood this to be true based upon his conversations with his co-workers, and instructions from Vice-Principal/Principal Michael Pettola to round his time up. [T6:161-163]. The Respondent testified that the Administration never addressed this language with him during his time as a home instructor. [T5:9]. The Respondent also indicated that he was under the impression that travel time was included between the school and the location where he was performing Home Instruction, notwithstanding the fact that he did not charge for travel time. [Id.]. The Respondent testified that neither Howard, Harvey, nor anyone else from the

Administration discussed travel time with him or provided written notice that travel time was not to be included. [*Id.* at 9-10, 11-12]. The Respondent testified that he filled out the vouchers, payroll sheets and other related forms in a substantially similar manner during the period of time that the Administration performed its internal audit. [*Id.* at 14-15].

With respect to the audit conducted by the Office of Legislative Services that was performed in 2010, the Respondent testified that he was not aware of the audit until this tenure proceeding. [*Id.* at 10]. Further, neither Howard, Harvey, nor anyone else from the Administration discussed the audit with him or provided him with a summary of the audit findings or recommendations despite the fact that he performed Home Instruction services during at least a portion of the audited time period. [*Id.* at 10-11].

The Respondent indicated that he has been performing the afternoon AM/PM Supervision for five (5) days a week during the school year for at least 7 years. [*Id.* at 16-17]. In his experience, the buses normally run late in the beginning of the school year. [*Id.* at 17]. There are also occasions when there are transportation issues for some of the students. [*Id.* at 18]. The Respondent testified that he has complied with requests from principals and vice-principals to give these children rides home after school. [*Id.* at 19-20].

The Respondent addressed the specific charges in the Board's Statement of Charges. With respect to Charge Number 2, the Board alleged that on August 3, 2015, the Respondent submitted a Payroll Voucher indicating that he provided Extended School Year Services from 8 a.m. to 3 p.m., for a total of seven (7) hours. [Ex. B-39, p. 4]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 2:30 p.m. to 5:30 p.m., for a total of three (3) hours. [*Id.*]. The Respondent admitted that the Payroll Voucher was "not accurate because what was happening I was doing payroll for the ESY staff and that was a typographical error. It should have been from 8 to 2." [T5:23; *see* T6:25-26]. When asked on cross why did not bring this error to the Board's attention the Respondent replied, "...I did not recognize that mistake until it was brought to my attention. It was not done intentionally." [T6:27]. The Respondent indicated that it would take him about 4 minutes to travel from school to the residence of SB, the child for whom he provided Home Instruction. [*Id.* at 28]. The Respondent testified that he did not charge for travel time, and he did not round up for his time out for Home Instruction. [*Id.* at 28, 31].

With respect to Charge Number 3, the Board alleged that on September 10, 2015, the Respondent submitted a Payroll Voucher indicating that he provided AM/PM Supervision from 2:50 p.m. to 4:30 p.m., for a total of one and one-half (1.5) hours. [Ex. B-39, p. 6]. The Board also alleged that for the same

day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 4:30 p.m. to 6:30 p.m., for a total of two (2) hours. [*Id.*]. The Respondent testified to the basis for the lack of a break between the services:

> ...That's the beginning of school. There was a special needs student whose name was not on the list and again I asked if I could drop him off after we tried to reach his parents, couldn't reach the parents, so we were able to drop the student - - student off enroute to going to home instruction. [T5:24].

On cross, the Respondent testified that on this occasion he did not round up his time for Home Instruction. [T6:37].

With respect to Charge Number 6, the Board alleged that on November 2, 2015, the Respondent submitted a Payroll Voucher indicating that he attended an SLC meeting from 4:00 p.m. to 5:00 p.m., for a total of one (1) hour. [Ex. B-39, p. 12]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 5:00 p.m. to 7:30 p.m., for a total of two and one-half (2.5) hours. [*Id.*]. The Respondent testified that SLC/SLT/SLD meetings are normally scheduled to last one (1) hour, but usually do not last that long. [T6:72]. The Respondent testified that he could not recall if he attended an SLC meeting that day, but he indicated that he was instructed by Pettola that "if the

meetings did not last a complete hour we were told to sign out for an hour because it was contractual for the $36." [T5:27-29].

With respect to Charge Number 9, the Board alleged that on January 19, 2016, the Respondent submitted a Payroll Voucher indicating that he attended an SLC meeting for a principal interview panel from 4:30 p.m. to 8:00 p.m., for a total of three and one-half (3.5) hours. [Ex. B-39, p. 17]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 3:45 p.m. to 6:15 p.m., for a total of two and one-half (2.5) hours. [*Id.*]. The Respondent testified that he attended the SLC meeting on January 19th, but as to the Home Instruction, he actually performed those services on January 18th:

> We did home instruction for [SB] on the 18th because it was Martin Luther King's birthday and I got the permission from the parent that we would come on the 18th because I knew we had to be in a meeting on the 19th for an interview for those that will be coming to princi - - interviewing for a principal position at Kilmer because I sat on the SLC. It was our - - I was required to be there. [T5:30-31; *see also* T6:64-65].

On cross, the Respondent indicated that it was possible that the SLC meeting could have ended a few minutes before 8:00 p.m. [T6:67].

With respect to Charge Number 10, the Board alleged that on February 1, 2016, the Respondent submitted a Payroll Voucher indicating that he attended an SLC meeting from 4:15 p.m. to 5:15 p.m., for a total of one (1) hour. [Ex. B-39, p. 19]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 5:00 p.m. to 7:00 p.m., for a total of two (2) hours. [*Id.* at 20]. As to Charge Number 11, the Board alleged that on March 7, 2016, the Respondent submitted a Payroll Voucher indicating that he attended an SLC meeting from 4:15 p.m. to 5:15 p.m., for a total of one (1) hour. [*Id.* at 21]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 5:15 p.m. to 7:15 p.m., for a total of two (2) hours. [*Id.* at 22]. The Respondent reiterated that the SLC meetings normally do not last a full hour. [T5:32].

With respect to Charge Number 12, the Board alleged that on March 14, 2016, the Respondent submitted a Payroll Voucher indicating that he provided AM/PM Supervision from 2:50 p.m. to 4:30 p.m., for a total of one and one-half (1.5) hours. [Ex. B-39, p. 23]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 4:15 p.m. to 6:45 p.m., for a total of two and one-half (2.5) hours. [*Id.* at 24]. The Respondent testified that

on that particular day he performed the Home Instruction at school rather than at the pupil's house. [T5:33-34]. On cross, however, the Respondent indicated that the time out for AM/PM Supervision was a typographical error. [T6:75]. The Respondent testified that it was possible that he completed those duties at 4:00 p.m. [*Id.*]. When asked for his arrival time to SB's house, the Respondent indicated that he got there at 4:15 p.m. [*Id.* at 75-76].

With respect to Charge Number 14, the Board alleged that on April 25, 2016, the Respondent submitted a Payroll Voucher indicating that he provided AM/PM Supervision from 2:55 p.m. to 4:30 p.m., for a total of one and one-half (1.5) hours. [Ex. B-39, p. 27]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 3:00 p.m. to 5:30 p.m., for a total of two and one-half (2.5) hours. [*Id.* at 28]. The Respondent testified that he recalled switching his afternoon duties with Marva Downer-Baird, a co-worker who was scheduled for the morning duty, because of the fact that he had to leave a few minutes early in the afternoon. [T5:35; T6:82-83]. On rebuttal, the Board provided Baird's payroll voucher for April 25, 2016, which indicated that she performed AM/PM Supervision from 7:55 a.m. to 8:25 a.m. [Ex. B-44]. Baird's payroll vouchers for April 20, 21 and 22 indicated that she worked the afternoon duties. [*Id.*]. Baird's start and end times appear to be rounded to the nearest five (5) minutes (i.e. 3:05 to 4:05).

With respect to Charge Number 16, the Board alleged that on May 31, 2016, the Respondent submitted a Payroll Voucher indicating that he attended an ESEA Advisory Council meeting from 5:15 p.m. to 7:00 p.m., for a total of one and three-quarter (1.75) hours. [Ex. B-39, p. 32]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 4:15 p.m. to 5:15 p.m., for a total of one (1) hour. [*Id.* at 31]. The Respondent confirmed that he attended the ESEA meeting. [T5:37].

With respect to Charge Number 17, the Board alleged that on June 6, 2016, the Respondent submitted a Payroll Voucher indicating that he attended an SLC meeting from 4:15 p.m. to 5:15 p.m., for a total of one (1) hour. [Ex. B-39, p. 33]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 4:15 p.m. to 5:15 p.m., for a total of one (1) hour.[7] [*Id.* at 34]. The Respondent testified that he performed the Home Instruction services for one (1) hour, but he wrote down the wrong time which should have been 5:15 p.m. to 6:15 p.m. [T5:38-39; T6:94-95].

[7] The Weekly Work Record actually indicated that the Respondent provided Home Instruction services from 4:15 p.m. to 7:15 p.m. [Ex. B-16, Coe 154]. The Respondent's payroll voucher for Home Instruction indicated 4:15 p.m. to 5:15 p.m. [Ex. B-16, Coe 153]. The Respondent testified that both were in error and should have indicated 5:15 p.m. to 6:15 p.m. [T6:95-98].

With respect to Charge Number 18, the Board alleged that on June 7, 2016, the Respondent submitted a Payroll Voucher indicating that he provided AM/PM Supervision from 2:55 p.m. to 4:30 p.m., for a total of one and one-half (1.5) hours. [Ex. B-39, p. 36]. The Board also alleged that for the same day the Respondent submitted a Payroll Voucher indicating that he attended an ESEA Advisory Council meeting from 5:00 p.m. to 5:30 p.m., for a total of one-half (.5) hour. [*Id.*]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 4:15 p.m. to 5:15 p.m., for a total of one (1) hour. [*Id.*]. The Respondent confirmed that he attended the ESEA meeting, provided Home Instruction, and performed AM/PM Supervision. [T5:39-40]. The Respondent, however, testified that he wrote the wrong time for the Home Instruction which should have been from 5:15 p.m. to 6:15 p.m. On cross, the Respondent indicated that he provided Home Instruction after the ESEA Advisory Council meeting that ended at 5:30 p.m. [T6:101-103]. As to the AM/PM Supervision, the Respondent testified that the end time should have been 4:00 p.m. because of the ESEA meeting. [*Id.* at 40-41]. On cross, the Respondent indicated that the AM/PM Supervision end time of 4:30 p.m. was correct. [T6:100].

With respect to Charge Number 24, the Board alleged that on October 5, 2016, the Respondent submitted a Payroll Voucher indicating that he provided

AM/PM Supervision from 2:55 p.m. to 4:30 p.m., for a total of one and one-half (1.5) hours. [Ex. B-39, p. 47]. The Board also alleged that for the same day the Respondent submitted a Weekly Work Record indicating that he provided Home Instruction services at a pupil's house from 4:00 p.m. to 6:30 p.m., for a total of two and one-half (2.5) hours. [*Id.* at 28]. The Respondent testified that the end time for the AM/PM Supervision was incorrect. [T5:42]. The Respondent testified that the supervision ended "roughly around 3, 3-something. Hour it up to make it four o'clock". [*Id.* at 44]. On cross, the Respondent indicated that "[t]his particular day may have been one of those days when a student was late or either the parent dropped [SB] at the school because when that would happen I would - - I would put down the time the parent picked the student up and also the time that [SGB] may have dropped [SB] off to my school." [T6:133]. The Respondent testified that he did not know for certain if this was the case, but that is what he normally did in those situations. [T6:133]. The Respondent testified that on this occasion he could have been performing both of the extra-curricular activities at the same time because he was still responsible for the student whose pickup from school was late. [T6:134-136].

Charge Numbers 4, 5, 7, 8, 13, 15, 19-23, and 25-40 correspond with the Respondent's timesheets from September 21, October 13, November 3, December 2, 2015, April 12, September 15, 21, 22, 26, 27, October 13, 18, 19, 20, 21, 24, 25, 27, 28, 31, November 1, 2, 3, 4, 7 and 9, 2016. [Ex. B-39]. These are

timesheets that do not reflect a break between extra-compensation activities. [Ex. B-33]. With respect to these charges and timesheets, the Respondent testified that in each instance he rounded up his time out for the first activity. [T6:110-116, 122-130, 138-149]. He testified that it was most likely that he did not round up where his timesheets reflected a break between those activities, but there were occasions that he did. [*Id.* at 112, 116, 126-132]. The Respondent indicated that he did not include travel time. [*Id.* at 113-114].

With respect to the Home Instruction services that the Respondent provided to SB, the Respondent testified that with the exception of the inaccuracies that he pointed out during his testimony that he provided all of the Home Instruction services for which he submitted vouchers/weekly work records for payment:

> [Respondent, On Direct]
>
> Q. [By Respondent Counsel Mellk] All right. During the entire time that you were providing home instruction to [SB] did you provide him the hours of service except as you've excepted during your testimony to [SB]?
>
> A. Yes, I did. And I think I went over the call of duty. Many nights I stayed there later. That time was not noted on my - - my work - - on my weekly work record nor was it reflected on my time sheet because I was given the amount of time that I would be paid for. * * * [T5:47].

During cross-examination, the Respondent testified that the "time out" that he recorded on the Payroll Vouchers for ending the services he provided depended on whether he rounded up. [T6:7-8]. However, he always recorded his "time in" with the time that he actually commenced performing the services. [*Id.* at 8]. The Respondent rounded up on his time out because of the express language contained on the Weekly Work Record form. [*Id.* at 9]. The Respondent acknowledged that the same language is not included on the Payroll Voucher forms. [*Id.* at 9, 13]. The Respondent testified that he sometimes rounded up for the time out on Home Instruction, SLT/SLC meetings, and AM/PM Supervision. [*Id.* at 9-10]. The Respondent also denied that he rounded up for his attendance at AM/PM Supervision, ESEA Council meetings, or principal interviews. [*Id.* at 10]. The Respondent testified that on the days where his Payroll Vouchers and Weekly Work Records include an overlap in time or the lack of a break in between activities it is his belief that he rounded up. [*Id.* at 54]. The Respondent testified that if there was a break between activities that he did not round up. [*Id.* at 55-60]. When asked on cross why he did not round up every day, the Respondent replied that there "was no need to round up every day". [*Id.* at 63].

On cross, the Respondent was asked why he did not inform Howard when she interviewed him as part of the Board's investigation of this matter of the basis for rounding up. The Respondent replied, "Because I didn't have any

representation. I didn't want what I was going to say to be misconstrued and so therefore I was given instruction by my attorney to listen and say nothing and that's what I did." [T6:80].

SGB is the parent of SB, a student for whom the Respondent provided Home Instruction services since from the end of 2011 through November of 2016. [See T4:4]. SGB testified that the Respondent regularly provided Home Instruction services for her son five (5) days a week. [*Id.* at 6]. SGB indicated that the Respondent regularly arrived on time, and he immediately began his instruction with SB who waited for him each day. [*Id.* at 27-29, 32-35]. SGB indicated that she personally observed the Respondent provide Home Instruction. [*Id.* at 40]. SGB testified that the Respondent usually stayed at their house for 2.5 to 3 hours each day, sometimes longer. [*Id.* at 7]. SGB testified that there were occasions that the Respondent provided the Home Instruction at school, rather than at home. [*Id.* at 19, 36-37]. SGB indicated that she signed the Weekly Work Records for Home Instruction every other week. [*Id.* at 7, 25]. SGB testified that the Respondent filled out the all of the information on the forms before she signed them. [*Id.* at 26]. When asked if the Respondent ever "shortchanged [SB] on the actual number of hours that he worked at home instruction", SGB replied, "No". [*Id.* at 50]. SGB testified to the Respondent's impact on her son:

> My son had a great deal of love for Mr. Coe. So did we. [SB] counted on Mr. Coe to come every Monday through Friday to teach him. If he didn't come - - which he never - - [SB] was ready. They got there. They even named each other nicknames. When Mr. Coe didn't come, [SB] got into depression because he couldn't get next to him. He couldn't call him. He couldn't see him. So he questioned us but we couldn't tell him. Trying to protect his feelings.
>
> Before my son died he wanted Mr. Coe - - he got his allowance and he wanted Mr. Coe to come - - or us to call him so he could come and take him to lunch. We told Mr. Coe couldn't come. He got mad, he went in his room and a week later he died.
>
> He got plenty of messages on my phone calling Mr. Coe on the telephone just to ask him how he's doing. "I hope you feel good, buddy." "I hope you all right, buddy." Only teacher he ever opened up to. He ever cared about. He - - I won't say care. I say love because you really had to get next to Stef for him to care about you, for him to wonder what you doing. [*Id.* at 17-18].

The parties presented the following arguments in support of their respective positions.

The Board's Position

The Board provides the following legal argument in its post-hearing brief:

LEGAL ANALYSIS AND PROPOSED FINDINGS OF LAW

THE DISTRICT HAS PROVEN THE TENURE CHARGES BY A PREPONDERANCE OF THE CREDIBLE EVIDENCE.

To prevail in this case, the District must establish the truth of the charges by a preponderance of the "credible evidence." Close v. Kordulak Bros., 44 N.J. 589, 598-99 (1965); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Preponderance is defined as the "greater weight of the credible evidence in the case," not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must be such as to lead a reasonably cautious mind to the given conclusions. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. Jackson v. Delaware, L.&W.R. Co., 111 N.J.L. 487, 490 (E.&A 1933).

In the instant matter, the indisputable evidence presented during the arbitration hearing demonstrated Mr. Coe's pattern of inappropriate and dishonest conduct during the course of two (2) school years, which involved the intentional submission of falsified timesheets. Each "Weekly Work Record" and "Payroll Voucher" submitted by Mr. Coe for his extra- duty assignments were personally completed and signed by him. Indeed, above Mr. Coe's signature on each "Payroll Voucher," the following statement is printed: "I DECLARE THAT THE WORK STATED ABOVE WAS ACTUALLY PERFORMED." Above Mr. Coe's signature on the "Weekly Work Record," the following statement is printed: "The signatures of the undersigned certify that the above work record is complete and accurate." However, a District audit of Mr. Coe's extra-duty assignments revealed that during the

2015-16 and 2016-17 school years, there were thirty-nine (39) occasions whereby Mr. Coe submitted falsified extra compensation timesheets.

Of the thirty-nine (39) fraudulent submissions, thirty-one (31) involved the situation where the end time for an assignment was exactly the same as the start time for another assignment on the same day. Thus, even though the assignments occurred in different locations, Mr. Coe intentionally failed to document the break and travel time in between the two assignments, resulting in overpayment to Mr. Coe. The other eight (8) fraudulent submissions involved double and triple billing, whereby Mr. Coe certified that he was performing different assignments all at the same time. Mr. Coe intentionally took advantage of the fact that two (2) different supervisors would not be comparing Mr. Coe's time sheets for overlap.

Mr. Coe's testimony during the hearing was simply not credible. While he attempted to explain the discrepancies with his timesheets, he contradicted himself and the documentation. A review of the record clearly demonstrates that Mr. Coe knew that he could not continuously bill two (2) assignments back to back as there are countless entries showing a break of at least thirty (30) minutes between assignments to account for his travel from school to the student's house for home instruction. Moreover, any assertion by Mr. Coe that he committed "human error" where he double and triple billed for his assignments must be rejected.

As such, for the reasons that follow, the District respectfully submits that all of the charges must be sustained and that Mr. Coe's employment with the District must be terminated.

A. **MR. COE IS GUILTY OF CONDUCT UNBECOMING A TEACHING STAFF MEMBER BY SUBMITTING FRAUDULENT TIMESHEETS.**

The right to tenure is created and governed entirely by statute. Breitwieser v. State-Operated School District of the City of Jersey City, 286 N.J. Super. 633, 670 (App. Div. 1996) (citing Spiewak v. Rutherford Board of Education, 90 N.J. 63, 72-73 (1982)). It is well established that teaching staff "shall

not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause . . ." N.J.S.A. 18A:28-5 (emphasis added).

Although unbecoming conduct is not specifically defined in the statute or regulations, the New Jersey Supreme Court in Laba v. Newark Board of Education, 23 N.J. 364, 384 (1957), noted that the touchstone of the charge is the teacher's fitness to discharge the duties and functions of his or her position. Id. Indeed, unbecoming conduct encompasses many categories of inappropriate behavior by tenured employees.

In general, conduct unbecoming a public employee has been defined as an "elastic standard that incorporates any conduct that adversely affects the morale or efficiency of the [district] . . . [or] which has the tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). "A finding of unbecoming conduct does not require a violation of any specific rule or regulation, but rather may be based primarily on a violation of an implicit standard of good behavior." Newark v. Massey, 93 N.J. Super. 317, 323 (App. Div. 1967).

Further, the Commissioner has held that teaching is a public trust and its violation requires a heavy penalty. Troy Hills Bd. Of Ed. v. Molinaro, 96 NJAR 2d (EDU) 268, 277. Unfitness to remain a teacher may be demonstrated by a single incident, if sufficiently flagrant. In re Tenure Hearing of Juan Cotto, 2000 WL 679185 (citing Redcay v. State Bd. Of Educ., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd o.b. 121 N.J.L. 326 (E. & A. 1944)).

"Teachers represent 'one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools.'" In re the Tenure Hearing of Juan Cotto, 2000 WL 679185 (citing In re Sammons, 1972 S.L.D. 302, 321 (Comm'r June 12, 1972)). As such, "[c]hildren are entitled to a supportive and nurturing classroom environment in which to develop their intellectual capacities and bolster their self esteem." In the Matter of the Tenure Hearing of Juan Cotto, 2000 WL 679185 (citing In re

Gilbert, 1982 S.L.D. 274, 326 (Comm'r April 5, 1982), aff'd, 1982 S.L.D. 382 (St. Bd. Nov. 3, 1982).

The Commissioner has emphasized the need for a teacher's modeling behavior:

> The teaching profession is chosen by individuals who must comport themselves as models for young minds to emulate... Being a teacher requires, inter alia, a consistently intense dedication to civility and respect for people as human beings.

In re Tenure Hearing of Beam, 1973 S.L.D. 157, 163.

The Commissioner has often stressed "that those persons who enter the teaching profession exercise a significant influence upon those they teach and... must exhibit a high degree of exemplary behavior" In re Tyler, 13 N.J.A.R. 297, 308 (1991). Indeed:

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher.

In re Tenure Hearing of Tordo, Jackson School District, 1974 S.L.D. 97, 98-99.

In the instant matter, there can be no doubt that Mr. Coe's actions constitute conduct unbecoming, thereby warranting his removal from his tenured position. Indeed, the District audit of Mr. Coe's extra-duty assignments revealed that during the 2015-16 and 2016-17 school years, there were thirty-nine (39) occasions whereby Mr. Coe submitted falsified extra compensation timesheets.

August 3, 2015

Despite his written representations, Mr. Coe did not work ten (10) extra duty hours on August 3, 2015. Indeed, Mr. Coe could not have provided Extended School Year Services

at the P.J. Hill School until 3:00 p.m. if he was providing Home Instruction services at a pupil's house at 2:30 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house at 2:30 p.m. if he was providing Extended School Year Services at the P.J. Hill School until 3:00 p.m.

On direct examination Mr. Coe acknowledged but chalked it up to a typographical error. At no point did Mr. Coe bring his alleged error to the attention of the District prior to his testimony. In light of the entire record, his testimony regarding his August 3, 2015 timesheets is simply not credible. His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number One and Charge Number Two must be sustained.

September 10, 2015

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on September 10, 2015. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 4:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 4:30 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 4:30 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 4:30 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 4:30 p.m., although could not state with certainty when his duties actually ceased. His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Three must be sustained.

September 21, 2015

Despite his written representations, Mr. Coe did not work three (3) extra hours on September 21, 2015. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m. if he was providing Home Instruction services at a pupil's house beginning at 4:00 p.m. Likewise, Mr. Coe could not have provided Home Instruction

services at a pupil's house beginning at 4:00 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 4:00 p.m., although could not state with certainty when his duties actually ceased. His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Four must be sustained.

October 13, 2015

Despite his written representations, Mr. Coe did not work three (3) extra hours on October 13, 2015. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m. if he was providing Home Instruction services at a pupil's house beginning at 4:00 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 4:00 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 4:00 p.m., although could not state with certainty when his duties actually ceased. His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Five must be sustained.

November 2, 2015

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on November 2, 2015. Mr. Coe could not have attended an SLC meeting at the Joyce Kilmer School until 5:00 p.m. if he was providing Home Instruction services at a pupil's house beginning at 5:00 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 5:00 p.m. if he was attending an SLC meeting at the Joyce Kilmer School until 5:00 p.m.

Mr. Coe testified that he did not recall if he attended an SLC meeting on November 2, 2015. (T 6/23/17, 24:3-13).

Mr. Coe also testified that the teachers' contract provides that teachers get paid for a full hour of attending an SLC meeting even when the full meeting does not last a full hours. However, there is no such language in the teachers' contract. (See Exhibit J-1, page 17).

Mr. Coe's actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Six must be sustained.

November 3, 2015

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on November 3, 2015. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m. if he was providing Home Instruction services at a pupil's house beginning at 4:00 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 4:00 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 4:00 p.m., although could not state with certainty when his duties actually ceased. His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Seven must be sustained.

December 2, 2015

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on December 2, 2015. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m. if he was providing Home Instruction services at a pupil's house beginning at 4:00 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house

beginning at 4:00 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 4:00 p.m., although could not state with certainty when his duties actually ceased. His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Eight must be sustained.

January 19, 2016

Despite his written representations, Mr. Coe did not work six (6) extra hours on January 19, 2016. Mr. Coe could not have provided Home Instruction services at a pupil's house at 3:45 to 6:15 p.m. if he attended the SLC principal interview from 4:30 p.m. to 8:00 p.m. Likewise, Mr. Coe could not have attended the SLC principal interview from 4:30 p.m. to 8:00 p.m. if he was providing Home Instruction services at a pupil's house at 3:45 to 6:15 p.m.

On direct examination Mr. Coe acknowledged but chalked it up to a typographical error. At no point did Mr. Coe bring his alleged error to the attention of the District prior to his testimony. In light of the entire record, his testimony regarding his January 19, 2016 timesheets is simply not credible. His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Nine must be sustained.

February 1, 2016

Despite his written representations, Mr. Coe did not work three (3) extra hours on February 1, 2016. Mr. Coe could not have attended an SLC meeting at the Joyce Kilmer School until 5:15 p.m. if he was providing Home Instruction services at a pupil's house at 5:00 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house at 5:00 p.m. if he was attending an SLC meeting at the Joyce Kilmer School until 5:15 p.m.

Mr. Coe testified that he did not recall how long the SLC meeting lasted. (T 6/28/17, 67:12-14). Mr. Coe's actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Ten must be sustained.

March 7, 2016

Despite his written representations, Mr. Coe did not work three (3) extra hours on March 7, 2016. Mr. Coe could not have attended an SLC meeting at the Joyce Kilmer School until 5:15 p.m. if he was providing Home Instruction services at a pupil's house beginning at 5:15 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 5:15 p.m. if he attended an SLC meeting at the Joyce Kilmer School until 5:15 p.m.

Mr. Coe testified that the SLC meeting did not last for a full hour, but that he nevertheless submitted payment for a full hour. (T 6/23/17 32:21-22). Mr. Coe's actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Eleven must be sustained.

March 14, 2016

Despite his written representations, Mr. Coe did not work four (4) extra hours on March 14, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 4:30 p.m. if he was providing Home Instruction services at a pupil's house at 4:15 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house at 4:15 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 4:30 p.m.

Mr. Coe's testified that he is not sure what time he ceased his PM supervision duties on this date. (T 6/28/17, 75:13-16). Mr. Coe's actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Twelve must be sustained.

April 12, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on April 12, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 4:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 4:30 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 4:30 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 77:17-19). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Thirteen must be sustained.

April 25, 2016

Despite his written representations, Mr. Coe did not work four (4) extra hours on April 25, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 4:30 p.m. if he was providing Home Instruction services at a pupil's house from 3:00 p.m. to 5:30 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house from 3:00 p.m. to 5:30 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 4:30 p.m.

Mr. Coe testified that this was another mistake and that he switched with another staff member and actually performed AM supervision and not PM supervision. (T 6/23/17 35:17-22). On cross-examination, Mr. Coe identified Ms. Baird as the employee he swapped with. (T 6/28/17 83:1-13). However, Mr. Coe's testimony was contradicted by the testimony of Shawn Mitchell, who explained that Exhibit B-44 clearly demonstrated that Ms. Baird worked the AM supervision shift on April 12, 2016 and that Mr. Coe was not being honest. (T 6/28/17 172:7-24). As such, this instance represents yet another example of fraudulent time sheet submitted by Mr. Coe. .

Mr. Coe's actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public

funds to him for work not performed. As such, Charge Number Fourteen must be sustained.

May 12, 2016

Despite his written representations, Mr. Coe did not work four and one-half (4.5) extra hours on May 12, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 6:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 6:30. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 6:30 if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 6:30 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 6:30 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 87:8-13). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Fifteen must be sustained.

May 31, 2016

Despite his written representations, Mr. Coe did not work two and three-quarter (2.75) extra hours on May 31, 2016. Mr. Coe could not have provided Home Instruction services at a pupil's house from 4:15 p.m. through 5:15 p.m. if he was in attendance at the ESEA meeting beginning at 5:15 p.m. Likewise, Mr. Coe could not have attended the ESEA meeting beginning at 5:15 p.m. if he was providing Home Instruction services at a pupil's house from 4:15 p.m. through 5:15 p.m.

Despite Mr. Coe's previous testimony that he did not round up for home instruction, he now testified on cross-examination that he thinks he rounded up the end time of his home instruction and then made it to the ESEA meeting in just two (2) minutes. Mr. Coe's actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Sixteen must be sustained.

June 6, 2016

Despite his written representations, Mr. Coe did not work two (2) extra hours on June 6, 2016. Mr. Coe could not have attended an SLC meeting at the Joyce Kilmer School from 4:15 p.m. to 5:15 p.m. if he was providing Home Instruction services at a pupil's house from 4:15 p.m. to 5:15 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house from 4:15 p.m. to 5:15 p.m. if he attended an SLC meeting at the Joyce Kilmer School from 4:15 p.m. to 5:15 p.m.

Mr. Coe claims that the entries on this date were another mistake and that the home instruction entry should have been 5:15-6:15. (T 6/23/17 38:23-25 and 39:1-4). On cross-examination, however, Mr. Coe was not sure what time he completed his home instruction. (T 6/23/17 95:15-18).

Mr. Coe's actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Seventeen must be sustained.

June 7, 2016

Despite his written representations, Mr. Coe did not work three (3) extra hours on June 7, 2016. Mr. Coe could not have provided AM/PM Supervision services through 4:30 p.m. if he was providing home instruction services beginning at 4:15 p.m. Moreover, Mr. Coe could not have attended the ESEA meeting at 5:00 p.m. if he was providing home instruction services through 5:15 p.m. This is yet another allegation by Mr. Coe that he made a mistake. Specifically, Mr. Coe claims that the home instruction and PM supervision times are wrong. Now, months later, he wanted to "make changes." (T 6/23/17 40:3-10). However, on cross-examination, Mr. Coe was unable to clarify the exact times he provided the respective services. (T 6/28/17, 102:1-9). This is yet another instance of fraud by Mr. Coe.

His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Eighteen must be sustained.

September 15, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on September 15, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 4:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 4:30 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 4:30 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 4:30 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 4:30 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 113:6-14). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Nineteen must be sustained.

September 21, 2016

Despite his written representations, Mr. Coe did not work three and three-quarter (3.75) extra hours on September 21, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 3:45 p.m. if he was providing Home Instruction services at a pupil's house beginning at 3:45 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 3:45 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 3:45 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 3:45p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 122:17-18). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Twenty must be sustained.

September 22, 2016

Despite his written representations, Mr. Coe did not work three and three-quarter (3.75) extra hours on September

22, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 3:45 p.m. if he was providing Home Instruction services at a pupil's house beginning at 3:45 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 3:45 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 3:45 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 3:45p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 123:2-7). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Twenty-One must be sustained.

September 26, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.50) extra hours on September 26, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m. if he was providing Home Instruction services at a pupil's house beginning at 4:00 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 4:00 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 4:00 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 124:23-25 and 125:1-4). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Twenty-Two must be sustained.

September 27, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.50) extra hours on September 27, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m. if he was providing Home Instruction services at a pupil's house beginning at 4:00 p.m. Likewise, Mr. Coe could not have

provided Home Instruction services at a pupil's house beginning at 4:00 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 4:00 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 124:23-25 and 125:5-9). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Twenty-Three must be sustained.

October 5, 2016

Despite his written representations, Mr. Coe did not work four (4) extra hours on October 5, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 4:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 4:00 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 4:00 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 4:30 p.m.

This is yet another allegation by Mr. Coe that he made a mistake. Here, he claims that the Home instruction and PM supervision times are wrong. Months later, he wanted to "make changes." Mr. Coe now wants the PM to read "3:55 to 4:00." (T 6/23/17 42:7-15). He then goes son to testify that maybe it was until "roughly around 3, 3 something." (T 6/23/17 44:2-3).

Clearly, this is another instance of fraud by Mr. Coe. Mr. Coe's actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Twenty-Four must be sustained.

October 13, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on October 13, 2016. Mr.

Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 3:30 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 3:30 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 3:30 p.m., although could not state with certainty when his duties actually ceased. His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Twenty-Five must be sustained.

October 18, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on October 18, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m. if he was providing Home Instruction services at a pupil's house beginning at 4:00 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 4:00 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 4:00 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 142:7-18). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Twenty-Six must be sustained.

October 19, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on October 19, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m. if he was providing Home Instruction services at a pupil's house beginning at 4:00 p.m. Likewise, Mr. Coe could not have provided Home

Instruction services at a pupil's house beginning at 4:00 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 4:00 p.m., although could not state with certainty when his duties actually ceased. His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Twenty-Seven must be sustained.

October 20, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on October 20, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 3:30 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 3:30 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 3:30 p.m., although could not state with certainty when his duties actually ceased. His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Twenty-Eight must be sustained.

October 21, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on October 21, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 3:30 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 3:30 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 3:30 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 145:15-18). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Twenty-Nine must be sustained.

October 24, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on October 24, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 3:30 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 3:30 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 3:30 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 143:16-25). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Thirty must be sustained.

October 25, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on October 25, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 3:30 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 3:30 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 3:30 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 143:16-25). His actions in submitting his timesheets

were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Thirty-One must be sustained.

October 27, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on October 27, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 3:30 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 3:30 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 3:30 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 144:24-25 and 145:1-2). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Thirty-Two must be sustained.

October 28, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on October 28, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 3:30 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 3:30 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 3:30 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 145:15-18). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Thirty-Three must be sustained.

October 31, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on October 31, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 3:30 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 3:30 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 3:30 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 145:15-18). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Thirty-Four must be sustained.

November 1, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on November 1, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m. if he was providing Home Instruction services at a pupil's house beginning at 4:00 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 4:00 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 4:00 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 147:1-14). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Thirty-Five must be sustained.

November 2, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on November 2,

2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m. if he was providing Home Instruction services at a pupil's house beginning at 4:00 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 4:00 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 4:00 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 4:00 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 147:1-16). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Thirty-Six must be sustained.

November 3, 2016

Despite his written representations, Mr. Coe did not work four (4) extra hours on November 3, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 3:30 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 3:30 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 3:30 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 147:21-25 and 148:1-11). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Thirty-Seven must be sustained.

November 4, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on November 4, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 3:30 p.m. Likewise, Mr. Coe could not have

provided Home Instruction services at a pupil's house beginning at 3:30 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 3:30 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 149:1-12). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Thirty-Eight must be sustained.

November 7, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on November 7, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 3:30 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 3:30 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 3:30 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 149:1-12). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Thirty-Nine must be sustained.

November 9, 2016

Despite his written representations, Mr. Coe did not work three and one-half (3.5) extra hours on November 9, 2016. Mr. Coe could not have provided AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m. if he was providing Home Instruction services at a pupil's house beginning at 3:30 p.m. Likewise, Mr. Coe could not have provided Home Instruction services at a pupil's house beginning at 3:30 p.m. if he was providing AM/PM Supervisions Services at the Joyce Kilmer School until 3:30 p.m.

Mr. Coe testified on cross-examination that he rounded up his PM supervision time to 3:30 p.m., although could not state with certainty when his duties actually ceased. (T 6/28/17, 149:1-12). His actions in submitting his timesheets were improper and fraudulent, which resulted in payment of public funds to him for work not performed. As such, Charge Number Forty must be sustained.

B. **MR. COE'S TESTIMONY REGARDING THE TIME SHEETS AT ISSUE WAS NOT CREDIBLE AND CANNOT SERVE TO JUSTIFY HIS ILLEGAL CONDUCT.**

Of the thirty-nine (39) fraudulent submissions, thirty-one (31) involved the situation where the end time for an assignment was exactly the same as the start time for another assignment on the same day. In other words, even though the assignments occurred in different locations, Mr. Coe intentionally failed to document the break and travel time in between the two assignments, resulting in overpayment to Mr. Coe. In order to justify his "rounding up" for PM supervision duties, Mr. Coe testified that he was authorized to do so by a former vice principal. Not surprisingly, Mr. Coe does not have any written documentation in support of his assertion. Nor does Mr. Coe allege that the Principal of the school gave the authority; rather, he points to a former vice principal.

Interestingly, however, Mr. Coe did not round up his PM supervision time each day. Rather, on most occasions, his time sheets reflected a break in between assignments at the Kilmer School and his home instruction duties. That makes sense, clearly because it takes time to exit the Kilmer building, get into a car, drive in traffic, park at S.B.'s house, and then enter and get situated for instruction. The Arbitrator will note by reviewing the audit that Mr. Coe knew that the proper and lawful procedure to follow. For example, on September 11, 2015, Mr. Coe ended PM supervision at 3:50 and then began home instruction at 4:30 p.m., which obviously accounts for travel time between the two locations. Moreover, On September 14, 2015, Mr. Coe ended PM supervision at 3:30 p.m. and then began home instruction at 4:00 p.m. Additionally, on September 17, 2015, Mr. Coe ended P.M. supervision at 3:30 p.m. and began home instruction at 3:45 p.m.

However, Mr. Coe decided to get greedy for whatever reason and wanted to receive extra money from the District for work he did not perform. That is why he began to slowly submit timesheets that did not account for a break, so that he would receive payments for continuous work during two separate and distinct assignments. Once he realized that he was able to "get away with it," he began to increase his frequency of submitting fraudulent documentation. Indeed, Ms. Johnson testified that she reached several conclusions after reviewing all of Mr. Coe's timesheets and the audit. (T 6/9/17, 76:9-13; see also Exhibit B-34). Ms. Johnson testified that one conclusion was during the 2015-16 school year, there were a total of sixteen (16) findings of overbilling. (T 6/9/17, 76:14-17). However, during the three (3) months of the 2016-17 school year, there were already twenty-one (21), as Mr. Coe increased the frequency of his overbilling. (T 6/9/17, 76:18-25).

Mr. Coe's own testimony demonstrates that he was engaging in illegal conduct. Indeed, when he was asked to identify the specific days that he rounded up his PM supervision time, interestingly, he only identified those days that were flagged by the District in its audit and marked by the "asterisks." Mr. Coe clearly understood that he was caught submitting fraudulent documentation. Indeed, if he truly believed that he had authorization to round up for PM supervision each day, why did he not do so? The answer is that he never had authorization to round up for PM supervision, he knew that rounding up was improper, and was trying to avoid getting caught.

The other eight (8) fraudulent submissions by Mr. Coe as part of the tenure charges involved double and triple billing, whereby Mr. Coe certified that he was performing different assignments all at the same time. While Mr. Coe would like to characterize these instances as "mistakes," clearly that is not the case with this many occasions at issue.

Indeed, Mr. Coe knew that the extra-duty timesheets relating to his P.M. bus supervision and the extra-duty timesheets relating to his home instruction duties were sent to two (2) different supervisors for review and approval. Mr. Coe intentionally took advantage of the fact that two (2) different

supervisors would not be comparing Mr. Coe's time sheets for overlap.

Mr. Coe's testimony during the hearing was simply not credible. While he attempted to explain the discrepancies with his timesheets, his testimony was contradictory and illogical. Examples of Mr. Coe's testimony which demonstrated that he engaged in conduct unbecoming include:

- Mr. Coe was asked by his counsel during direct examination to discuss certain language appearing on "Weekly Work Record for Home Instruction." In discussing the phrase "Round hour to the nearest quarter hour" in the "total hours" box, explained that it was his understanding that:

  To—if I, if I/m going to 3—after three o'clock, if it's anything after 3, 4—like say 3:10 I hour up to 3:15. Anything after 3:16, 3:17 I round up to the next quarter hour which would be 3:30.

(T 6/23/17, 9:1-4).

- On cross-examination, Mr. Coe initially testified that he rounded up his time for home instruction. (T 6/28/17, 9:19-24).
- Then, Mr. Coe changed his mind and denied rounding up for home instruction. (T 6/28/17, 9:21-25).
- During his direct examination testimony, Mr. Coe did not discuss rounding up for AM/PM supervision.
- On cross-examination, Mr. Coe initially testified that he did not round up his time for PM supervision. (T 6/28/17, 10:1-5).
- Then, Mr. Coe changed his mind and said that he rounded up for PM supervision. (T 6/28/17, 11:1-14).
- Mr. Coe acknowledged that Ms. Bethea, the principal of the school, never advised him that he would round up for PM supervision. (T 6/28/17, 12:17-21).
- Mr. Coe acknowledged that there was never anything written authorization issued by anyone

which would have allowed round up for PM supervision. (T 6/23/17, 50:3-6).

- Mr. Coe admitted that for the days in yellow identified on the audit, he did not work the full amount of time listed on his timesheets. (T 6/28/17, 50:14-17).
- Mr. Coe then testified that he did not round up for PM supervision every day but that the only days he rounded up were the dates identified in the audit. Specifically, Mr. Coe testified that:

> Normally where you—guys have the Tabs on—have I guess those little marks on there are times when its reflecting I guess you're saying an overlap, those would probably be the times where I rounded up . . .

(T 6/28/17, 53:10-25 and 54:1-2).

- Thus, even though Mr. Coe testified he was allowed to round up, the only days he actually rounded up were those thirty-one (31) days identified in the audit. (T 6/28/17, 55:13-25 and 56:1-7).
- When asked why he did not round up on other days for PM supervision, Mr. Coe simply stated: "I didn't round. I just put the time I left." (T 6/23/17, 126:12-23, 126:24-25 and 127:1-6).
- Mr. Coe testified on direct examination that based upon his understanding, travel time for home instruction from his school to the student's residence was "also included." (T 6/23/17, 9:1-4).
- However, on cross examination, Mr. Coe testified that he did not include travel time for home instruction. (T 6/28/17, 148:12-20).

A review of the District's audit clearly demonstrates that Mr. Coe knew that he could not continuously bill two (2) assignments back to back as there are countless entries showing a break of at least thirty (30) minutes between assignments to account for his travel from school to the student's house for home instruction. Moreover, any assertion by Mr. Coe that he committed a "mistake" or "human error" where he double and triple billed for his assignments must be rejected.

C. **THE PROPER PENALTY IS THE REMOVAL OF MR. COE FROM HIS TENURED POSITION.**

Unbecoming conduct is conduct which adversely affects the moral or efficiency of the agency of which the employee is a member, which has a tendency to destroy public respect for government employees and confidence in the operation of governmental services, or which violates an implicit standard of good behavior. City of Asbury Park v. Dep't. of Civil Service, 17 N.J. 419 (1955). A finding of unbecoming conduct does not require that any specific rule or regulation have been violated but may be based primarily on a violation of an implicit standard of good behavior. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960); Newark v. Massey, 93 N.J. Super. 317, 323 (App. Div. 1967).

In an educational setting, unbecoming conduct has been held to be demonstrated by a series of incidents indicating a pattern of behavior, or by a single incident if sufficiently flagrant. See Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), affirmed o.b. 131 N.J.L. 326 (E.&A. 1944).

I/M/O The Tenure Hearing of Curtis Robinson, State-Operated School District of The City of Paterson, 2008 WL 3819075 July 24, 2008, the Commissioner noted that it has long been recognized that — by virtue of the unique position they occupy — educators must be held to an enhanced standard of behavior. As was succinctly stated in In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, 1972 S.L.D. 302, 321:

> [Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. (emphasis added)

Id.

In the Matter of the Certificates of Olga Stasiuk, 2006 WL 2361390 (N.J. Adm.), it was stated that "[j]ust as the submission of a fraudulent teaching certificate demeans the value of the entire certification system, the submission of material oral misrepresentations upon which a school district relies, albeit temporarily, subverts the integrity of the process emplaced to protect children. See In re DeBello, 97 N.J.A.R. 2d (EDE) 1. Since schools must rely on the trustworthiness of information and documents provided by teaching or administrative applicants, the submission of inaccurate, misleading or fraudulent information is a serious offense. Id. Teachers are entrusted with the care, control and education of school children. They are "one of the most dominant and influential forces in the lives of children." In re Sammons, 72 S.L.D. 302, 321. Indeed, "[a] teacher should possess personal qualities valued by our society because a teacher helps to shape the attitudes of young minds toward that society." In re Bradley, 92 N.J.A.R. 2d (EDE) 5, citing, Adler v. Board of Education of the City of New York, 342 U.S. 485, 493 (1952).

Teachers must be held to a high standard of conduct because of the influence they can and should exercise over students. State Bd. of Examiners v. Charlton, 97 N.J.A.R. 2d (EDE) 18. Undoubtedly, honesty is one of the sacred virtues, which a teacher is expected both to possess and impart to her students. Id.

The Commissioner of Education has commented on the seriousness of charges which arise from a teacher's breach of public trust:

> Teachers are public employees who hold positions demanding public trust, and in such position, they teach, inform, and mold habits and attitudes and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience and learn about the teacher. When a teacher deliberately and willfully violates the . . . public trust placed in him, he must expect dismissal . . . .I/M/O Tenure Hearing of Ernest Tordo, School District of Jackson, Ocean County, 1974 S.L.D. 97, 98-99. See, also, I/M/O Tenure Hearing of Jacques, L. Sammons, School District of Black Horse Pike Regional, Camden County, 1972 S.L.D. 302, 321; and

I/M/O Tenure Hearing of Kenneth Henderek, School District of the Township of East Brunswick, Middlesex County, 94 N.J.A.R. (EDU) 268 at 275.

In Carter v. Cumberland County Welfare, 92 *N.J.A.R.*2d (CSV) 71, a principal clerk typist with fifteen years of service and no prior disciplinary record was terminated from employment for theft of two dollars. In concluding that removal was appropriate, the Administrative Law Judge stated:

> I take no delight in recommending the removal of the appellant because all of us suffer momentary weakness or lapses in judgment. But a theft of public funds, no matter how insignificant, once discovered, cannot be condoned or excused.

The Merit System Board upheld the removal noting that "the theft of public funds, no matter how small the amount, is a serious offense which cannot be excused." Id.

In Christian v. Newark Housing Authority, 93 *N.J.A.R.*2d (CSV) 124, a building maintenance worker was removed for theft of a box of copper tubing and leaving his workplace without permission. In recommending termination of employment, the Administrative Law Judge observed that the theft of public property was the "much more serious offense" and held:

> In most circumstances, progressive discipline is appropriate. However, this is not necessarily the case where the conduct engaged in by an employee involved dishonesty or moral turpitude which impacts upon his or her inability to carry out his duty to the public. The public is entitled to public employees who are honest for the reason that public employment involves the public trust. In his actions in this matter, appellant completely disregarded the public trust by engaging in the attempted theft of public property.

Id. at 128.

In In the Matter of Eddie Jimenez, 2011 WL 7031055, the New Jersey Civil Service Commission noted that:

> It is well-settled public policy that all public employees are expected to exhibit appropriate behavior, both on and off the job, in order to project a positive image to the public that they serve and the taxpayers who fund their positions. Any conduct that serves to diminish the public trust in the integrity of its employees is intolerable and such conduct is unbecoming a public employee. *See In the Matter of Matthew Greer* (MSB, decided June 7, 2006). The appellant's actions directly contradict the positive image public employees are expected to exhibit. Few actions betray trust more than those affiliated with deceit, and the appellant, by his own admission, intended to deceive the appointing authority.

Id.

A single incident may be sufficiently egregious in nature to warrant termination. In this case, Mr. Coe committed thirty (39) separate offenses which include theft of time, theft of services, and theft of public funds, which amounts to unbecoming conduct. Mr. Coe, as a public employee paid with public funds, breached the public trust. Mr. Coe's actions were sufficiently flagrant and outrageous. Whether he stole $1.00 or $1,000 or $10,000 or $100,000, he has demonstrated that he is not fit to serve as a teaching staff member for the District.

CONCLUSION.

As outlined above, the statutes and case law are clear. Mr. Coe, as a public employee and teacher, was to serve as a model of appropriate behavior. Instead, Mr. Coe engaged in a pattern of inappropriate and fraudulent conduct. Mr. Coe is guilty of deliberately falsifying time sheets, theft of time, theft of public funds, which amounts to conduct unbecoming a teacher. One of the incidents set forth in the charges alone would be cause for his removal from employment. However, the combination of the thirty nine (39) events spanning the course of two (2) school years, demonstrated through the unrefuted evidence offered by the District, leaves no doubt that Mr. Coe is not fit to serve as a teacher. In the end, as a result of Mr. Coe's intentional and deceitful conduct, he was

paid with public funds for services he did not provide to students. Therefore, each of the tenure charges must be sustained and Mr. Coe must be removed from his tenured teaching position. [Board Brief, pp. 60-92].

The Board's reply brief addresses the Respondent's argument that he was entitled to travel time for his extra-duty assignments:

> Mr. Coe cites to 29 C.F.R. § 785.38 for the proposition that he could bill for his travel time from Kilmer to S.B.'s residence. However, said regulation does not apply to extra-duty assignments, as PM supervision and home instruction was not Mr. Coe's "principal activity." Mr. Coe's workday ended when the dismissal bell rang at Kilmer. Indeed, he was not travelling in connection with his main position as a resource room teacher. Any driving from Kilmer to S.B.'s house as part of the extra-duty assignment would be deemed noncompensable commuting time. Normal commuting from home to work and back is ordinary travel and not a "principal activity" absent a contract stating otherwise. 29 C.F.R. §§ 785.34 and 785.35.
>
> Moreover, the undisputed record demonstrated that based upon the contract between the District and the teacher's union, home instructors receive $42.00 per hour for direct contact with students. (T 6/15/17, 8:1-14; See also Exhibit J-1). Home instructors do not receive compensation for preparation time or for travel time. (T 6/15/17, 8:15-20). Ms. Harvey made clear that home instructors only receive compensation for actual instruction with students. (T 6/15/17, 8:21-24).
>
> Mr. Coe's argument is also inconsistent with his testimony on cross-examination, whereby he stated that he did not bill for any travel time relating to his home instruction duties.
>
> As such, Mr. Coe was not entitled as a matter of law to bill for any travel time. [Board's Reply, pp. 19-20].

The Respondent's Position

The Respondent provides the following legal argument in his post-hearing brief:

LEGAL ARGUMENT
THE TENURE CHARGES SHOULD BE DISMISSED

POINT ONE
THE APPLICABLE STANDARDS AND LAW

A tenured teacher may only be removed for inefficiency, incapacity, unbecoming conduct, or other just cause. N.J.S.A. 18A:6-10. "The statutory status of a tenured employee may not be lightly removed." *IMO Tenure Hearing of Claudia Ashe-Gilkes, Sch. Dist. of City of East Orange, Essex County*, OAL Dkt. No. 07135-08. Tenure laws are meant to protect teaching staff members from dismissal for unfounded, flimsy, or political reasons. *See Veimeister v. Prospect Park Board of Education*, 5 N.J. Super. 215, 218 (App. Div. 1949); *Spiewak v. Rutherford Board of Education*, 90 N.J. 63 (1982). The Board bears the burden of demonstrating unbecoming conduct by a preponderance of the competent, credible evidence. *Atkinson v. Parsekian*, 37 N.J. 143, 149 (1962). Unbecoming conduct is a broad term which may include any conduct which adversely affects the morale or efficiency of the public entity, or has a tendency to destroy public respect for government employees and confidence in the operation of government services. *See Karins v. City of Atl. City*, 152 N.J. 532, 554 (1998).

A finding of unbecoming conduct does not mandate removal. Rather, the penalty to be imposed for unbecoming conduct (i.e., dismissal or some lesser penalty) requires consideration of a number of relevant factors, including: **[1]** the nature and gravity of the offense; **[2]** the impact on the teacher's career; **[3]** any extenuating or aggravating circumstances; and **[4]** the harm or injurious effect the conduct may have had on the proper administration of the

school system. *In re Fulcomer*, 93 N.J. Super. 404, 422 (App. Div. 1967). In determining whether removal, or some lesser penalty, is appropriate, the fundamental question is whether the teacher may be returned to his position without harm or injurious effect on the proper administration of the school district. The touchtone of the determination lies in the teacher's fitness to discharge the duties and functions of his position. *See In re Grossman*, 127 N.J. Super. 13, 29 (App. Div. 1974); *In re Young*, 202 N.J. 50, 66 (2010).

When deciding tenure charges, no consideration or deference is given to a Board's decision to pursue the penalty of termination. Rather, as a matter of law, the arbitrator is required to independently determine the appropriate penalty, if any, to be imposed based upon his findings in the case. In other words, tenure charges are decided *de novo*, and not under an "abuse of discretion" standard. *Fulcomer, supra*, 93 N.J. Super. at 409-410.

While a single, sufficiently flagrant incident may be grounds for removal (*See Redcay v. State Board of Education*, 130 N.J.L. 369 (Sup. Ct. 1943), *aff'd. o.b.* 1341 N.J. L. 326 (E&A 1944)), a scheme of progressive discipline is generally applied to findings of unbecoming conduct. This reflects the idea that the nature, number and proximity of earlier disciplinary infractions, both minor and major, should occasion progressively severe sanctions, unless just cause to the contrary is shown. *West New York v. Bock*, 38 N.J. 500 (1962); *IMO Tenure Hearing of Owen Newson, State Operated School District, City of Newark*, DOE Dkt. No. 276-9/12; *In the Matter of Arnold Borrero, City of Newark*, 2009 WL 3816616 (N.J. Admin).

It is said to be "axiomatic that the degree of penalty should be in keeping with the seriousness of the offense." *Elkouri and Ekouri, How Arbitration Works*, 7th Ed., 15-40. In less serious cases, arbitrators are very likely to change or modify an employer's discipline if it is excessive, disproportionate to the offense, inconsistent with principles of progressive discipline, punitive rather than corrective, or inconsiderate of mitigating circumstances. *Id.* at 15-43. Even in the case of theft, mitigating circumstances, such as the absence of a policy expressly providing for termination, and a long,

discipline-free record may render termination too harsh a penalty. *Id.* at 15-42 to 15-43.

Moreover, arbitrators are likely to set aside or reduce penalties where the employee had not previously been reprimanded and warned that his or her conduct would trigger the discipline. Even when the misconduct is of a serious nature, the employee must not be lulled into believing that his conduct will not subject him to sanction. *Id.* Once discipline for a given offense is imposed and accepted, it cannot therefore be increased, nor may another punishment be imposed, lest the employee be unfairly subjected to double jeopardy. The double jeopardy doctrine also prohibits employers from attempting to impose multiple punishments for what is essentially a single act. The arbitral concept of double jeopardy arises from fundamental fairness and just cause. *See Elkouri, supra,* 15-60-61.

Removal of a tenured teacher is a serious penalty, not always warranted even in the face of significant misconduct. For example, where not cruel, premeditated, or vicious, a teacher's rash, inappropriate action—even involving inappropriate physical contact with a student—may not mandate removal from tenure. *Matter of Tenure Hearing of Boyd,* 93 N.J.A.R. 2d (EDU) 445 (teacher who struck a student not removed from tenure). Similarly, numerous, relatively minor instances of treating students inappropriately may not warrant removal from tenure. *In the Matter of the Tenure Hearing of Barbara Emri,* Comm. of Ed. Dec. No. 371-02 (teacher who engaged in unbecoming conduct on more than 20 occasions in her dealings with students— including the use of racial slurs – not removed from tenure).

A survey of Commissioner of Education decisions demonstrates that conduct far more serious, or even dangerous to children, than anything alleged by the Board in this case may not warrant removal from tenure. *See, e.g., IMO the Tenure Hearing of Poston,* Comm. of Ed. Dec. No. 362-06 (eighth grade teacher who referred to student's mother as a "dyke" in front of entire class suspended for 120 days without pay); *IMO Tenure Hearing of Adam Mierzwa,* Comm. of Ed. Dec. No. 283-08 (teacher who lost his temper and displayed poor judgment on three separate occasions, including an incident where he forcefully pushed a student

into a seat, suspended for 240 days without pay); *See also IMO Tenure Arbitration of Richard Vicenti*, DOE Dkt. No. 255-14 (teacher who engaged in "abusive, angry, and demeaning behavior on a number of occasions not removed from tenure); *IMO the Tenure Hearing of Henry Allegretti, School District of the City of Trenton*, Comm. of Ed. Dec. No. 96-00 (teacher who engaged in sexually inappropriate discussions with students not terminated from position); *IMO the Tenure Hearing of George Mamunes, Pascack Valley Regional School District*, Comm. of Ed. Dec. No. 208-00 ("extreme penalty" of termination not warranted for teacher who made racist and sexist comments to his students on several occasions); *In re Tenure Hearing of Joseph Prinzo, Passaic County Technical Institute*, Comm. of Ed. Dec. No. 259-01 (teacher's failure to supervise students resulted in students viewing sexually explicit videotape in classroom suspended for 30 days without pay); *IMO Tenure Hearing of Alan S. Tenney*, 1983 SLD 836 (teacher who ordered student to sit outside of classroom unsupervised for disciplinary reasons and left class unattended on another occasion for 23 minutes penalized with loss of three months salary); *IMO Tenure Hearing of Victoria Jakubiak*, Commissioner of Ed. Dec. No. 33-99 (librarian who left five year old child unsupervised for five minutes suspended for one month without pay); *IMO Tenure Hearing of Carmen Quinones*, 1996 N.J.A.R. 2d (EDU) 649 (teacher left a student in the park and left class unattended received penalty of 120 days loss of pay); *IMO Tenure Hearing of Kimberly Geurds*, Comm. of Ed. Dec. No. 267-10+ (teacher who discussed "douche-bags" and who used the words "penis," "vagina", and "balls" in class with fifth grade students not removed from tenure).

Even a teacher's criminal conviction for conduct unrelated to his employment does not, *per se*, warrant removal from tenure. *See IMO Tenure Hearing of Martin Lieb, School District of the Town of West Orange, Essex County*, 1985 S.L.D. 933 (teacher convicted of lewd conduct not removed).

In light of these well-established principles, and as set forth, *infra*, it is clear that Mr. Coe did not engage in conduct unbecoming a teaching staff member, and that, in any event, has done nothing to warrant the draconian penalty of removal from his tenured teaching position.

POINT TWO
THE PRIOR RECORD OF MR. COE

Mr. Coe has been employed by the Board as a Teacher of Special Education for the past 16 years. **T5:7:4-7**. For the past 10 years, he has served as a home instructor, and for the past seven years, he has provided a.m./p.m. services to the Board. **T5:7:16-8:1**.

"Long service with the company, particularly if unblemished, is a definite factor in favor of the employee whose discharge is reviewed through arbitration. Arbitrators have recognized that the loss of seniority may work great hardship on the employee, and that it is not conducive to the improvement of relations between other workers and management." *Elkouri, supra*, 15-68.

Mr. Coe offered undisputed and unrebutted testimony that during his 17 years of service to the Board, he had never been subjected to any formal discipline, save the instant Tenure Charges, and that his performance evaluations over the years had ranged from "good" to "outstanding." **T5:50:3-12**. As such, he appears before this tribunal with a long and unblemished record of service to the students of the Trenton School District.

POINT THREE
MR. COE PERFORMED THE SERVICES FOR WHICH HE WAS PAID

Beyond the performance of his normal teaching duties for the Board, Mr. Coe performed several other duties and functions for which he was paid at an hourly rate. These duties included the supervision of students before and after the regular school day (referred to hereinafter as "am/pm duty"); participation in School Leadership Council ("SLC") and other meetings, and providing home-bound instruction to a student, [SB]. Mr. Coe was compensated at a rate of $42.00 per hour for extra duties which involved student contact time (i.e., am/pm duty and homebound instruction) and at the rate of $36.00 per hour for duties which did not involve student contact, such as attendance at SLC meetings. **T3:11:6-12:9; 79:5-18**.

Significantly, there is no evidence, nor does the Board even allege, that Mr. Coe did not completely and competently discharge the extra duties to which he was assigned. The Board does not claim, for example, that Mr. Coe ever left his am/pm duty before his students had gone home for the day. It does not allege that he ever arrived at an SLC meeting late or left a meeting before it had ended. As Principal Bethea testified, the SLC sign-in sheets did not contain start or end times, and thus provided no guidance on the actual length of those meetings. **T3:41:22-47:3.**

Moreover, as the testimony of [SB's] mother, [SGB], made abundantly clear, Mr. Coe always provided [SB] with all of the instructional time to which he was entitled, as reflected on Mr. Coe's timesheets. She testified that he spent "two and a half to three" hours at her house five days a week, and that he frequently stayed "longer than that." **T4:6:20-7:14.** She knew the times that Mr. Coe arrived and left, because she watched the same television shows everyday, and that Mr. Coe arrived before the end of "General Hospital," which ran from 3:00pm-4:00pm. **T4:48:19-49:13.** She was present during [SB's] instruction, and testified that Mr. Coe "never shortchanged" her son. **T4:50:2-12.**

[SGB] compellingly described the impact that Mr. Coe had on her son:

> My son had a great deal of love for Mr. Coe. So did we. [SB] counted on Mr. Coe to come every Monday through Friday to teach him. If he didn't come - - which he never—[SB] was ready. They got there. They even named each other nicknames. When Mr. Coe didn't come[8], [SB] got into depression because he couldn't get next to him. He couldn't call him. He couldn't see him. So he questioned us but we couldn't tell him. Trying to protect his feelings.
>
> Before my son died he wanted Mr. Coe—he got his allowance and he wanted Mr. Coe to come—for us to call him so he could come and take him to lunch. We told Mr. Coe couldn't come. He got mad, he went in his room and a week later he died.

[8] i.e., after he was removed from his assignment as [SB's] home-bound instructor.

> He got plenty of messages on my phone calling Mr. Coe on the telephone just to ask him how he's doing. "I hope you feel good, buddy." "I hope you all right, buddy." Only teacher he ever opened up to. He ever cared about. He—I won't say care. I say love because you really had to get next to [SB] for him to care about you, for him to wonder what you doing.

T4:17:20-18:16. These are not the words of a parent whose child was disserved by his teacher. Rather, Mr. Coe more than met expectations in his tutelage of Stephon.

Mr. Coe's exceptional service to Stephon is not mere gloss. Rather, it forcefully demonstrates that Mr. Coe is fit to discharge the duties and functions of his position—the "touchstone issue" in this case. *See Grossman, supra*.

POINT FOUR
THE BOARD FAILED TO PROVE THAT MR. COE WAS NOTIFIED OF AND SUBSEQUENTLY VIOLATED ANY BOARD POLICY OR PROCEDURE

The testimony of the Board's witnesses was, effectively, limited to a recitation of the content of Mr. Coe's timesheets. Significantly, the Board offered no real evidence that it ever provided Mr. Coe with any policies, procedures, directives, trainings, or guidelines as to how those timesheets should be completed, or how he should track his time in connection with his performance of extra duties.

"[I]n the arbitration of discipline cases...there must be reasonable rules or standards, consistently applied and enforced and widely disseminated...An employee can hardly be expected to abide by the 'rules of the game' if the employer has not communicated those rules, and it is unrealistic to think that, after the fact, an arbitrator will uphold a penalty for conduct that the employee did not know was prohibited." *Elkouri, supra*, 15-70.

This is precisely the situation presented by this case. The Board's proofs in this regard would generously be described as scant, and realistically characterized as nonexistent.

Monique Harvey, the supervisor of Special Education, was responsible to "monitor and approve all time as it relates to home instruction." **T2:5:22-6:16**. Despite this, she "was not sure" whether any Director of Special Education had, in the past five years, issued any policies of procedures to be followed in connection with home instruction. **T1:27:14-28:15**. She claimed that home instructors did not receive compensation for preparation time or travel time (**T2:8:15-24**), but offered no evidence that this, or other timekeeping guidelines, had ever been communicated to home instructors. Lissa Johnson testified that "[School Business Administrator] Jayne Howard does a training every year on all of the finance procedures." **T1:90:2-3**. Jayne Howard, however, offered no testimony whatsoever about any such training. She claimed that administration planned to "write a manual and collaborate with the Special Ed Department" (**T3:62:8-17**), but no such manual was ever introduced into evidence, nor was there any testimony that it was actually created.

On the other hand, Mr. Coe provided credible and unrebutted testimony as to District practices pertaining to time recording. He testified that Mr. Pettola, a Vice Principal and later Interim Principal, instructed attendees at SLC and other meetings to "sign out for an hour" even if those meetings did not last for a complete hour. **T5:29:1-23**. He recalled that SLC meetings normally did not last for a full hour. **T5:32:21-22**. He further testified that Mr. Pettola had instructed staff to "round up" in connection with recording their time for am/pm supervision. **T6:11:7-12:5**. Throughout his testimony, Mr. Coe candidly acknowledged that he typically "rounded up" his am/pm supervision time to the nearest quarter hour, and then spent the "round up" time commuting to Stephon Bacon's house.

Mr. Coe testified that he never billed the Board in connection with "travel time" to or from Stephon Bacon's home. **See, e.g., T6:66:6-9; 74:6-8; 76:11-12**. In the absence of any policy, procedure, or directive to the contrary, it would have been reasonable for Mr. Coe to do so. In fact, the Fair Labor Standards Act, 29 U.S.C. § 201, et. seq., requires an employer to pay employees who are traveling from one workplace to another during the work day. Specifically, 29 C.F.R. 785.38, Travel that is All in the Day's Work, provides:

> Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.

This being the case, Mr. Coe's "rounding up" his am/pm duty to the nearest quarter hour is ultimately of no moment: since he was traveling from am/pm duty to home instruction with Stephon Bacon, he was entitled, as a matter of law, to be paid for that period of time. Mr. Coe further testified that there was never any "round up" in connection with his homebound instruction services. **T6:37:19-23**.

Clearly, the Board promulgated no work rule which Mr. Coe knowingly violated. Even if, *arguendo*, Mr. Coe should have known (despite his supervisors' directives to the contrary) that he should not "round up" his am/pm or SLC meeting time, the Board's failure to enforce any such existing rule or policy mandates against the imposition of discipline here. "Lax enforcement of rules may lead employees reasonably to believe that the conduct in question is tolerated by management." Hence, "Arbitrators have not hesitated to disturb penalties where the employer over a period of time has condoned the violation of the rule in the past." *Ekouri, supra*, 15-74. The Board's failure to take basic steps to assure employee compliance with its alleged policies over a period of years cannot, at this late hour, be foisted upon Mr. Coe.

POINT FIVE
THE BOARD FAILED TO PROVE THAT MR. COE HAD BEEN CORRECTED, WARNED, OR REPRIMANDED IN CONNECTION WITH HIS TIMESHEETS

For all the reason set forth, *supra*, Mr. Coe provided credible, consistent, and reasonable explanations as to the manner in which he recorded his extra duty time. He freely acknowledged that, in a limited number of instances, his incorrectly misreported small amounts of time—which mistakes were not brought to his attention until the Tenure Charges were commenced against him.

Where an employee has accounted for himself in a such a reasonable manner, it is incumbent upon the employer to demonstrate that the employee had been warned of the impropriety of his conduct. "Failure to give prior warnings may be one of the reasons for the refusal by an arbitrator to sustain disciplinary action (particularly discharge)." *Elkouri, supra*, 15-73.

Despite this, it is not disputed that Mr. Coe was not advised, either formally or informally, of any concerns vis-à-vis his timesheets until on or about January 10, 2017 (**T1:83:20-86:3**)—well after the period of time contemplated by the allegations in the Tenure Charges.

Indeed, Principal Bethea testified that she reviewed Mr. Coe's am/pm vouchers "every pay period" (**T3:34:1-8**), yet never notified Mr. Coe that there was any issue with the way they had been prepared. Jayne Howard testified that the "State Department" conducted an extensive audit of the District's home instruction and after-duty payments for the 2007-2008 and 2008-2009 school years. **T3:53:18-54: 6**. Notwithstanding this, there was no evidence that Mr. Coe was ever informed that there was any concern with his submission of timesheets.

Under all of these circumstances, there was simply no reason for Mr. Coe to believe that he was doing anything improper in connection with his submission of time records. Having failed to advise him to the contrary, the Board cannot now seek the draconian penalty of termination against a

long-serving, unblemished employee. [Respondent's Brief, pp. 3-15].

Based upon the above, and the entire record, the Respondent requests that the charges be dismissed, that he "be reinstated to his tenured teaching position with full back pay, benefits, and emoluments." [*Id.* at 44]. The Respondent is willing to refund the Board the amount of $63 for the errors he made in his timesheets for August 3, 2015, March 14, 2016, and October 5, 2016. [*Id.*].

DISCUSSION

Pursuant to N.J.S.A. 18A:6-10, "[n]o person shall be dismissed or reduced in compensation * * * if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state * * * except for inefficiency, incapacity, unbecoming conduct, or other just cause." I have carefully reviewed the entire record of this proceeding. The Board must prove the basis for the tenure charges against the Respondent by a preponderance of the credible evidence that the Respondent committed unbecoming conduct and other just cause including, but not limited to, willful and intentional misconduct, falsification of time sheets, theft of time, theft of services, and theft of public funds. [See Ex. B-39].

The Respondent has been employed by the Board for 17 years. The evidence does not suggest or show that he was the recipient of a negative evaluation or any written discipline. As the record indicates, the Respondent performed several extra-curricular duties outside of the regular student school day. The Board's decision to dismiss the Respondent from his tenured teaching position was based upon the conclusions it drew from the Respondent's timesheet records. There is no evidence that the Respondent failed to perform or appear for his assigned duties. The Board's case-in-chief rests on the Respondent's timesheets that, on their face, include inconsistencies and areas

of concern for the Board such as overlaps in time on various assignments or the lack of a break in time between assignments. These are said to support the Board's charges that the Respondent engaged in the conduct set forth therein.

The State's Office of Legislative Services performed an audit of the school district in 2010. The audit resulted in findings that led to the discipline, in some instances dismissal, of Board employees. The Respondent was not within the scope of the audit. The evidence does not suggest or show that the Respondent was targeted or involved in any way during the audit or the personnel actions that later ensued against other employees. Nor does the evidence suggest or show that the Board shared the audit findings with employees, implemented a written policy on recordkeeping, or provided specific training to employees subsequent to the OLS audit.

In November 2016, the Board conducted an internal audit in anticipation of the Office of Legislative Services returning to perform for a 10-year audit. The internal audit caused concern to the Administration in that it revealed several inconsistencies in the Respondent's timesheets (Payroll Vouchers, Weekly Work Records, etc.). Based upon the manner in which the Respondent recorded his time, these records on their face appeared to the Board to show that the Respondent was performing more than one duty at once, and sometimes in

more than one location at the same time and being paid for the overlap in time.

The Respondent admitted that some of his timesheets contained errors. The evidence also shows that the Respondent's methodology of calculating his hours by rounding up his time caused him to be paid for time that he did not actually perform certain duties. The Respondent admitted that his rounding up had this effect, but he denied that he was willfully attempting to receive compensation for services that he did not perform. From his perspective, his recordkeeping was regular and consistent with the manner in which he had done so for at least two (2) years without any question ever being raised that his understanding was not accurate or not consistent with any policy. I am persuaded that the Grievant was forthright in his testimony notwithstanding the fact that his explanations for some inconsistencies in his timesheets were not clear or consistent.

Given this record, the evidence does not establish that the Respondent deliberately falsified his timesheets which, if proven, would reasonably provide the Board with a basis for his termination. The Respondent calculated his time in a substantially similar manner for several years without written notification, review or determination from the Administration that his methodology was inconsistent with the manner expected by the Board. Given the presence of his

practice, and the absence of a written policy or administrative directive to the contrary, I am not persuaded that the Respondent's actions were a deliberate, willful attempt to falsify his timesheets.[9] The Respondent testified to errors that he made. The explanations that he provided during the tenure proceedings were, at times, inconsistent. But the evidence does not compel me to conclude that the Respondent was consciously attempting to falsify his time records. I attribute the Respondent's lack of a consistent response in some areas of his testimony to be from his failure to recall the duties that he performed on specific dates that date back to the beginning of the 2015-2016 school year.

I have considered all of the charges proffered by the Board. The record does not demonstrate that the Respondent committed acts of conduct unbecoming and/or other just cause for dismissal.[10] Based on the foregoing facts and the applicable law, I conclude that the Board has not sustained its tenure charges against Respondent Michael Coe. The Respondent shall be immediately reinstated to his tenured teaching position and made whole in all respects.

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[9] Nothing herein shall be construed as preventing the Board from promulgating and implementing a written policy concerning the methodology of record keeping that is required.

[10] To reiterate, the alleged conduct includes, but is not limited to willful and intentional misconduct, falsification of time sheets, theft of time, theft of services, and theft of public funds. None of these charges are supported by the evidence.

DECISION

The Board has not sustained its tenure charges of conduct unbecoming and/or other just cause against Respondent Michael Coe. The charges are dismissed in their entirety. The Respondent shall be immediately reinstated to his tenured teaching position and made whole in all respects.

Dated: November 10, 2017
Sea Girt, New Jersey

Robert C. Gifford

State of New Jersey }
County of Monmouth }ss:

On this 10th day of November, 2017, before me personally came and appeared Robert C. Gifford to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Linda L Gifford
Notary Public
Expires 1-10-21

332-17

COLUMBIA HIGH SCHOOL BASEBALL BOOSTERS, INC. PETITIONER, V. BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Petitioning 501(c)3 organization – the Columbia High School Baseball Boosters (Booster Club) sought a ruling from the Commissioner that the provisions of New Jersey's Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*, and its accompanying statutes and regulations prohibiting harassment, intimidation and bullying (HIB), do not apply to them. This case involves a challenge by the Booster Club to the respondent Board's determination that it committed an act of HIB when it disinvited one of the baseball team members to the end of the year banquet in retaliation for the student's complaints of HIB against the baseball coaches. Petitioner filed a motion for summary decision, which was opposed by the Board.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioning parent-run private non-profit organization provides fundraising to benefit the Columbia High School baseball team; the trustees of the Booster Club have not been recognized or appointed by the respondent Board as volunteers within the school district; the within case stems from an HIB allegation against the Booster Club by a student athlete who, with his family, was disinvited from the annual year-end banquet, allegedly in retaliation for the student's complaints of HIB against the baseball coaches; the issue in this matter is whether the Act and its accompanying statutes, regulations and policies apply to the Booster Club. The ALJ concluded that Act and its accompanying statutes and regulations do not apply to the Booster Club because its members are not staff, school employees, students or school volunteers. Accordingly, the petitioner's motion for summary decision was granted.

Upon comprehensive review, the Commissioner determined that the Booster Club itself cannot violate the Act and therefore it is entitled to summary decision. In so deciding, the Commissioner pointed out that booster club members themselves are not exempt from the purview of the Act. Instead there must be a determination on a case-by-case basis as to whether the member falls into one of the categories of individuals that have certain responsibilities under the Act. Based on the circumstances in this case, the Commissioner finds that it is not appropriate at this juncture to remand this matter to the OAL to determine whether any of the individual Booster Club members violated the Act. Conducting a hearing now at the OAL concerning the conduct of the individual Booster Club members would be beyond the scope of the HIB investigation that was conducted and decided at the Board level.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 13, 2017

OAL DKT. NO. EDU 4046-17
AGENCY DKT. NO. 42-3/17

COLUMBIA HIGH SCHOOL BASEBALL BOOSTERS, INC. PETITIONER, V. BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the South Orange-Maplewood Board of Education (Board), and the reply thereto filed by the Columbia High School Baseball Boosters, Inc. (Booster Club). This case involves a challenge by the Booster Club to the Board's determination that it committed an act of Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq*. The Board found that the Booster Club committed an act of HIB when it disinvited one of the baseball team members to the end of the year banquet in retaliation for the student's complaints of HIB against the baseball coaches. In so doing, the Board found that the Booster Club was a volunteer in the District by virtue of its involvement with the District, and with the baseball team in particular.

The Administrative Law Judge (ALJ) found that the Act and the implementing regulations do not apply to the Booster Club. Specifically, the ALJ concluded that *N.J.A.C.* 6A:16-7.7 and *N.J.S.A.* 18A:37-15 do not apply to the Booster Club because they are not "staff, school

employees, students or volunteers." Therefore, the ALJ granted summary decision in favor of the Booster Club.

Upon a comprehensive review of the record in this matter, the Commissioner finds that the Booster Club is entitled to summary decision because the club itself cannot be found to have violated the Act. The Act was enacted "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises." *N.J.S.A.* 18A:37-13.1.f. In order to achieve those goals, school districts are required to adopt a policy prohibiting HIB, and the Act identifies the minimum components that shall be included in every policy. Notably, HIB policies must include "consequences and appropriate remedial action for a **person** who commits an act of harassment, intimidation or bullying." *N.J.S.A.* 18A:37-15b(4) (emphasis added). Therefore, *N.J.S.A.* 18A:37-15b(4) "clearly establishes that responses to a person (not only a student) who commits an act of HIB must include both the consequences and appropriate remedial action." [1] *See*, New Jersey Department of Education, *Model Policy and Guidance for Prohibiting Harassment, Intimidation and Bullying on School Property, at School-Sponsored Functions and On School Buses*, revised April 13, 2011, at 16. However, there is nothing in the Act to suggest that it intended to lump a group of individuals together when there is an allegation of HIB; instead it is more appropriate to evaluate the actions of each individual.

Although a booster club itself cannot be found to have violated the Act, it is important to recognize that individual booster club members are not exempt from the purview of

[1] The Commissioner is mindful that a school district's response to HIB that occurs off school grounds is only appropriate when the conduct substantially disrupts or interferes with the orderly operation of the school or the rights of other students. *N.J.A.C.* 6A:16-7.7(b); *N.J.A.C.* 6A:7.1 and 7.5.

the Act.[2] Instead there must be a determination, on a case-by-case basis, as to whether the member falls into one of the categories of individuals that have certain responsibilities under the Act. The specific statutory and regulatory provisions impose additional responsibilities for reporting and initiating a school district's HIB policy and procedures on certain individuals. For example, there are distinctions among the reporting requirements of specific individuals, as well as a school district's obligation to provide HIB training to certain individuals. Under *N.J.S.A.* 18A:37-16b and *N.J.A.C.* 6A:7.7(c), "[a] member of a board of education, school employee, contracted service provider, student or volunteer who has witnessed, or has reliable information that a student has been subject to harassment, intimidation or bullying shall *report* the incident to the appropriate school official..." (*emphasis added*). With respect to training requirements, school districts must provide training on its HIB policy to "school employees and volunteers who have significant contact with students" and information regarding the policy shall be provided to "full-time and part-time staff, volunteers who have significant contact with students, and those persons contracted by the district to provide services to students." *N.J.S.A.* 18A:37-17(b) and (c); see also, *N.J.A.C.* 6A:7.7(e)1.

Additionally, under *N.J.S.A.* 18A:37-16a, "[a] member of a board of education, school employee, student or volunteer shall not engage in reprisal, retaliation or false accusation against a victim, witness or one with reliable information about an act of harassment intimidation or bullying." In this case, the Board found that the Booster Club is a volunteer and that it violated *N.J.S.A.* 18A:37-16 and Board Policy 5512 when it disinvited one of the baseball team members to the end of the year banquet in retaliation for the student's complaints of HIB against the baseball

[2] School districts have the option of including a statement in their HIB policy expressly stating that booster club members are covered under the district's HIB policy.

coaches. Instead of making a finding of HIB against the Booster Club itself, the Board should have initiated an HIB investigation to determine whether any of the Booster Club members violated the Act, including whether any of the members constituted a volunteer under *N.J.S.A.* 18A:37-16a, and if so, whether any of the members engaged in retaliation against the student athlete in violation of the Act.

Based on the circumstances in this case, the Commissioner finds that it is not appropriate at this juncture to remand this matter to the OAL to determine whether any of the individual Booster Club members violated the Act. Certainly if any individual members were accused of violating the Act, they would have been given notice of the allegations and entitled to the due process guaranteed by the Act, including a right to a hearing before the Board. *See*, *Edward Sadloch et al. v. Board of Education of the Township of Cedar Grove, Bergen County*, Commissioner Decision No. 216-15, decided June 23, 2015. Conducting a hearing now at the OAL concerning the conduct of the individual Booster Club members would be beyond the scope of the HIB investigation that was conducted and decided at the Board level.

Accordingly, the recommended decision of the ALJ is modified as discussed above and the Booster Club's motion for summary decision is granted.

IT IS SO ORDERED.[3]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 11/13/17

Date of Mailing: 11/15/17

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 04046-17
AGENCY DKT.NO. 42-3/17

COLUMBIA HIGH SCHOOL BASEBALL BOOSTERS, INC,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE/MAPLEWOOD SCHOOL DISTRICT ESSEX COUNTY

Respondent.

Janelle Edwards-Stewart, Esq., for petitioner (Porzio, Bromberg &Newman, attorneys)

Sandra N. Varano, Esq. for respondent (Nirenberg & Varano, attorneys)

Record Closed: August 9, 2017 Decided: August 14, 2017

BEFORE **KIMBERLY A. MOSS,** ALJ:

Petitioner, Columbia High School Baseball Boosters, Inc (CHSBB)., brings this action seeking summary decision alleging that the harassment, intimidation and bullying (HIB) statutes and regulations do not apply to them.

On March 23, 2017, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested matter. On June 7, 2017, petitioner filed a motion for summary decision. On July 14, 2017 respondent, South Orange/Maplewood School District Board of Education (District) filed opposition to the motion for summary decision. On August 9, 2017, CHSBB filed a reply to the opposition to its motion.

FACTUAL DISCUSSION

In 2013 CHSBB created a formal structure as a private not-for-profit organization and elected a Board of Trustees. CHSBB is a separate corporate entity. The initial Board of Trustees consisted of five parents of baseball players within the baseball program at Columbia High School. Other parents have taken over these positions. The Board of Trustees has not been recognized or appointed by the Columbia High School (CHS) Board of Education (BOE) as volunteers within the district. CHSBB provides fundraising to CHS baseball team. The fundraising is in the form of dues from players' families, proceeds from the sale of baseball clothes, yearbook ad sales, banner sales, car washes and can drives. The funds generally go to the purchase of equipment for the baseball team.

CHSBB hosts events throughout the school year which focus on celebrating the team and player's achievements. One such event is the year end banquet which has occurred each June for many years. The year-end banquet is a private off campus non-school sponsored event attended by players and their families. CHSBB does not accept money from CHS or BOE for the banquet or any other event. CHSBB was advised by the Acting Superintendent, James Memoli, that as a separate organization it

could determine who would be invited to the banquet. D.D., a student on the baseball team, and his family were uninvited to the banquet.

The HIB allegation against CHSBB are based on D.D. and his family being disinvited to the year-end banquet. The District has an HIB policy, policy 5512. The Districts HIB policy was never distributed to CHSBB nor has CHSBB or its Board members been offered training about the HIB policy.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 6A:16-7.7(a)1 provides:

> (a) Each district board of education shall develop, adopt, and implement a policy prohibiting harassment, intimidation, or bullying on school grounds, pursuant to N.J.S.A. 18A:37-15.
>
> 1. Each district board of education shall develop the policy in consultation with, at a minimum, parents and other community members, school employees, school volunteers, students, and school administrators.

N.J.A.C. 6A:16-7.7

> (a) Each district board of education shall develop, adopt, and implement a policy prohibiting harassment, intimidation, or bullying on school grounds, pursuant to N.J.S.A. 18A:37-15.
>
> 1. Each district board of education shall develop the policy in consultation with, at a minimum, parents and other community members, school employees, school volunteers, students, and school administrators.
>
> 2. Each district board of education shall have control over the content of the policy, except that it shall contain, at a minimum, the following components:
>
> i. A statement prohibiting harassment, intimidation or bullying of a student;

ii. A definition of harassment, intimidation or bullying no less inclusive than that set forth in the definition at N.J.S.A. 18A:37-14 and N.J.A.C. 6A:16-1.3;

iii. A description of the type of behavior expected from each student;

iv. Appropriate remedial action for a student who commits an act of harassment, intimidation or bullying that takes into account the nature of the behavior, the developmental age of the student and the student's history of problem behaviors and performance and that may include the following:

(1) A behavioral assessment or evaluation including, but not limited to, a referral to the child study team, as appropriate; and

(2) Supportive interventions and referral services, including those at N.J.A.C. 6A:16-8;

v. Consequences for a student who commits an act of harassment, intimidation, or bullying that are:

(1) Varied and graded according to the nature of the behavior, the developmental age of the student and the student's history of problem behaviors and performance; and

(2) Consistent with the provisions of N.J.A.C. 6A:16-7, as appropriate;

vi. Appropriate consequences and remedial action for a staff member who commits an act of harassment, intimidation, or bullying;

vii. A procedure for reporting, verbally and in writing, an act of harassment, intimidation, or bullying, including a provision that permits a person to report anonymously consistent with N.J.S.A. 18A:37-15.b(5);

(1) The district board of education shall not take formal disciplinary action based solely on the anonymous report;

viii. A procedure for prompt investigation of violation and complaint reports consistent with N.J.S.A. 18A:37-15.b(6)(a) through (f) and 16.d;

ix. A requirement for the principal, in conjunction with the school anti-bullying specialist, to define the range of ways in which a school will

respond once an incident of harassment, intimidation, or bullying is identified, consistent with the range of responses adopted by the board of education, pursuant to N.J.S.A. 18A:37-15.b(7);

(1) The responses, at a minimum, shall include support for victims of harassment, intimidation, or bullying and corrective actions for documented systemic problems related to harassment, intimidation, or bullying;

x. A statement that prohibits a district board of education member, school employee, student, or volunteer from engaging in reprisal, retaliation, or false accusation against a victim, witness, or any person who reports or has reliable information about an act of harassment, intimidation, or bullying.

(1) The statement shall include the consequence(s) and appropriate remedial action(s) for a person who engages in reprisal or retaliation;

xi. Consequences and appropriate remedial action for a person found to have falsely accused another as a means of retaliation or harassment, intimidation, or bullying;

xii. A statement of how the harassment, intimidation, and bullying policy is to be publicized, including notice that the policy applies to participation in school-sponsored functions and on school buses.

(1) Notice of the district board of education's policy shall appear in any publication of the school district that sets forth the code of student conduct, pursuant to N.J.A.C. 6A:16-7.1, for schools within the school district;

xiii. A requirement that a link to the harassment, intimidation, and bullying policy be posted prominently on the home page of the school district's and each school's website;

xiv. A requirement that the harassment, intimidation, and bullying policy be distributed annually to all school staff, students, and parents;

xv. A requirement that the name of the school district's anti-bullying coordinator and his or her school phone number, school address, and school e-mail address be listed on the home page of the school district's website;

xvi. A requirement that the name of the school's anti-bullying specialist and his or her school phone number, school address, and school e-mail address be listed on the home page of the school's website; and

xvii. Provisions for appropriate responses to harassment, intimidation, or bullying, as defined in N.J.S.A. 18A:37-14 and N.J.A.C. 6A:16-1.3, that occurs off school grounds in cases in which a school employee is made aware of the actions or a

school administrator should have known of an incident of harassment, intimidation, or bullying.

(1) Responses to harassment, intimidation, or bullying that occurs off school grounds shall be consistent with N.J.A.C. 6A:16-7.1 and 7.5 and this section.

(b) A district board of education shall not be prohibited from adopting a harassment, intimidation, and bullying policy that includes components more stringent than components set forth in N.J.S.A. 18A:37-15 and (a) above.

(c) A district board of education member, school employee, contracted service provider, student, or volunteer who has witnessed, or has reliable information that a student has been subject to harassment, intimidation, or bullying shall report the incident to the appropriate school official designated by the district board of education's policy, pursuant to N.J.S.A. 18A:37-15 and (a)2vii above, or to any school administrator or safe schools resource officer, who shall immediately initiate the school district's procedures concerning harassment, intimidation, and bullying.

1. A district board of education member or school employee who promptly reports an incident of harassment, intimidation, or bullying to the appropriate school official designated by the district board of education's policy, or to any school administrator or safe schools resource officer, and who makes the report in compliance with the district board of education's policy, is immune from a cause of action for damages arising from a failure to remedy the reported incident, as set forth in N.J.S.A. 18A:37-16.c.

(d) A school administrator who receives from a school district employee a report of harassment, intimidation, or bullying, and fails to initiate or conduct an investigation, or who should have known of an incident of harassment, intimidation, or bullying and fails to take sufficient action to minimize or eliminate the harassment, intimidation, or bullying, may be subject to disciplinary action.

(e) The district board of education shall:

1. Annually review the training needs of school employees and volunteers who have significant contact with students for the effective implementation of the harassment, intimidation, and bullying policies, procedures, programs and initiatives of the district board of education and implement training programs for school employees and volunteers who have significant contact with students, consistent with P.L. 2010, c. 122, the annual review of training needs and the findings of the annual review and update of the code of student conduct, pursuant to N.J.A.C. 6A:16-7.1(a)2.

i. Information regarding the district board of education's policy against harassment, intimidation, and bullying shall be incorporated into the school district's employee training program.

(1) The program shall be provided to full- and part-time staff, volunteers who have significant contact with students and persons contracted by the school district to provide services to students;

2. Develop a process for annually discussing with students the school district's harassment, intimidation, and bullying policy;

3. Annually conduct a re-evaluation, reassessment and review of its harassment, intimidation, and bullying policy, and make any necessary revisions, consistent with N.J.S.A. 18A:37-15.c.

i. The programs or other responses shall be planned in consultation with, at a minimum, parents and other community members, school employees, school volunteers, students, and school administrators;

4. Annually establish, implement, document, and assess bullying-prevention programs or approaches and other initiatives designed to create schoolwide conditions to prevent or intervene in harassment, intimidation, and bullying in schools of the school district.

i. Programs, approaches, and initiatives shall be planned in consultation with, at a minimum, parents and other community members, school employees, school volunteers, students, and school administrators; and

5. Submit to the executive county superintendent a copy of its approved harassment, intimidation, and bullying policy within 30 days of its adoption.

(f) The principal of each school in the school district shall appoint a school anti-bullying specialist to perform the functions established in N.J.S.A. 18A:37-20.a and c.

(g) The chief school administrator of the school district shall appoint a district anti-bullying coordinator to perform the functions established in N.J.S.A. 18A:37-20.b and c.

(h) The district board of education shall form a school safety team in each school in the school district to achieve the purposes and perform the functions established in N.J.S.A. 18A:37-21.

The requirements are promulgated pursuant to N.J.S.A. 18A:37-13 through 32 and shall not be interpreted to prevent a victim from seeking redress under any other available civil or criminal law.

N.J.S.A. 18A:37-15.3 provides:

> The policy adopted by each school district pursuant to section 3 of P.L.2002, c.83 (C.18A:37-15) shall include provisions for appropriate responses to harassment, intimidation, or bullying, as defined in section 2 of P.L.2002, c.83 (C.18A:37-14), that occurs off school grounds, in cases in which a school employee is made aware of such actions. The responses to harassment, intimidation, or bullying that occurs off school grounds shall be consistent with the board of education's code of student conduct and other provisions of the board's policy on harassment, intimidation, or bullying.

The districts HIB policy, policy 5512, states in pertinent parts:

> Consequences and Appropriate Remedial Actions – Adults
>
> The district will also impose appropriate consequences and remedial actions to an adult who commits an act of harassment, intimidation, or bullying of a student. The consequences may include, but not be limited to: verbal or written reprimand, increment withholding, legal action, disciplinary action, termination, and/or bans from providing services, participating in school district-sponsored programs, or being in school buildings or on school grounds. Remedial measures may include, but not be limited to: in or out-of-school counseling, professional development programs, and work environment modifications.
>
> Harassment, Intimidation, and Bullying Reporting Procedure
>
> The Board of Education requires the Principal at each school to be responsible for receiving complaints alleging violations of this Policy. All Board members, school employees, and volunteers and contracted service providers who have contact with students are required to verbally report alleged violations of this Policy to the Principal or the Principal's designee on the same day when the individual witnessed or received reliable information regarding any such incident. All Board members, school employees, and volunteers and contracted service providers who have contact with students, also shall submit a report in writing to the

Principal within two school days of the verbal report. The Principal will inform the parents of all students involved in alleged incidents, and, as appropriate, may discuss the availability of counseling and other intervention services. The Principal, upon receiving a verbal or written report, may take interim measures to ensure the safety, health, and welfare of all parties pending the findings of the investigation.

Harassment, Intimidation, and Bullying Investigation

Parents of involved student offenders and targets/victims shall be provided with information about the investigation, in accordance with Federal and State law and regulation. The information to be provided to parents or guardians shall include the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, and whether consequences were imposed or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within five school days after the results of the investigation are reported to the Board of Education.

Reprisal or Retaliation Prohibited

The Board prohibits a Board member, school employee, contracted service provider who has contact with students, school volunteer, or student from engaging in reprisal, retaliation, or false accusation against a victim, witness, one with reliable information, or any other person who has reliable information about an act of harassment, intimidation, or bullying or who reports an act of harassment, intimidation, or bullying. The consequence and appropriate remedial action for a person who engages in reprisal or retaliation shall be determined by the administrator after consideration of the nature, severity and circumstances of the act, in accordance with case law, Federal and State statutes and regulations and district policies and procedures.

Harassment, Intimidation, and Bullying Policy Publication and Dissemination

This Policy will be disseminated annually by the Superintendent to all school employees, contracted service providers who have contact with students, school volunteers, students, and parents who have children enrolled in a school in the district, along with a statement explaining the Policy applies to all acts of harassment, intimidation, or bullying, pursuant to N.J.S.A. 18A:37-14 that occur on school property, at school-sponsored functions, or on a school bus and, as appropriate, acts that occur off school grounds.

The issue in this matter is the bullying statues, regulations and policy apply to CHSBB. The regulation when read in its totality clearly lists students, staff members, district Board of Education member, school employee and volunteer as being subject to the policy. The District's policy when read as a whole lists adults to whom the HIB policy applies to as Board members, school employee, contracted service provider who has contact with students or school volunteer. CHSBB does not fit into any of the above categories. The regulation states that the HIB policy must be distributed annually to all school staff, students and parents. Respondents admit that the policy was not distributed to CHSBB. The regulation requires training of school employees and volunteers regarding implementation of the HIB policy. Respondent admits that CHSBB did not have HIB training.

N.J.A.C. 6A:16-7.7 is promulgated pursuant to N.J.S.A. 18A:37-13 through 32.

I **CONCLUDE** that N.J.A.C 6A: 16-77 and N.J.S.A. 18A: 37 -15 does not apply to CHSBB because they are not staff, school employees, students or school volunteers.

ORDER

Accordingly, it is hereby **ORDERED** that the petitioner's motion for summary decision is **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8-14-17
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

AUG 15 2017

Date Mailed to Parties:

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

333-17

PHILLIS STILWELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the termination of her employment by the respondent Board, alleging that the school district violated her tenure rights when she was summarily terminated by a vote of the Board on October 21, 2015. Petitioner contended that she had been employed by the Board in a clerical position and had acquired tenure pursuant to *N.J.S.A.* 18A:17-2(b)(2). The Board asserted that petitioner was employed by the school district as a non-tenured custodian/maintenance employee within the meaning of *N.J.S.A.* 18A:17-3, and received extra pay to perform additional inventory control duties; as a non-tenured janitorial/custodial employee, petitioner was lawfully dismissed without the filing of formal tenure charges.

The ALJ found, *inter alia,* that: the central issue herein is whether petitioner held a tenured position from which she could not be summarily terminated; petitioner was continuously employed by the Board as a custodian from March 2008 until her termination in October 2015; in 2010, petitioner applied for and was given a position identified as Inventory Control Clerk, for which she received an employment letter that set forth that she was approved for reassignment as Inventory Control Clerk, a position which came with a stipend on top of her base salary as a custodian; petitioner continued in this position until she was terminated from the District's employ on October 21, 2015; petitioner's argument that she was employed in a tenured clerical position is without merit, as she never received notice from the Board that she had obtained tenure; petitioner remained under the supervision of the buildings and grounds department; and petitioner was obligated to assist with special custodial duties that are never assigned to clerical staff. The ALJ concluded that petitioner was employed as a custodian and received a stipend to perform the duties of an inventory control clerk, but this did not convert her custodial position into a clerical position; petitioner did not acquire tenure in the district as she was never employed in a position that would earn tenure. Accordingly, the ALJ affirmed the Board's termination action.

Upon comprehensive review of the record and the undisputed facts in this matter, the Commissioner rejected the Initial Decision, finding, *inter alia*, that: it is undisputed that clerical tenure is acquired by operation of law pursuant to *N.J.S.A.* 18A:17-2(b); the duties performed in a position, not the position title itself, control whether tenure can be accrued in that position; based on an analysis of the petitioner's actual duties and time allocated to performing clerical tasks as compared to custodial tasks, petitioner's exclusive role was to serve as inventory control clerk, a position that is clerical in nature; petitioner served in her clerical position for more than five years, and therefore earned tenure; petitioner was terminated without tenure charges having been filed and therefore was deprived of her tenure right to a hearing pursuant to *N.J.S.A.* 18A:6-10. Accordingly, the Commissioner ordered the Board to reimburse petitioner for back pay, benefits and emoluments for the period from October 21, 2015 to July 18, 2016.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 13, 2017

OAL DKT. NO. EDU 20522-15
AGENCY DKT. NO. 364-12/15

PHILLIS STILWELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and respondent's reply thereto – submitted in accordance with *N.J.A.C.* 1:1-18.4 – were also considered by the Commissioner.

The Administrative Law Judge (ALJ) found that petitioner was employed as a custodian and received a stipend to perform the duties of an inventory control clerk. The ALJ reasoned that petitioner's employment or job title did not change from custodian to inventory control clerk because she never received notice from the Board of having obtained tenure; she remained under the supervision of the buildings and grounds department; and she was obligated to assist with special custodial duties that are never assigned to clerical staff.

Petitioner's exceptions substantially reiterate the substance of her submissions at the OAL, recasting the arguments therein to support her contention that the ALJ erroneously concluded that petitioner was not a tenured employee in the District. Specifically, petitioner argues that the ALJ improperly applied the law of tenure acquisition because the ALJ's decision was based on "irrelevant factors" such as petitioner's job title, supervisor, salary schedule, and board recognition of tenure. Petitioner also argues that the ALJ failed to make specific findings of fact

as to the nature of her daily duties and responsibilities, or the proportion of time spent on various tasks, and that the record demonstrates that majority of petitioner's duties were clerical in nature. Petitioner further argues that the Board failed to follow the law when it summarily terminated her from her tenured clerical position; therefore she is entitled to back pay, benefits, and emoluments from October 21, 2015 through to July 18, 2016.

In reply, respondent also restates the positions advanced in the Board's submissions at the OAL. Respondent contends that petitioner was a custodian through title, duties, supervision, and pay as she received a small stipend in addition to her annual custodian salary for the clerical tasks that she performed. Respondent argues that petitioner was in the custodial bargaining unit and salary guide, was paid in accordance to her custodial contract, and her duties were not clerical in nature because her responsibilities involved daily physical labor, which was beyond the duties of other secretaries and clerks employed by the District. Respondent submits that the ALJ properly relied on the testimony of the Assistant Superintendent and the Building and Grounds Supervisor in determining that the inventory control clerk position was not clerical in nature. Respondent argues that the ALJ's decision was appropriate based on the facts and evidence set forth in the record; further, the petitioner was terminated for fraudulent misrepresentation of her income, and she has waived her right to any future public employment pursuant to her guilty plea and sentencing.

As a preliminary matter, the crux of the dispute here is whether petitioner's position as an inventory control clerk was "clerical," conferring tenure rights following satisfaction of the requirements of *N.J.S.A.* 18A:17-2, or whether she was a non-tenured custodian with additional duties that were clerical in nature.[1] In order to properly make a determination of the nature of a

[1] If it is determined that petitioner was tenured in a clerical position, then a determination must be made as to whether the Board violated any tenure rights in terminating petitioner from her position.

particular position, thorough fact finding and analysis of the duties performed and the balance of the time between the various duties and responsibilities performed – if the position requires performance of both clerical and non-clerical duties – must be conducted. *See Marlene Marbut v. Board of Education of the Township of South Brunswick, Middlesex County*, 97 *N.J.A.R.*2d (EDU) 99 (N.J. Admin. 1996); *see also Quinlan v. Bd. of Educ. of the Twp. of North Bergen,* 73 *N.J. Super.* 40 (App. Div. 1962). The Commissioner finds that the Initial Decision did not include proper findings of fact with regard to whether the inventory control clerk position was clerical or custodial, and the ALJ failed to provide clear analysis for her determination that petitioner was a non-tenured custodian. The record in this matter, however, is sufficient for the Commissioner to make a final determination without remand to the OAL.[2] Therefore, upon a comprehensive review of the record, the Commissioner rejects the ALJ's decision.

It is undisputed that tenure is acquired by operation of law pursuant to *N.J.S.A.* 18A:17-2(b), which provides: "[a]ny person holding any secretarial or clerical position or employment under a board of education of any school district or under any officer thereof" shall acquire tenure after either "[t]he expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may be fixed by the board or officer employing him," or "[e]mployment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year . . . ." The term "clerical" is not defined in the statute; however, case law and decisional law have provided guidance on the meaning of clerical, as well as the nature of the duties typically associated with the same. In *Barnes v. Bd. of Educ. of Jersey City*, 85 *N.J. Super.* 42, 44-45 (App. Div. 1964), the Appellate Division rejected the notion that "secretarial" and "clerical" are synonymous, holding

[2] The Commissioner also notes that the relevant facts are not in dispute.

"the phrase 'clerical position' was intended to extend the statutory protection coverage beyond secretarial employment." The Appellate Division further held "since tenure statutes are intended to secure efficient public service by protecting public employees in their employment, the widest range should be given to the applicability of the law." *Id.* at 45 (citations and internal quotation marks omitted). Guided by *Barnes*, ALJs have relied on the dictionary definition of "clerk" in an effort to determine whether the nature of the work performed was clerical. *See e.g.*, *Amelia Colon-Serrano v. Bd. of Educ. of the City of Plainfield, Union County*, OAL Dkt. No. EDU 11588-06N at *6 (Dec. 13, 2007), Commissioner Decision No. 31-08 (Jan. 28, 2008) ("Webster's Ninth New Collegiate Dictionary defines a clerk as a) an official responsible for correspondence, records, and accounts and vested with specified powers or authority, b) one employed to keep records or accounts or to perform general office work") (internal citations and quotation marks omitted); *Betsey Roach v. School District of South Orange-Maplewood*, 96 *N.J.A.R.*2d (EDU) 370 at *18 (N.J. Admin. 1995) ("clerk is one employed (as in a business office) to keep records or accounts or to perform more or less routine office tasks . . . a person employed, as in an office, to keep records, accounts, files, handle correspondence, or the like") (internal citation and quotation marks omitted).

Clerical duties may include but certainly are not limited to: answering telephones, filing records, photocopying documents, data input and data collecting, assisting supervisors, completing forms maintained in the ordinary course of business, and performing tasks as assigned by supervisors. *See Colon-Serrano*, *supra* at *3 (finding that "answer[ing] the telephones, answer[ing] the phone for her various supervisors, fil[ing], photocopy[ing] student records, photocopy[ing] papers for her superiors . . . not only for herself or her department but also for the neighboring departments[,]" and "prepare[ing] reports documenting student absences,

complete[ing] student transfer forms . . . ." were clerical duties); *Diane Giardina v. Bd. of Educ. of the Twp. of Pequannock, Morris County*, OAL Dkt. No. EDU 7677-03 at *12 (Feb. 18, 2005), Commissioner Dec. No. 124-05 (Apr. 4, 2005) (finding that the petitioner's position as office aide was tenure eligible as her responsibilities were consistent with clerical duties because the petitioner "typed, made copies of documents, engaged in bookkeeping and other office-related tasks . . . .", prepared various reports and interacted with students and parents as directed by her supervisor, managed "petty cash, the substitute teacher payroll, staff attendance," and "updated student rosters (incoming and outgoing students), ordered supplies and books and organized use of the school facilities by outside groups . . . ."). This tribunal has also found that "gathering videotapes, films and other instructional materials requested by teachers, delivering these requested items to various school buildings, picking them up after use and performing simple maintenance tasks such as untangling twisted tapes, cleaning cassettes or splicing broken film" constituted clerical work. *Roach, supra.* Additionally, in *Roach*, the petitioner was expected to "travel to all elementary schools to deliver supplies and equipment" and her position was characterized as 'a diverse one,' which entailed overseeing of the media library, delivering media to the six elementary schools, and assisting with the inventory and maintenance of our large stock of audio visual equipment," and her responsibilities also included receiving delivery of "new Apple IIE computers . . . unpacking them, recording serial numbers and helping to connect the parts." *Id.*

It is well-settled that duties performed in a position, not the position title itself, control whether tenure can be accrued in the position. *See Quinlan, supra* at *50 (noting that nature of the work performed is a crucial factor in determining whether the position is tenure eligible); *Roach, supra* (finding that the petitioner, who held various job titles in the district – including "audiovisual library technician" and "media aide (clerical)" – had tenure in the district

as her duties were *predominantly* clerical); *see also Giardina, supra,* at *24-28; *Delores Kopko v. Bd. of Educ. of the Twp. of Middletown, Monmouth County*, OAL Dkt. No. EDU 7302-10 (July 25, 2011), Commissioner Dec. No. 370-11 (Sep. 7, 2011). In accepting same, the Commissioner notes that the "mere fact that an employee performs clerical duties" or that a position requires "additional, non-clerical duties" – such as a paraprofessional – is not controlling. *See Giardina, supra* at 24-28 (finding that "petitioner held a clerical position eligible for tenure pursuant to *N.J.S.A.* 18A:17-2 when she served as an Office Aide since the bulk of her duties was clerical) (internal citations and quotation marks omitted). Therefore, the Commissioner's determination of this matter rests on whether petitioner's duties were predominantly clerical or custodial in nature, as well as the amount of time allocated towards performing her clerical tasks as compared to her custodial tasks.[3]

Petitioner's responsibilities – as set forth in the job description for inventory control clerk – were as follows:

A. Receive all materials delivered to school:
    1. Check orders, with assistance of supervisors as needed
    2. Follow procedure for forwarding receiving copies to the Administration Building
    3. Follow procedures for inventory control system to computer
B. Verify delivered goods conform with order
C. Fill in-school supply requests
D. Maintain inventory control system
E. Assist in determining general supply purchases as indicated by computer projections
F. Perform shipping duties for returned materials
G. Perform any other related duties as assigned by the school principal
H. Assist in custodial activities as directed by the plant manager, Supervisor of Buildings and Grounds and School Business Administrator.

[3] The Commissioner notes that the parties failed to include job descriptions for clerical staff and custodial staff in support of their arguments in this matter; however, the Commissioner deems that the job description for the inventory control clerk – coupled with the testimony of the witnesses – is sufficient to determine the nature of petitioner's position.

It is evident from a review of petitioner's job duties that a majority of her responsibilities were clerical in nature. Petitioner's detailed testimony regarding her job responsibilities reveals that between July 2010 (reassignment from custodian to inventory control clerk) and October 2016 (termination from her position as inventory control clerk), her daily tasks primarily consisted of the responsibilities listed in A, B, and D. The testimony further reveals that petitioner performed the responsibilities listed in F on a weekly basis, and the responsibilities listed in C and E annually and as needed throughout the school year. Responsibilities listed in G and H were performed on a need basis or when assigned. Specifically, the custodial activities were performed infrequently or when there was a need for extra support in the Buildings and Grounds Department. Testimony provided by Board employees did not contradict petitioner's account of her job responsibilities and her discharge of her duties. Significantly, the Board's Buildings and Grounds Supervisor testified that in the middle school, the person in charge of the tasks set forth in the inventory control clerk job description only works four hours per day on said tasks, and works as a custodian for the remaining four hours of her workday; whereas, petitioner's eight-hour days were allotted to performing the job responsibilities of her inventory control clerk position. Notably, petitioner's evaluations were also for the duties performed as an inventory control clerk, not custodian. Therefore, petitioner's exclusive role was to serve as inventory control clerk, which position is clerical in nature.

With regard to respondent's contentions that petitioner was a custodian with "additional" clerical duties because she was in the custodial bargaining unit and salary guide, was paid in accordance to her custodial contract, and performed duties that were not clerical in nature because her responsibilities involved daily physical labor beyond what was required of other secretaries and clerks employed by the District, the Commissioner is unpersuaded. In *Quinlan*,

supra, the Appellate Division found that the petitioner – who worked "half and half" as "clerk" and "attendance officer" – retained tenure accrued as a "clerk" because she continued to perform clerical duties, and the fact that the petitioner was "listed in a work schedule for attendance officers . . . or that she was referred to in a resolution of the board [ ] as an attendance officer[,]" or that she referred to herself as an attendance officer, did not undermine her clerical duties. Similarly, the Board's labelling of petitioner as a custodian (and petitioner's occasional custodial tasks) did not change the fact that her day-to-day duties were clerical in nature. The physical demands of some of petitioner's tasks – while purportedly atypical of other secretarial and clerical staff in the District – certainly does not render the inventory control clerk position non-clerical because of the broad definition afforded to the term "clerical," and due to the parallel between the physical demands of petitioner's position and the clerical position in *Roach*, *supra*. Respondent seems to disregard the fact that the majority of petitioner's tasks as inventory control clerk are not typically assigned to custodial staff. Additionally, it is not inconceivable for a member of the Buildings and Grounds Department to serve in a clerical position within the Department, especially when the tasks and responsibilities of that position are clerical in nature.

It bears noting that in the "abilities" section of the inventory control clerk job description, three of the four abilities listed are: ability to keep accurate written records; ability to use a computer with ease for the purpose of inventory record keeping, electronic communication and for tasks related to position; and knowledge of basic receiving procedures. These requisite "abilities" are ordinarily not essential for the performance of custodial duties, but are more commonly necessary for tasks performed by clerical and/or secretarial staff, as demonstrated by the case law and decisional law pertaining to clerical tenure. Therefore, to consider petitioner's

position akin to that of a custodian – when the requisite skills, abilities, and responsibilities are not comparable or substantially similar – is wholly inappropriate.

The tenure statute – *N.J.S.A.* 18A:6-10 *et seq.* – provides in pertinent part that "[n]o person [under tenure] shall be dismissed . . . expect for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing . . . ." In this matter, petitioner – a tenured clerical staff member of the District – was terminated without tenure charges having been filed with the Commissioner; therefore, petitioner was deprived of her tenure right to a hearing pursuant to *N.J.S.A.* 18A:6-10. As such, petitioner is entitled to back pay, benefits, and emoluments from October 21, 2015 through to July 18, 2016.

The tenure statute should be "liberally construed to achieve its beneficent ends." *Spiewak v. Bd. of Educ. of Hamilton Twp., et al.*, 90 *N.J.* 63, 74 (N.J. 1982). Here, petitioner served as an inventory control clerk – a position that was clerical in nature – for five years; therefore, petitioner obtained tenure in the District as a clerical staff member. Accordingly, the Initial Decision of the OAL is rejected, and respondent is directed to reimburse petitioner for back pay, benefits, and emoluments from October 21, 2015 through to July 18, 2016.

IT IS SO ORDERED.[4]

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 11/13/17
Date of Mailing: 11/15/17

[4] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 20522-15
AGENCY DKT. NO. 364-12/15

PHILLIS STILWELL,
Petitioner,
v.
NORTH BRUNSWICK BOARD OF EDUCATION,
Respondent.

Edward A. Cridge, Esq., on behalf of petitioner Phillis Stillwell (Mellk O'Neill, attorneys)

Marc G. Mucciolo, Esq., for respondent North Burnswick Board of Education (Methfessel & Werbel, attorneys)

Record Closed: July 14, 2017 Decided: August 14, 2017

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Phillis Stilwell (petitioner) appeals her termination effective October 21, 2015, from the North Brunswick Board of Education (Board) under cover of December 4, 2015. The Board filed its Answer to the Petition on Appeal under cover of December 18, 2015. The matter was transmitted to the Office of Administrative Law (OAL), on December 21, 2015, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -

15 and N.J.S.A. 52:14F-1 to -13. The central issue is whether petitioner held a tenured position from which she could not be summarily terminated.

On January 11, 2016, I held a case management conference telephonically with the parties in which discovery and hearing dates were discussed. A hearing was originally scheduled for August 4, 2016, but was adjourned several times at the request of one or both parties, with one additional adjournment due to adverse weather. The plenary hearings were ultimately held on February 27 and May 1, 2017. Post-hearing briefs were permitted and the record closed on July 14, 2017, with receipt of the written closing statements as the final submissions.

FACTUAL DISCUSSION

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

It is not disputed that on October 13, 2015, a Complaint and Summons was issued against petitioner as the defendant in the Superior Court of New Jersey, Middlesex County, for the offense of theft by deception for falsifying household income in order to obtain free school lunches for her four children for over a six year period. As a result of this criminal complaint, the Board voted to terminate petitioner's employment at its October 21, 2015, Board meeting. On October 5, 2016, a Judgment of Conviction was entered on petitioner's guilty plea to a criminal third degree offense of theft by deception, sentencing her to one year of probation, forfeiture of her Board pension, prohibition of any future employment within any school district, and restitution of $3,776.10, plus court fees.

The issue at hand is whether petitioner was protected from summary termination under the tenure laws such that she would have the right to her salary from October 2015 to October 2016.

Petitioner commenced employment with the Board on March 1, 2008 as a substitute custodian and then became a permanent night custodian, assigned to Judd School, effective September 1, 2008, at an annual salary of $29,334 (Step A). On June 17, 2010, petitioner's employment contract for July 1, 2010, through June 30, 2011, was for base salary of $30,273 (Step A) plus a stipend of $549 for the fact that she had a boiler license. In 2010, it was announced that there was an opening for the inventory control clerk. Petitioner applied for it and was given that position. Accordingly, a new employment letter was issued on July 22, 2010, setting forth that she was approved for reassignment as Inventory Control Clerk, with a salary of $31,715 (Step A), inclusive of the same base salary but both the boiler license stipend and an additional stipend for inventory control of $893. Petitioner's work location was moved to the high school.

Petitioner described her duties as the inventory control clerk as including receiving shipments, checking them against the purchase orders, logging them into the computer, and correcting any errors in those orders. The summer was the heaviest time of year for shipments. Generally, she could receive from one to twenty a day. She physically gathered and delivered the supplies received up to five or six times a day. Petitioner also maintained the online inventory and placed internal (staff) requests for supplies. She would handle the supplies of caps and gowns during graduation season, and she could be called on to escort vendors into the building.

Petitioner could be called on to provide custodial assistance. She attended the daily morning meetings, and would occasionally substitute for needed coverage at lunch time or with garbage cleanup. She estimated that such would occur maybe once per month. Petitioner had no boiler duties after she assumed inventory control, notwithstanding that she still received that stipend. Petitioner's evaluations were written up by either Ed Wiznicka, Custodial Supervisor, or Knox. It appeared that a custodian standard form was used but that on some of her evaluations, that word was crossed out and "shipping and receiving" was written in.

On cross-examination, petitioner acknowledged that she reported to Lorraine Knox, Plant Manager, as did all custodians. No clerks or secretaries reported to Knox. William O'Connor, who was in charge of Maintenance and Custodial services, had a

secretary but she would be the only clerical staff that reported to him. Petitioner admitted that snow duty was demanded only of custodians, including her. She was also eligible for overtime pay for custodial needs for special night or weekend events at the high school.

John Petela testified for the Board with respect to the general employment structure at the Board; employment, salary and contractual guidelines; and the circumstances surrounding petitioner's termination. With respect to the latter, petitioner's theft and fraudulent free lunch certifications were uncovered in the fall of 2015 as a result of an annual audit conducted by the Assistant Business Administrator. It was reported to the police and raised at the next Board meeting. The Business Administrator supervises Building and Grounds department, among others, that was under the direction of its then-Supervisor William O'Connor. Lorraine Know reported to O'Connor, who was the Plant Manager.

Petela sent the termination letter to petitioner, but also spoke to her before it became official. She received thirty days of pay in lieu of notice. Petela stated that she never raised the tenure issue at the time. In his mind, it was clear that petitioner was a custodian with additional inventory duties. In support of that opinion, Petela reviewed the various salary guides that apply under the union contract to teachers, clerks or custodial and maintenance personnel. He also confirmed that tenure letters always go out to those receiving it after the Board vote. In addition, he confirmed that only custodial and maintenance employees would be called in to shovel snow. He could not recall on cross-examination whether he had ever reviewed petitioner's evaluations.

William O'Connor also testified for the Board. He retired last fall but worked forty-three years for North Brunswick, starting as a bus driver and courier, and working his way up to Supervisor of Buildings and Grounds. He had approximately seventy employees under his supervision, with authority to recommend hiring decisions to the Board. O'Connor explained that the inventory control clerk duties were always awarded to someone on the custodial staff. Petitioner's replacement, for example, was a custodian at the middle school. Petitioner's eligibility to earn overtime came only from the fact that she was governed by the custodial/maintenance salary guidelines in the

union contract. While the work entailed some computer skills, it was dominated by physical labor. O'Connor reviewed all custodial evaluations with Wiznicka before they would be issued to employees. While he noted that the form was often modified for petitioner, he believed that was because the job duties listed were more natural for the regular custodial responsibilities.

I **FIND** by the preponderance of the credible evidence that petitioner was a non-tenured custodian who received a minimal stipend to perform the duties of an inventory control clerk. I **FIND** that the latter stipend never transmuted her employment or job title into a clerical position with the Board. This is further supported by the fact that petitioner never received a notice of having obtained tenure. Furthermore, petitioner remained under the supervision of Lorraine Knox, and remained obligated to assist with special custodian duties such as snow shoveling, to which clerical staff were never assigned.

LEGAL DISCUSSION

N.J.S.A. 18A:17-2(c) provides that any person holding any secretarial or clerical position or employment in a school district, after the expiration of a period of employment of three consecutive years in the district or a shorter period as may be fixed by the Board, shall hold the position or employment under tenure during good behavior and efficiency. Petitioner argues that this provision protected her employment with the Board once she became the inventory control clerk. The Board notes, and it is not disputed, that N.J.S.A. 18A:17-3 does not require tenure for utility workers/janitors. Instead, the Legislature allows boards of education discretion to deny tenure by appointing janitors for a fixed term, it permits boards and utility workers to negotiate terms of employment, and allows boards to determine which utility worker, if any, shall receive tenure. Wright and E. Orange Personnel Ass'n v. E. Orange Bd. of Educ., 99 N.J. 112, 118-19.

A claimant of tenure in situations such as this one bears the burden of presenting sufficient competent and credible evidence of facts essential to his or her claim. Here, petitioner must prove by a preponderance of competent and credible evidence that the

respondent employed her in a clerical position in order for her claim for tenure to succeed. Wright, supra, 99 N.J. at 119.

Based on the foregoing facts and applicable law, I **CONCLUDE** that petitioner was employed as a custodian under the supervision of the Department of Building and Grounds. She earned an extra stipend for both her inventory control duties and her boiler license, but the former did not transmute her position into a clerical one. Therefore, she does not have tenure, was never awarded tenure, and was never in a position that would earn tenure.

ORDER

Accordingly, and for the reasons articulated above, it is **ORDERED** that the termination action of respondent North Brunswick Board of Education is hereby **AFFIRMED**. It is further **ORDERED** that the appeal of petitioner for relief under Title 18A is hereby **DISMISSED** with prejudice consistent with the reasons set forth above.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 14, 2017
DATE

Gail M Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency:

Date Mailed to Parties: AUG 15 2017

Lisa Rudes
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

APPENDIX

WITNESSES

For Petitioner:

Phillis Stillwell

For Respondent:

William O'Connor

John Petela

EXHIBITS

For Petitioner:

P-1 Appointment Letter, dated July 15, 2008

P-2 Contract for Employment, dated June 17, 2010

P-3 Inventory Control Clerk Reassignment Letter, dated July 22, 2010

P-4 Inventory Control Clerk Contract Letter, dated July 27, 2010

P-5 Inventory Control Clerk Employment Contract, dated July 22, 2010

P-6 Employment Contract, dated June 23, 2011

P-7 Employment Contract, dated June 28, 2012

P-8 Employment Contract, dated June 23, 2013

P-9 Employment Contract, dated May 29, 2014

P-10 Performance Review, dated April 13, 2011

P-11 [not in evidence]

P-12 Performance Review, dated August 21, 2013

P-13 Performance Review, dated June 1, 2014

P-14 Inventory Control Clerk Job Description

P-15 Termination Letter, dated October 21, 2015

P-16 Judgment of Conviction, dated October 5, 2016

For Respondent:

R-1 Petition of Appeal

R-2 Answer to Petition

R-3 Discovery Request/Document Demand

R-4 Board's Responses to Discovery Demands

R-5 Stilwell Application and Letter, dated June 6, 2008

R-6 Board Letter of Employment, dated February 21, 2008

R-7 Board Letter of Employment with Contract, dated July 15, 2008

R-8 Board Letter of Employment, dated April 30, 2009

R-9 Board Letter of Employment, dated July 22, 2010

R-10 Board Letter of Employment with Contract, dated July 27, 2010

R-11 Board Letter of Termination, dated October 22, 2015

R-12 Custodial-Maintenance Interview Form, dated July 1, 2008

R-13 Custodial-Maintenance Interview Form, dated June 2, 2010

R-14 Custodial-Maintenance Interview Form, dated July 13, 2010

R-15 Custodial-Maintenance Interview Form, dated July 14, 2010

R-16 Work Appraisal 2008-2009

R-17 Work Appraisal 2009-2010

R-18 Work Appraisal 2010-2011

R-19 Work Appraisal 2012-2013

R-20 Work Appraisal 2013-2014

R-21 Job Description

R-22 Letter from Prosecutor, dated October 11, 2016

R-23 Plea Agreement, dated October 5, 2016

R-24 Presentence Report, dated September 27, 2016

R-25 Complaint and Summons, dated October 13, 2015

R-26 Order of Forfeiture of Public Employment, dated July 18, 2016

R-27 Payroll Documents

R-28a Contract Agreement, 2016-2019

R-28b Contract Agreement, 2012-2015

336-17

336-17
D.I., ON BEHALF OF MINOR CHILD, I.I., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

In September 2017, *pro se* petitioner D.I. filed an appeal seeking an order directing the respondent Board to allow her daughter, I.I. – an eighth grade student in the River Dell School District – to switch her assigned elective for the current year from "Music Studio 8" to "Art of the 20th Century 8." A motion for emergent relief in this matter was denied on October 6, 2017 following a hearing on October 4, 2017.

The ALJ found, *inter alia*, that: petitioners herein demonstrated that I.I. suffered temporary disappointment over the denial of the desired art elective assignment, but failed to demonstrate any irreparable harm; petitioners did not satisfy this first prong of the requirements for emergent relief set forth in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.; all four prongs of *Crowe* must be satisfied in order to qualify for emergent relief; accordingly, petitioners cannot and do not qualify for emergent relief; petitioners claim that the reasons offered by the District for denying I.I.'s choice of elective course were arbitrary and capricious is without merit; and the remedy sought by the petitioners would undermine the authority granted to the District to run its schools in an efficient manner, pursuant to *N.J.A.C.* 6A:8-3.1 and 6A:8-3.2. The ALJ concluded that the Board's denial of the request for a schedule change in this matter was appropriate, was not arbitrary or capricious, and must be affirmed. Further, as there are no additional underlying issues remaining to be resolved here, the ALJ concluded that the matter should be dismissed.

Upon comprehensive review of the record, the Commissioner concurred with the ALJ's findings and conclusions. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, for the reasons stated therein. The petition was dismissed.

November 17, 2017

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

336-17

OAL DKT. NO. EDU 14169-17
AGENCY DKT. NO. 221-9/17

D.I., ON BEHALF OF MINOR CHILD, I.I.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the Initial Decision of the OAL have been reviewed, as have the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4 and the Board's reply thereto.

Petitioner argues in her exceptions that she is aware of an instance where a student's schedule was changed when it was not related to mathematics or special education, and therefore I.I.'s schedule should be changed to Art of the 20th Century 8 rather than Music Studio 8. Petitioner also points out that when new students move into the district, they would be assigned an elective in the middle of the year, so it would not disrupt the class for I.I. to be transferred to her desired class. Further, petitioner maintains that she did not receive a letter from the Board regarding the decision that students could not select or change their elective courses, and contends that it is illogical to randomly select electives because only 2 of 20 students who are members of the National Junior Art Society were placed into art class. Finally, petitioner argues that it would not create a hardship for the school or affect the school's budget to switch I.I.'s elective class from music to art.

In reply, the Board argues that petitioner's exceptions present new facts and do not demonstrate that she is entitled to emergent relief. Specifically, the Board points out that whether another student's schedule was changed, or the fact that new students would need to be assigned an elective, do not demonstrate that petitioner has a likelihood of success on the merits. Further, whether petitioner

received a letter regarding the Board's policy for assigning electives does not mean that I.I. should be entitled to change classes. Finally, whether petitioner disagrees with the manner in which the Board assigned electives does not demonstrate that the method was arbitrary, capricious or unreasonable. Accordingly, the Board urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Further, the Commissioner agrees with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner when it denied petitioner's request for a schedule change. The Commissioner notes that petitioner's exceptions do not establish entitlement to emergent relief, nor do they show that the Board acted arbitrarily; further, petitioner's arguments were fully considered by the ALJ in reaching his decision.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 11/17/17*

Date of Mailing: 11/20/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION-
EMERGENT RELIEF
OAL DKT. NO. EDU 14169-17
AGENCY REF. NO. 221-9/17

D.I. ON BEHALF OF MINOR CHILD I.I.,
Petitioner,
v.
BOARD OF EDUCATION OF THE RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,
Respondent.

D.I., Parent of minor, I.I., Petitioner, pro se

Rodney T. Hara, Esq., for Respondent (Fogarty & Hara, attorneys)

Record Closed: October 4, 2017 Decided: October 6, 2017

BEFORE **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE

D.I., on behalf of her Eighth Grade, Middle School daughter, I.I., is appealing the River Dell Board of Education's (the District's) denial of a request to change her daughter's schedule, i.e., changing I.I.'s elective course from "Music Studio 8" to "Art of the 20th Century 8".

The N.J. State Board of Education transmitted this matter to the Office of Administrative Law (OAL), where it was filed on September 27, 2017 as a contested case. N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to –13.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following:

(1) D.I. is the parent of I.I., an Eighth-Grade student at the River Dell Middle School.

(2) The Petitioners seek emergent relief in the form of an Initial Decision reversing the determination of the River Dell Board of Education ("District") which denied Petitioners' request for a schedule change whereby I.I. would change her enrollment in "Music Studio 8" to "Art of the 20th Century 8".

(3) The School District sent several notices to the parents of soon-to-be Eighth graders notifying them of the impending limitations on choice of electives and that schedule changes would be limited to matters dealing with mathematics and special education only.

(4) While the Respondent's position is that due to budgetary restrictions, the school was not able to fully accommodate the students' anticipated requests for elective course choices, the matter at bar can be decided without resolving the merits of that assertion.

(5) The Petitioners were not able to demonstrate 'irreparable harm" to I.I. due to the District's denial of the schedule change.

ISSUES PRESENTED

(1) Have the requirements under Crowe v. DeGioia, 90 N.J. 126 (1982) been met for the granting of emergent relief?

(2) Have the Petitioners presented a legal basis for their claim that a student's choice of elective course is a "right" that cannot be abrogated by the school district?

(3) Should the school district be compelled to grant the schedule change requested by I.I., namely changing her elective course registration from "Music Studio 8" to "Art of the 20th Century 8"?

LEGAL ANALYSIS AND DISCUSSION

Petitioners assert that the School District's denial of I.I.'s request for changing her schedule, i.e. changing her elective from Music to Art violated the "New Jersey Student Learning Standards for Visual and Performing Arts" and was therefore arbitrary and capricious. The legal basis for Petitioners' case is a certain text taken from the State Department of Education website which reads as follows:

> "In grades 6-8, students should gain greater depth of understanding in at least one of the arts disciplines. Students must continue to have opportunities to create and perform, as determined by student choice, with the expectation that they achieve competency in their chosen discipline. All four arts disciplines must be made available to middle-level students."

Petitioners argue that the nature of the language employed in the above-quoted text is mandatory, not permissive and that therefore a school district may not deprive a student of his or her choice of arts discipline elective. Specifically, Petitioners argue that the phrase "...students *must* continue to have opportunities to create and perform" and the phrase ""All four arts disciplines *must* be made available....", when amplified by

the phrase "as determined by student choice" mandates that a school district provide the elective courses which the individual student chooses for himself or herself. Furthermore, Petitioners argue that the inclusion of the phrase "as determined by student choice" establishes a "right" and thus trumps the notion that the School District has discretion over which elective courses the individual student will be assigned.

In the case at bar, Petitioners maintain that the reasons offered by the School District (which are contained in various correspondences in P-1, P-2, P-2A, P-3 and Exhibit 'C' of R-1) for denying I.I.'s choice of elective course are arbitrary and capricious because they are not grounded in any law or regulation and are contrary to the above-quoted mandatory language of the New Jersey Student Learning Standards (NJSLS).

D.I. brought several correspondences to the Tribunal's attention which set forth the District's notice to parents that schedule changes would not be permitted and setting forth the District's reasons why schedule changes would not be permitted (with the exception of changes for Mathematics and Special Education courses). D.I. argued that she is aware of at least one instance where a student was granted a course change which was not related to Mathematics or Special Education. Upon questioning, she stated that the schedule (course) change did not involve the "Art of the 20th Century 8" course which I.I. seeks.

D.I. argued that she and her daughter met the requirements set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) and were thus entitled to emergent relief. Specifically, she argued that the first prong of Crowe, requiring Petitioners to carry the burden of proving an irreparable harm, was satisfied by the fact that I.I. suffered disappointment at not being allowed to take the Art course that she looked forward to taking, that the after-school activities offered were not for-credit courses as was the sought-after Art course, and by the fact that she would have a lesser chance of gaining entry into an honors level high school art course without the Eighth Grade, course in "Art of the 20th Century 8" course.

As to the second prong of Crowe, Petitioners argued that the cited section of the New Jersey Student Learning Standards was published pursuant to the provisions of the New Jersey Administrative Code, and therefore had the force of law. Moreover, the mandatory nature of the language cited above established that it was I.I.'s settled right to take the elective of her choice.

As to the third prong of Crowe, the Petitioners re-iterated the points made regarding the first prong stated that they did not receive the Principal Richard Freedman's "July 2017" letter (R-1, Exhibit "C"), and added that the student made her elective course preference known and the school district denied her request.

As to the fourth prong of Crowe, the Petitioners argued that the student's request was a very simple one: to place her in the Art class of her choice, which, Petitioners maintained, would not seriously affect the School District's operations or budget. Petitioners noted that the School District recently and unwisely spent significant money on the transportation of the school's football players to travel to an out-of-state ball game, yet could not find the money to grant a simple course change for a single student.

The School District's response to the Petition focused on the assertion by Petitioners that they were entitled to emergent relief. The District argued that the assertions of "irreparable harm" to I.I. failed to establish any "harm" that could be considered serious enough to warrant the emergent relief sought. Moreover, there was certainly no sort of harm that could be considered in any way "irreparable", i.e. some harm that cannot possibly be undone. The District made the point that I.I.'s "disappointment" at not being able to enroll in the already-filled Art course did not rise to the level of the type of "severe personal inconvenience" contemplated in Crowe. (In Crowe the allegation of "severe personal inconvenience" was not a matter of disappointment, but rather had to do with Crowe's impending homelessness.)

In regard to Crowe's second prong, the District argued that there was no "settled right" of a student to enroll in a course that was already filled and that the notion of

"student choice" advocated by the Petitioners was inconsistent with the orderly running of the District's schools. The District noted that the "legal basis" cited by the Petitioners on page one of P-1 was not a law or a regulation, but merely information from the Department of Education's website. The district argued that the cited material did not have the force of law and did not establish a "right".

In regard to the third prong of Crowe, the District maintained that it sent appropriate notices concerning the impending limitations on elective courses and that it devised a system whereby openings were randomly and fairly apportioned.

In regard to the fourth prong of Crowe, the District maintained that it had limited resources in the budget, that it used a computer-generated, random process to ensure equal access to elective courses, that it offered two after-school enrichment alternatives to those eighteen students who did not get into the "Art of the 20th Century 8" Art class, one of which was a nationally-recognized Art honor society. The District argued that the hardship to I.I. was merely a matter of her "disappointment", while the hardship to the District, in the event of an adverse ruling, would be the complete overhaul of the workable, fair elective enrollment system that it had devised plus the re-budgeting that it would entail.

CONCLUSIONS

The Petitioners have demonstrated that I.I. suffered temporary disappointment over the denial of the desired Art course. In an attempt to explore the possibility of irreparable harm, the Tribunal questioned D.I.'s assertion that enrollment in a high school Art honors course would be denied to I.I. because she lacked the "Art of the 20th Century 8" course. D.I. admitted that this assertion was based on speculation, not facts. I **CONCLUDE** that the Petitioners have not demonstrated that they have suffered or will suffer irreparable harm. The Petitioners have not satisfied the first prong of Crowe. Since it is necessary to establish all four prongs of Crowe to qualify for emergent relief, I **CONCLUDE** that Petitioners cannot and do not qualify for emergent relief.

The Petitioners base I.I.'s asserted "right' to enroll in any elective she chooses on the language set forth on page one of P-1. The cited language was taken from a "Frequently Asked Questions" section of the Department of Education's website under the heading "Visual and Performing Arts Standard Document" pertaining to "New Jersey Student Learning Standards." I **CONCLUDE** that the cited language does not have the force of law. I **CONCLUDE** that the cited language does not deprive or lessen the School District's authority to schedule the type or number of classes in a given subject.

I **CONCLUDE** that the cited language does not confer any "right" on a student to enroll in an any elective course he or she chooses. I **CONCLUDE** that the Petitioners have not demonstrated that I.I. was denied any "right" afforded to her under law.

I also **CONCLUDE** that the remedy sought by the Petitioners would undermine that authority granted to the School District to run the school in an efficient manner, pursuant to N.J.A.C. 6A:8-3.1 and 6A:3.2 (b) (6) and (e) (3). I **CONCLUDE** that the language cited by the Petitioners does not compel the School District to grant the requested schedule change.

I **CONCLUDE** that the denial of Petitioner's request for a schedule change in this matter was appropriate, was not arbitrary nor capricious and that the action of the River Dell Board of Education should be **AFFIRMED.** I further **CONCLUDE** that there are no further underlying issues that remain to be resolved, therefore, the within matter should be **DISMISSED**.

ORDER

Based upon the foregoing, the decision of the District to deny Petitioners the elective course change from "Music Studio 8" to "Art of the 20th Century 8" is hereby **AFFIRMED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 6, 2017
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: October 6, 2017

Date Mailed to Parties: OCT 6 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Db

APPENDIX

List of Witnesses

For Petitioner:

D.I., Petitioner, parent of I.I.

For respondent:

None

List of Exhibits

For Petitioner:

P-1 Petition (7 sheets)

P-2 Eight sheets of e-mailed correspondence (8 sheets)

P-2A September 12, 2017 letter from D.I. to NJDOE Commissioner Kimberly Harrington (1 sheet)

P-3 E-mails between D.I. and Dale Schmid (2 sheets)

For Respondent:

R-1 Fletcher Certification (9 sheets plus Exhibits 'A' through 'G')

R-2 Attorney Hara's Letter Brief dated October 4, 2017 (19 sheets)

337-17

OAL DKT. NO. EDU 814-17
AGENCY DKT. NO. 305-12/16

K.G., on behalf of minor child, D.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed. According to the Agreement, the first settlement payment was due on July 14, 2017. This date preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon a mutually satisfactory alternate date for the effectuation of the settlement payment. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 11/20/17

Date of Mailing: 11/20/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00814-17
AGENCY DKT. NO. 305-12/6

K.G. ON BEHALF OF MINOR CHILD D.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,

Respondent.

Stephen L. Ritz, Esq., for petitioner

Janelle Edwards-Stewart, Esq., for respondent (Porzio, Bromberg and Newman, attorneys)

Record Closed: October 5, 2017 Decided: October 10, 2017

BEFORE **JUDE-ANTHONY TISCORNIA,** ALJ:

On January 18, 2017, the matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement and the Board's resolution.

Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

DATE

JUDE-ANTHONY TISCORNIA., ALJ

Date Received at Agency: 10-12-17

Date Mailed to Parties: OCT 12 2017

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

id

PORZIO
BROMBERG&NEWMAN P.C.

ATTORNEYS AT LAW MORRISTOWN NJ • NEW YORK NY • PRINCETON NJ • WASHINGTON DC • WESTBOROUGH MA

JANELLE EDWARDS-STEWART
MEMBER, CT, NJ AND NY BARS
DIRECT DIAL NO.: 973-889-4092
E-MAIL ADDRESS: JEDWARDSSTEWART@PBNLAW.COM

October 3, 2017

RECEIVED
2017 OCT -5 A 9:49
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

VIA FACSIMILE AND REGULAR MAIL

Judge Jude Tiscornia
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: *K.G. on behalf of minor child D.C. v. Board of Education of the City of Summit, Union County*
OAL Dkt. No.: EDU 00814-17
Our File No.: 08415.07840

Dear Judge Tiscornia:

As Your Honor is aware, we represent the Summit Board of Education in the above-referenced matter. A telephone status conference has been scheduled to occur tomorrow, October 4, 2017. However, based upon the enclosed executed agreement and board approval of same (provided to Petitioner's counsel on September 20, 2017), this matter has resolved, and a teleconference no longer appears necessary.

We thank Your Honor for courtesies extended.

Respectfully submitted,

Janelle Edwards-Stewart

Enclosure
cc: Stephen Ritz, Esq. (via electronic mail)

100 SOUTHGATE PARKWAY, P.O. BOX 1997
MORRISTOWN, NJ 07962-1997
TELEPHONE (973) 538-4006
FAX (973) 538-5146
www.pbnlaw.com

SUMMIT PUBLIC SCHOOLS

Board of Education • 14 Beekman Terrace • Summit New Jersey 07901-1702 • 908-273-3025

Louis J. Pepe, RSBA, Assistant Superintendent

September 18, 2017

RECEIVED
2017 OCT -5 A 9:11
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Janelle Edwards-Stewart, Esq.
Porzio, Bromberg Newman, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997

Dear Ms. Edwards-Stewart:

The Board of Education of Summit in the County of Union, New Jersey convened a meeting on Thursday, September 14, 2017 at 7:00 PM in the Summit High School Library/Media Center.

The following Board members were present: Mr. Hanley, presiding, Mr. Bonner, Mr. Dietze, Ms. McCann, Ms. Miller, Ms. Primack, and Ms. Wong. Also present were Mr. Chang, Superintendent of Schools, Mr. Pepe, Assistant Superintendent/Board Secretary, Dr. Kachmar-Desonne, Director of Special Services, Dr. Block, Director of Human Resources, Ms. McCann, Director of Elementary Education, Ms. Derpich, Director of Secondary Education, and Ms. Masbang, Assistant Business Administrator.

SCHOOL BOARD OPERATION

J. Approval of Settlement Agreement between Summit Board of Education and parents of student #3604023724 as per attorney recommendation

Motion by Mr. Dietze, seconded by Ms. McCann
Roll Call 7-0
Motion Carried

I, Louis J. Pepe, RSBA, Assistant Superintendent/Board Secretary of the City of Summit, in the County of Union, State of New Jersey hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on September 14, 2017 has been compared by me with the original minutes of said City of Summit Board of Education and is a true and complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract. In witness I have hereunto set my hand and affixed the corporate seal of the said board of education.

Louis J. Pepe, RSBA
Assistant Superintendent/Board Secretary

Agreement attached

SETTLEMENT AGREEMENT

This settlement agreement ("Agreement") made by and between

Summit Board of Education
(Hereinafter referred to as "Summit")

AND

K.G. o/b/o D.C.
(Hereinafter referred to as "K.G.")

RECEIVED
2017 OCT -5 A 9:11
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

WHEREAS, Summit is duly organized as a public school district under the laws of the State of New Jersey, and

WHEREAS, K.G. was found by Summit to have enrolled her daughter in Summit Public Schools, while attending the Academy for Performing Arts ("APA") at Union County Vocational and Technical School ("UCVTS"), despite not being domiciled in Summit during the 2016-17 school year; and

WHEREAS, K.G. appealed that determination to the Commissioner of Education under the following docket numbers: Agency Docket Number 305-12/16; OAL Docket Number EDU 00814-17; and

WHEREAS, Summit continued to pay tuition for D.C.'s continued attendance at APA through May 2017; and

WHEREAS, the parties wish to avoid the expense of further litigation and enter into a settlement;

NOW, THEREFORE, in consideration of the mutual covenants and promises hereinafter set forth, the parties agree as follows:

1. **Payment for Fall Semester of 2016-17 at APA.** K.G. shall pay the total sum of one thousand five hundred dollars ($1,500.00) to Summit. Payment shall be made by K.G. as follows:

(a) At or before 3:00 p.m. on July 14, 2017, K.G. shall pay Summit the amount of seven hundred and fifty dollars ($750.00);

(b) Beginning with August 2017, on or before the first day of every month, K.G. shall issue payment to Summit in the amount of one hundred and twenty five dollars ($125.00) until a sum of one thousand five hundred ($1,500.00) is paid in full. This is anticipated to occur by January 1, 2018;

(c) Each payment by K.G. shall be made via certified check or money order made out to the "Summit Board of Education;"

(d) If K.G. chooses to mail any of the aforementioned payments, she shall ensure that it is received by Summit before the end of the school day on the first day of the month. Payments may be mailed to Louis Pepe, Assistant Superintendent for Business, Summit Board of Education, 14 Beekman Terrace, Summit, New Jersey 07901.

(e) If K.G. chooses to hand deliver any of the aforementioned payments, she shall ensure that it is delivered by the end of the school day on the first day of the month. Payments may be hand delivered to a member of the Business Office for the Summit Board of Education, 14 Beekman Terrace, Summit, New Jersey 07901. If a payment is handed to any person other than the Assistant Superintendent for Business, Louis Pepe, or the

Assistant Business Administrator, Kathy Masbang, K.G. shall request and maintain a signed and dated payment receipt.

(f) In the event that K.G. fails to make a timely payment hereunder, and such default is not cured within five (5) calendar days, Summit shall be entitled to the immediate entry of a Consent Judgment by the Superior Court of New Jersey against K.G. for the amount of $1,500.00 (one thousand five hundred dollars) and/or $3,900, which includes Summit's unpaid reimbursement sum from Watching (*see* Paragraph 3 herein), together with interest calculated from the date of default and reasonable attorneys' fees and costs incurred by Summit in connection with any litigation or collection proceedings related to K.G.'s default under this Agreement. The total sum owed shall be less any and all payments received by Summit. The Consent Judgment shall be signed by the parties simultaneously upon the signing of this Agreement, and shall be held in escrow by the law firm of Porzio, Bromberg & Newman, P.C. The Consent Judgment shall be attached hereto as Exhibit "A" and incorporated into this Agreement by reference. K.G. understands that she will not receive any notice from Summit regarding her requirements to make the payments set forth in Paragraphs 1 and 2.

(g) Upon Summit's receipt of K.G.'s final payment, Summit's legal counsel shall forward the unfiled Consent Judgment via regular mail to Stephen L. Ritz, Esq., 225 Millburn Avenue, Suite 101, Millburn, New Jersey 07041 and said Consent Judgment shall then be null and void.

2. **Payment for Spring Semester of 2016-17 at APA.** K.G. has represented to Summit that the Watchung Board of Education has agreed to be responsible for full payment of D.C.'s tuition for attendance at the APA at UCVTS for the Spring Semester (i.e., February 1, 2017 through June 30, 2017). Based upon this representation, K.G. shall be personally liable to Summit for any and all Spring Semester tuition that Watchung does not pay. This liability includes Watchung's reimbursement to Summit in the amount of two thousand four hundred dollars ($2,400.00) for Summit's having already paid D.C.'s Spring Semester tuition for the months of February, March, April, and May. K.G. shall facilitate reimbursement to Summit in the amount of two thousand four hundred dollars ($2,400.00) to be received on or before February 1, 2018. In the event that full reimbursement is not received by Summit on or before February 1, 2018, K.G. shall commence making direct monthly payments in the amount of $125.00 on or before the first day of every month, beginning with February 1, 2018 and ending with an October 1, 2019 payment. K.G.'s Spring Semester payments shall be separate from and in addition to the Fall Semester payments set forth at Paragraph 2 herein.

3. **Withdrawal and Release.** The parties each agree to withdraw their claims and counterclaims as they relate to the present matter within 14 days of the execution of this Agreement. The parties further agree not to refile same. K.G. herein releases and gives up any and all civil and administrative claims and rights she may have against Summit, its current or former elected or appointed officials, administrators, employees, attorneys, agents, servants, representatives, predecessors and successors, insurance carriers, and all other persons or entities for whom any of the above have been or may be legally responsible, for any damages or injuries, including any civil claim for compensatory damages, punitive damages, or any damages or

injuries to K.G. or D.C. arising out of the residency/domicile or education of the minor child D.C., whether known or unknown, that have taken place through the date of this Agreement.

4. **Non-Admission of Liability**. Nothing contained in this Agreement is intended, nor shall be construed in the following manner: (i) to waive or release any future claim arising after the date this Agreement is signed by both parties; or (ii) to limit either party's right to enforce the terms of this Agreement. Each party acknowledges and agrees that this Agreement is a compromise of disputed claims and neither this Agreement, nor any consideration provided pursuant to this Agreement, shall be taken or construed to be an admission or concession by either party of any kind with respect to any fact, liability, or fault.

5. **Severability.** Should any provision of this Agreement be declared illegal or unenforceable by any court of competent jurisdiction and cannot be modified to be enforceable, such provision shall immediately become null and void, leaving the remainder of this Agreement in full force and effect.

6. **Authorization.** Each individual signing this Agreement warrants and represents that he or she has the full authority and is duly authorized and empowered to execute this Agreement on behalf of the Party for which he or she signs.

7. **Jurisdiction.** This Agreement shall be governed by the laws of New Jersey, and the Superior Court of New Jersey, Union County, shall have jurisdiction over, and be the proper venue for, any disputes arising out of this Agreement.

8. **Construction.** The parties and their counsel have participated fully in the review of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. The language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any party.

9. **Successors.** This Agreement shall inure to the benefit of the parties hereto, and their respective officers, directors, employees, attorneys, heirs, executors, administrators, successors and assigns.

10. **Amendment.** This Agreement may only be amended by a writing signed by all of the parties to this Agreement.

11. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties and fully supersedes any and all prior contracts or agreements between the parties, and it likewise fully supersedes any and all other conflicting agreements or understandings between the parties.

K.G.
Date: 7-6-17

For Summit Board of Education
Name:
Title: Louis J. Pepe, RSBA
Assistant Superintendent
Date: 8/3/17

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, New Jersey 07962-1997
(973) 538-4006
Attorneys for the Summit Board of Education

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

K.G. o/b/o D.C., Petitioner, v. Summit Board of Education, Respondent/Counter- Claimant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: _____ COUNTY DOCKET NO.: _____ **CONSENT JUDGMENT**

1. This matter was heard before the Office of Administrative Law, OAL DKT NO. EDU 00814-17.

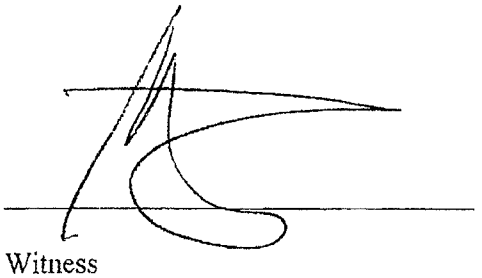
2. Petitioner K.G. on behalf of D.C. ("K.G.") and Respondent Summit Board of Education ("Summit"), appearing through counsel, entered into the Settlement Agreement to which this judgment has been attached and in which this judgment is incorporated by reference. At all times relevant, K.G. was represented by legal counsel, who approved the form and terms of the Settlement Agreement and this Consent Judgment.

3. K.G. is presently in default of her obligations under the terms of the parties' Settlement Agreement, and, by its terms, Summit is entitled to judgment in the amount of one thousand five hundred and/or three thousand nine hundred dollars ($1,500.00 or $3,900.00). together with interest calculated from the date of default and reasonable attorneys' fees and costs incurred by Summit in connection with any litigation or collection proceedings related to K.G.'s default under this Agreement, less any and all payments made, as provided by the Affidavit of Summit also attached hereto and made a part thereof.

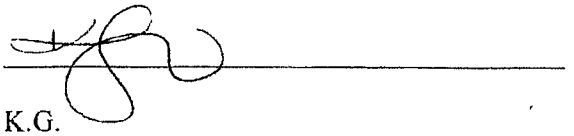
4. K.G. has consented to the entry of this Consent Judgment, should she be in default

of the Settlement Agreement, without further notice to her. See the following:

> By the terms of the Settlement Agreement between Respondent Summit and me, this Consent Judgment is to be held in escrow by Porzio, Bromberg & Newman, P.C. pending full payment of the settlement amount. Should I be in default of the Settlement Agreement, and should that default not be timely cured, I hereby consent to, and waive further notice of, the entry of this Consent Judgment on the Court's docket.



Witness



K.G.

Accordingly, it is on this _____ day of _____, 201___,

Judgment is hereby entered in favor of Respondent Summit and against Petitioner K.G. in the amount of $_____, as established by the Affidavit of Summit attached hereto and made a part hereof.

338-17

338-17

T.T., ON BEHALF OF MINOR CHILD, G.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro se petitioner challenged the determination of the respondent Board that G.C. was not the victim of harassment, intimidation or bullying (HIB) under the provisions of the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 to -32.1 (the Act). T.T., the mother of G.C. – a seventh grade student in respondent's school district – alleged that her daughter had been the victim of treatment by staff members employed by the Board that constituted HIB within the meaning of the statute. In a separate petition, T.T. contended that the Board had violated regulations pertaining to G.C.'s student record. The two matters were consolidated and heard together on April 29, 2016.

The ALJ found, *inter alia*, that: the Act applies to any gesture, or any written, verbal or physical act, or any electronic communication that is reasonably perceived as being motivated either by an actual or perceived characteristic, such as, *inter alia*: race, color, religion, national origin, gender, sexual orientation, or any other distinguishing characteristic; in this case, the allegations of HIB involved three separate incidents wherein G.C. purportedly was the victim of HIB at the hands of various teaching staff members, and a substitute teacher; all alleged HIB incidents were investigated by the principal of the Intermediate School, who was trained as the building's HIB specialist; based on the testimony at the hearing and the record of this matter, none of the three alleged instances of HIB met the definition as spelled out in the Act; none of the actions taken appear to have been motivated by any actual or perceived characteristic as outlined in the statute; to the extent that the petitioner alleges that her advocacy on behalf of G.C. is the qualifying distinguishing characteristic, the record is devoid of evidence that such advocacy motivated any of the actions in the three incidents at issue here; with regard to the student records issue, there was an information breach involving a school administrator's child which resulted in several of G.C.'s fellow students being privy to G.C.'s schedule before she received it in the mail; the Board, however, acknowledged this breach, took steps to ensure that it does not happen again, and accommodated petitioner's request for relief by making a change to G.C.'s schedule. The ALJ concluded that petitioner did not meet her burden of proof to show that the Board's HIB determination was arbitrary, capricious or unreasonable; further, the records matter is now moot as petitioner received the relief that was sought. Accordingly, the ALJ recommended dismissal of the petition.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

November 17, 2017

338-17

OAL DKT. NOS. EDU 12994-15 AND EDU 13587-15 (CONSOLIDATED)
AGENCY DKT. NOS. 226-8/15 AND 187-7/15

T.T., ON BEHALF OF MINOR CHILD, G.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the petitioner. The Board's reply exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(d), and will therefore not be considered by the Commissioner.[1]

In her exceptions, petitioner argues that the alleged actions constitute Harassment, Intimidation and Bullying (HIB) because G.C. was being retaliated against for filing HIB allegations, and G.C. was being targeted because she has a mother who advocates for her. Procedurally, petitioner contends that the Board did not properly investigate the HIB complaints and failed to file the HIB report within the proper time limit.[2]

[1] The Commissioner was not provided with a transcript of the April 29, 2016 hearing at the OAL.

[2] Petitioner's exceptions appear to reference a September 22, 2017 incident, which occurred after the record in this matter was closed and well after the 2015 petitions were filed. Additionally, attached to petitioner's exceptions is a series of documents, including an exhibit marked "P-8", which does not appear to have been presented at the hearing in this matter. Any new allegations or additional documents that were not entered into evidence before the Administrative Law Judge will not be considered by the Commissioner.

Upon a comprehensive review of the record, the Commissioner agrees with the Administrative Law Judge (ALJ) that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination. There is no evidence in the record that the alleged actions were motivated by a distinguishing characteristic of G.C. Although petitioner appears to allege that G.C.'s distinguishing characteristic is that she has a mother who advocates for her, there is no indication of this in the record; further, petitioner's exceptions do not demonstrate that – even if the advocacy of G.C.'s mother was a distinguishing characteristic – the alleged actions were *motivated* by said characteristic, as required by *N.J.S.A.* 18A:37-14.

The Commissioner further concurs with the ALJ's conclusion that – although unauthorized individuals gained access to G.C.'s schedule – *N.J.A.C.* 6A:32-7.7 provides for requests to stay the disclosure of records pending final determination of the challenged procedure. Here, the Board has already addressed the unauthorized disclosure of student records, so there is no disclosure for which petitioner can request a stay. Finally, the Commissioner is in agreement with the ALJ's determination that the issues involving G.C.'s schedule were previously addressed by providing petitioner with the relief she sought, so that aspect of this matter is now moot.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED.[3]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: ~~11/17/17~~

Date of Mailing: 11/20/17

[3] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 12994-15 AND EDU 13587-15 (Consolidated)

AGENCY DKT. NOS. 226-8/15 AND 187-7/15

T.T., ON BEHALF OF MINOR CHILD, G.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,

Respondent.

T.T., on behalf of minor child, **G.C.**, petitioner, pro se

Valter H. Must, Esq., for respondent (Carluccio, Leone, Dimon, Doyle & Sacks, L.L.C., attorneys)

Record Closed: August 22, 2016 Decided: October 5, 2017

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Petitioners, T.T., on behalf of minor child, G.C., residents of Toms River, New Jersey, and the mother of a seventh-grade girl, and father P.C., contend that their daughter was the victim of behavior statutorily defined as harassment, intimidation and bullying (HIB) and of violation of student records regulations, by respondent Board of Education of the Toms River Regional School District, Ocean County (Board).

PROCEDURAL HISTORY

Petitioner filed a petition with the Commissioner of Education (the Commissioner) on August 17, 2015, and July 15, 2015. Answers were filed and the matters transmitted to the Office of Administrative Law (OAL) on September 1, 2015, and September 4, 2015. As the matter involving the challenge to G.C.'s schedule was transmitted with a request for emergent relief, it is noted that the emergent relief was settled upon the respondent's accommodating petitioner's schedule change request. An order of consolidation was entered on December 3, 2015. The matters were heard together on April 29, 2016, and the record was held open to allow for the filing of documents post-hearing by the parties. A conference call was held to advise the parties that additional facts and allegations of new incidents submitted after the hearing would not be considered and the record closed on August 22, 2016. Orders were entered in this matter to allow for the extension of time in which to file the initial decision. The parties agree that the incident of February 25, 2015 as described in the petition, is not under review in these proceedings due to the ninety- day rule.

STATEMENT OF FACTS

Although these proceedings consist of two separate petitions which have been consolidated, for clarity of record the testimony and evidence was presented for each matter separately. In the HIB matter, the Board called Bryan Madigan (Madigan), who is employed by the Toms River Board of Education as a principal at the Intermediate East building. He has been so employed for seventeen years, and prepared the HIB investigations (R-1, R-2

and R-3). He has received training in harassment, intimidation, and bullying (HIB). Reviewing the first investigation report (R-1), Madigan noted that there was a report that the director of the school play made comments about G.C.'s gum-chewing, and that there was a full HIB investigation after. He interviewed G.C., the student-petitioner in this matter, and reviewed a written statement and interview with the director regarding their comments about G.C.'s mother allowing G.C. to chew gum. Three other students were also interviewed by Madigan. The scene in the play called for gum-chewing, and upon learning that two of the students had braces, the director decided to not have them actually chew gum. G.C. alleged that the director expressed surprise when G.C., who wears braces, stated that her mother allows her to chew gum, asking "Is everyone getting this on tape? G's mom is going to allow her to chew gum." It was determined that there was no HIB from this matter, and the Board agreed.

Madigan then reviewed the investigation of the second alleged bullying incident (R-2), and stated that the G.C. felt that she was picked-on by the teacher, which made it hard to attend class. The teacher did not like the answer that the student gave on a quiz, and upon receiving G.C.'s explanation citing support she found in a book said, "well I guess I can accept that." G.C stated there was no follow up and she never received the quiz back. It was noted that the teacher does not always return homework. Other students were interviewed in the matter, and their statements were consistent with the teacher's. The teacher explained that the "quiz" was a mini assessment designed to determine of the students were reading. She stated that she accepted the answer as given. Madigan determined that there was no HIB, and the Board agreed with him.

Madigan then reviewed the third HIB incident (R-3). G.C. was sent to the office by a substitute teacher, and she saw the principal. She stated that the substitute teacher was treating her unfairly, and embarrassing her in front of her peers. Madigan did not speak to G.C., stating that T.T. would not allow him to do so. Other students said that the class was noisy, one child moved to the back of the room, and another child was disciplined. The substitute addressed G.C. for turning-around and acting-out. The substitute called G.C. up to the front of the room and said, "it must be hard for you to listen to someone else because you do what you want." Madigan determined that this was not an instance of HIB, the matter was appealed to the Board, and the Board agreed.

On cross examination, Madigan was asked why only three students were interviewed in the first incident, when fifty people were present. He stated that the characters the Boylan sisters were involved and so they would be directly in the presence of the incident and heard most closely what had occurred. He reiterated that other students had braces. He was then asked who he interviewed with regard to the second incident. Madigan interviewed J.R. who was the same student interviewed in the prior HIB incident, and three others, and he was asked why only those three when there were thirty students in the class. Madigan stated that he was attempting to determine if students are being treated fairly in class. It was noted that J.R.'s parents both work for the Board of Education, and the question was asked why this student should keep being interviewed. Madigan noted that she was directly involved in the gum incident, as for other incidents, it was a believed that J.R. was friends with petitioner G.C.

With regard to the third incident, Madigan noted that he was aware that the regular teacher apologized for the incident. When asked if he knew that Mr. Clark asked G.C. to write an apology, and that she was in hives and nervous, Madigan stated that he was of the understanding that G.C. was okay with the apology. When asked why the substitute teacher involved keeps being assigned to classes where petitioner G.C. is assigned, he stated that he has no reason not to, as the substitute was found not guilty of HIB. He stated that nothing happened again that year, and that the administration made sure of it. Madigan notes that this year, the current year, there was a new system in place first for substitutes and third-party employers where a substitute can pick their assignment. He is not always sure what class a substitute is going to be assigned to, and noted that G.C. has been offered the opportunity to come speak to the administration or guidance counselors, but his understanding is that T.T. instructed G.C. not to speak to anybody but her.

Madigan believes there is no evidence that the play director in the first incident has any problem with G.C. It is noted that with regard to the third incident, G.C. was not the only student required to apologize, as another student also had to write an apology to the regular teacher, stating that he was sorry.

T.T. the mother of G.C. testified on behalf of the petitioner. She believes that the Board did not follow its own procedures, stating that she believes the attorney found that HIB was not established before the Board even voted. She stated that she believes that G.C. feels that she is retaliated against because she, T.T., and G.C.'s father P.C., advocate on her behalf. T.T. alleges that the plum parts in the school plays are given to children of administrators and teacher of the year recipients.

With regard to the first incident, T.T. told the Board about the incident, and they conducted an HIB investigation. Only three of fifty students present were interviewed, and a parent of one of the three interviewed children is affiliated with the school.

With regard to the second incident, T.T. alleges that the grades policy is not fair. She believes that one teacher, Brianne Bates, would give points to some students, but not her daughter, and made her move back a row in the school play.

With regard to the third incident, she believes that asking her daughter to write an apology is unacceptable, and believes it was inappropriate that she was not allowed to confront the substitute in front of her daughter to determine what happened. She underscored that the regular teacher apologized to G.C. for the incident. She described being worried about her daughter, and that she cries every day. She stated that her daughter is a straight A+ student who loves school, but does not want to go because she does not feel safe there. T.T. stated that a cease-and-desist letter that is in place limits how she is able to communicate with the school, and that she cannot talk to the anti-bullying specialist directly.

On cross-examination, T.T. identified the cease-and-desist order (R-4) which directs her to address her concerns directly to Madigan. The school offered counseling to G.C., but G.C. refused the counseling due to the guidance counselor's reaction to the HIB investigation. G.C. feels singled-out, and retaliated against, due to her parents' advocacy on her behalf.

With regard to the issue involving the disclosure of student records, T.T. testified on her own behalf. She stated that an administrator's child sent a text to G.C., and to other

students, about G.C.'s schedule before G.C. ever received her schedule in the mail. T.T. complained to the administration, which angered the assistant superintendent. Prior to the school year starting, an email was sent to T.T. The email did not mention that Madigan's daughter had access to his password. This occurred before the 2014 school year, and happened again prior to the 2015 school year and was a manipulation of the school schedule. It was noted that J.R.'s father is the principal of the high school. J.R. texted that she did not want G.C. in the same class, and had access through her father's ID to change the class assignments (P-5 and P-6).

The assistant superintendent said he would take care of the matter with Madigan. He told T.T. that it was a secretary employed by the school district who allowed the students to access school records. It was noted that the two principles' daughters bragged about having access and power to records and schedules.

T.T. stated that when she hears these issues she gets worried and complains. Her daughter G.C. feels targeted by other students because T.T. complains. T.T. wants to know since these issues were known for the prior year, how it was able to happen again.

On cross-examination, T.T. stated that she does not know who specifically sent the text, but that it was not J.R. She was asked for texts of the second incident. T.T. asked for G.C. to be placed in a particular class, and that request was accommodated, but was noted that the bully in this matter lives next door. She stated that the kids were pretending to want a particular teacher, and that a particular class was the place to be, but that was not true, they were trying to be in a different class. She asked that G.C. be assigned to the class that the students were talking about, and as a result G.C. was not in the class with the students she wanted.

Madigan once again took the stand. He stated the allegation was brought to his attention about his daughter, and he investigated the matter. He stated that his daughter and another student were helping another teacher, when people started getting texts that students were getting their schedules in the mail at home. His daughter and her friend N.P. went to his secretary to ask if they could learn their homeroom and assignment, and then asked about their friends. He acknowledged that

his secretary told him about the incident. Madigan believes that N.P. then texted G.C. with the information. He stated that the students should not have asked, his secretary received a written reprimand, and that his daughter is happy that G.C. was in her class.

This year, Madigan stated that G.C.'s parents made a request to the guidance department that she see her homeroom assignment, and the administration honored that request. He had no idea that J.R. was accessing the schedule, or that J.R. requested a different cycle from G.C.

On cross-examination, Madigan stated he did not believe that he was biased investigating his own daughter. He stated that his daughter and G.C. could be in the same cycle, but not homeroom and N.P. is happy in the same cycle. He noted that his daughter and N.P. play basketball, and that his daughter and any students for that matter, are now not allowed behind the secretary's desk. He agrees that the circumstances give the perception of preferential treatment. To his knowledge, this no longer occurs. Madigan's directive and direction is that no students are allowed behind the secretary's desk. He asked why his daughter was allowed to not wear her school ID, but that G.C. gets in trouble for not wearing hers, he responded that his daughter was reprimanded.

Madigan acknowledged that his other daughter from another school was given a part in the school play before other students were offered. He stated that it was the director's idea was to have small children in the play, and that the director suggested his children, and that he said that it was okay. He believes that his daughters are held to higher standards than other children. Madigan stated that there are 1,500 children in the school, and they address it when they know that rules are broken.

Considering the testimonial and documentary evidence in the matter, I **FIND** that Mr. Madigan investigated three instances of alleged HIB against G.C. In one instance, a play director sarcastically asked those assembled if people were recording G.C. stating that her mother would let her chew gum with braces. In the second, a teacher skeptically quipped that she guessed she could accept G.C.'s answer in a mini quiz when presented by G.C. with support found in a book for the given answer, and in the third, a substitute sent G.C. to the office for talking in class and made a comment about G.C. doing whatever she wants.

G.C. was made to write an apology. In all three instances Madigan determined that no HIB occurred and the board agreed with him.

I further **FIND** that in advance of the 2015-2016 school year, students gained access to the records system and were able to ascertain G.C.'s schedule and informed G.C. of that fact before she had been notified of her schedule. When G.C. was concerned she would not be in class with people she wanted to be with, T.T. requested a change which was accommodated.

CONCLUSIONS OF LAW

Toms River Regional School District's HIB policy was adopted in the aftermath of the enactment of comprehensive amendments to the New Jersey Anti-Bullying Law. N.J.S.A. 18A:37-14. The 2010 amendments, which were approved on January 5, 2011, and took effect with the 2011-2012 school year, strengthened the definition of HIB to include:

> [A]ny gesture, any written, verbal or physical act . . . whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging a student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or

c. creates a hostile educational environment for the student by interfering with a student's education or be severely or pervasively causing physical or emotional harm to the student.

[N.J.S.A. 18A:37-14.]

In the present matter, only two witnesses offered testimony: the administrator conducting the investigations and the mother of the alleged victim. No testimony was offered by anyone with first hand knowledge or observation of the incidents in question. However, even taking the written statements offered by G.C. at face value and assuming arguendo that the events in question occurred as described therein,it appears that none of the three alleged instances of HIB meet the definition of HIB as spelled out in the statute and I so CONCLUDE. None of the actions taken appear to be motivated by any actual or perceived characteristic as outlined in that statute. To the extent that the petitioners allege that their advocacy on behalf of G.C. is the qualifying distinguishing characteristic, the record is devoid of evidence that such advocacy motivated the actions in any of those instances. It is noted that in the third incident, the conduct was performed by a substitute teacher, who is presumably less a part of daily interaction between students and parents and it is difficult to ascribe such motivation absent a modicum of evidence that is simply not present in the record.

It is further noted that the Commissioner will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal/> (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)). The Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl.

Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, in order to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M., supra, EDU 2780-07. It is a weighty burden; one which I **CONCLUDE** this petitioner has not met. Accordingly, I further **CONCLUDE** that petitioner's action challenging the Board's determination that HIB did not occur in the herein described incidents must be **DISMISSED.**

With regard to the student record issue, N.J.S.A. 18A:36-19 provides that the "State Board of Education shall provide by regulation for the creation, maintenance and retention of pupil records and for the security thereof and access thereto, to provide general protection for . . . the right of both pupil and parent or guardian to reasonable privacy as against other persons." To that end, N.J.A.C. 6A:32-7.5 (a) provides that "[o]nly authorized organizations, agencies or persons as defined in this section shall have access to student records." N.J.A.C. 6A:32-7.5(e) identifies the limited organizations, agencies or persons which have a right to access. The record reflects that information contained in student records regarding G.C., specifically, her schedule for the upcoming school year, was disclosed to people not identified by N.J.A.C. 6A:32-7.5(e). Accordingly, I **CONCLUDE** that respondent did not maintain G.C.'s student records in a manner so as to provide general protection for the right of G.C. to reasonable privacy.

However, the record further reflects that respondent acknowledges this breach and has taken steps to ensure that it does not happen again. Mr. Madigan offered detailed testimony demonstrating that the district took the matter seriously and took steps to prevent a repeat and took action as necessary to address the matter with the responsible personnel. It is further clear that respondent took into account petitioner's request at to class assignment which stemmed from the disclosure of the information. Although N.J.A.C. 6A:32-7.7 does give parents a right to appeal impermissible disclosure of a student record, the regulation seems to contemplate a prospective action to stay disclosure rather than to address a disclosure after it occurred, as with the present matter.

To the extent that the matter was transmitted by the Commissioner to the OAL as a challenge to G.C.'s schedule, the record reflects that the district accommodated petitioner's request in making a change to G.C.'s schedule. Accordingly, I **CONCLUDE** that the matter as transmitted is moot, as petitioner received the relief that was sought.

ORDER

Based on the foregoing, I **ORDER** that the petition be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 5, 2017
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: 10/5/17

Date Mailed to Parties: 10/5/17

lam

APPENDIX

WITNESSES

For Petitioner:

T.T.

For Respondent:

Bryan Madigan

EXHIBITS

For Petitioner:

P-1 Copy of Cease and Desist Email Correspondence, from Valter H. Must, Esq., Carluccio, Leone, Dimon, Doyle & Sacks, L.L.C., dated February 6, 2015, at 5:15 p.m.

P-2 Copy of Correspondent to Mrs. Curci (T.T.) from Valter H. Must, Esq., Concerning Standard Protocol in Communicating with School Administration

P-3 Photographs

P-4 Representation Letter from Brian M. Cige, Esq., to Valter H. Must, Esq., Concerning Cease and Desist Letter, dated February 6, 2016, and Settlement Agreement, dated January 21, 2014

P-5 Text Message Conversation

P-6 Statement from G.C. Concerning Class Schedules

P-6 Email from Brian Cige, Esq., to T.T., Regarding the outline of HIB, dated April 28, 2016

P-7 Email Conversation between T.T., Geetee7@aol.com, and Dr. Marc Natanagra, Concerning Release of G.C.'s Private Student Information at Toms River East, dated August 26, 2015

For Respondent:

For Respondent:

R-1 Toms River Regional Schools Investigation Report - Non-Pupil Accused, written February 25, 2015

R-2 Toms River Regional Schools Investigation Report - Non-Pupil Accused, written March 2, 2015

R-3 Toms River Regional Schools Investigation Report - Non-Pupil Accused, written May 1, 2015

R-4 Cease and Desist Letter from Valther (sic) H. Must, Esq., Carluccio, Leone, Dimon, Doyle & Sacks, L.L.C., to Tina Tillem-Curci, dated February 6, 2015

R-5 Cover letter from Valter H. Must, Esq., enclosing emails, date April 29, 2016

339-17

OAL DKT. NO. EDU 07007-17
AGENCY DKT. NO. 80-4/17

M.B. and K.C., on behalf of minor child, M.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MENDHAM, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner reminds the parties of the Board's obligations under *N.J.S.A.* 18A:36-19a, *N.J.A.C.* 6A:16-7.8, and *N.J.A.C.* 6A:32-7.1 *et seq.* The parties are further reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 11/20/17

Date of Mailing: 11/20/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 07007-17
AGY REF NO. 80-4/17

M.B. AND K.C. ON BEHALF OF M.B.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF MENDHAM, MORRIS COUNTY,

Respondent.

Howard P. Lensik, Esq., for Petitioners (Triarsi, Betancourt, Wukovits & Dugan, LLC, attorneys)

Stephen M. Bacigalupo, II, Esq., for Respondents (Schwartz, Simon, Edelstein & Celsco, LLC, attorneys)

Record Closed: October 12, 2017 Decided: October 16, 2017

BEFORE **JOHN P. SCOLLO**, ALJ:

Petitioning parents challenge the Board's HIB determination.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on May 17, 2017.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached settlement agreement.

I have reviewed the terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

It is hereby **ORDERED** that the parties comply with the terms of the settlement agreement; and

It is further **ORDERED** that petitioner's appeal is withdrawn with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 16, 2017
DATE

John P. Scollo
JOHN P. SCOLLO, ALJ

Date Received at Agency: October 16, 2017

Date Mailed to Parties: OCT 18 2017
db

Lisa James-Beavers
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SSE C Schwartz Simon Edelstein & Celso LLC
ATTORNEYS AT LAW

100 South Jefferson Road ▪ Suite 200 ▪ Whippany, New Jersey 07981
Tel: 973.301.0001 ▪ Fax: 973.993.3152 ▪ www.sseclaw.com
Please Reply to Whippany Office

October 11, 2017

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2017 OCT 12 P 4:36
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

VIA FACSIMILE & LAWYERS SERVICE
Honorable John P. Scollo, A.L.J.
State of New Jersey – Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: M.B. and K.C. o/b/o M.B. v. Mendham Twp. Bd. of Educ.
OAL Docket No.: EDU 07007-17
Agency Ref. No.: 80-4/17

Dear Judge Scollo:

As Your Honor is aware, this firm represents Respondent, the Mendham Township Board of Education, with regard to the above-referenced matter. Enclosed for Your Honor's review and consideration is a fully executed Settlement Agreement and Release, as well as the Certified Board Resolution approving same. Accordingly, it is respectfully requested that Friday's telephone conference, currently scheduled for 4:00 p.m., be canceled.

Thanking Your Honor in advance for Your anticipated attention to this matter.

Respectfully submitted,

Schwartz Simon
Edelstein & Celso LLC

STEPHEN M. BACIGALUPO, II
A Member Of The Firm

SMB/bms

CC: Howard P. Lesnik, Esq. (*via* Facsimile & Lawyers Service)

Stephen M. Bacigalupo, II

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SCHWARTZ SIMON
EDELSTEIN & CELSO LLC
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Whippany, New Jersey 07981
Tel. (973) 301-0001; Fax (973) 993-3152
Attorneys for Respondent,
Mendham Township Board of Education

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2017 OCT 12 P 4:36
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

M.B. and K.C. o/b/o M.B.,	:	BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION
Petitioners,	:	
v.	:	OAL DKT. NO.: EDU 07007-17
	:	AGENCY REF. NO.: 80-4/17
MENDHAM TOWNSHIP BOARD OF EDUCATION,	:	
Respondent.	:	**SETTLEMENT AGREEMENT AND RELEASE**

WHEREAS, Respondent, the Mendham Township Board of Education (hereinafter referred to as the "Board", is a body politic and corporate, organized and existing by virtue of the law of the State of New Jersey, pursuant to N.J.S.A. 18A:11-1, and which is invested with the authority for maintaining and operating the public school district for the Mendham Township School District (hereinafter referred to as the "District");

WHEREAS, M.B. and K.C. (hereafter referred to as "Petitioners") are the parents of M.B., who, at all times relevant herein, has been a student attending the Mendham Township Elementary School, which is operated by the Board;

WHEREAS, it is the position of the Board that it has fully complied with all of the laws and regulations regarding the investigation and determination of an incident of Harassment, Intimidation and Bullying (hereinafter referred to as "HIB") involving M.B.; and

WHEREAS, it is the position of Petitioners that following the District's HIB investigation, M.B. was wrongfully determined to have engaged in an act of HIB toward another student, which resulted in the filing of a Petition of Appeal with the Commissioner of Education (hereinafter referred to as "Commissioner") that was assigned Agency Reference Number 80-4/17 and OAL Docket Number EDU 07007-17; and

WHEREAS, the parties are interested in resolving the within matter amicably without further protracted litigation while achieving the goals of both parties;

NOW, THEREFORE, in consideration of the following valuable consideration, both parties agree to settle this matter, subject to the terms and conditions set forth herein, and subject to the approval by the Board as follows:

1. The Board agrees that upon final execution and approval of this Settlement Agreement and Release (hereinafter referred to as "Agreement"), all records pertaining to the underlying HIB incident, including all HIB investigations and charges, shall be removed from M.B.'s school file and secured in a separate file maintained in the Superintendent of School's office where they shall be held until such time as they may be destroyed pursuant to N.J.A.C. 6A:32-7.8. In order to effectuate this process, Petitioners consent to the Principal of the Mendham Township Elementary School reviewing M.B.'s student records in order to ensure that all of her records in the District pertaining to the underlying HIB incident are placed in the Superintendent of School's office with a notation that such records are non-accessible other than as outlined in this Agreement.

2. The parties further agree that, in the event M.B. is accused of an act of HIB at any time from the final execution and approval of this Agreement up to and including her graduation from the Mendham Township Middle School, those documents pertaining to this underlying HIB

incident may be used by District personnel in order to assess and determine if there is a pattern of behavior on the part of M.B.

3. As long as M.B. is not found to have committed another act of HIB at any time from the final execution and approval of this Agreement up to and including her graduation from the Mendham Township Middle School, all information/records pertaining to the underlying HIB incident shall not be disclosed to any third party and shall not be forwarded in the event M.B. transfers to another public school district. Furthermore, any inquiries made to the District as to whether M.B. was involved in an act of HIB shall be forwarded to the Superintendent of Schools for a proper response in accordance with this Agreement.

4. This Agreement is entered into solely for the purpose of resolving certain issues raised in the underlying Petition of Appeal. Neither the execution, delivery, nor performance of this Agreement shall constitute or be construed at any time or for any purpose to be an admission of liability or wrongdoing by the parties; and the parties further agree that this Agreement shall not be used as evidence in any judicial, administrative, or quasi-judicial proceeding, except to enforce the terms of said Agreement.

5. In consideration for the making of this Agreement and for other consideration provided under the terms herein, Petitioners individually and o/b/o M.B., for herself and her heirs, administrators, beneficiaries, assigns, executors, and attorneys, knowingly, voluntarily and unconditionally releases and forever discharges the Board from any and all rights, claims, causes of action, without limitation, any and all other liabilities of any nature or amount, whether known or unknown, in law or equity, including but not limited to claims for compensatory damages, punitive damages, any other federal, state, or local, civil or human rights law, rule, regulation or

ordinance, any public policy, tort, contract or other common law; or on any other unlawful basis, that they/she may have or ever had against the Board up until the execution of this Agreement.

6. This Agreement and all of its terms are and will remain confidential to the maximum extent permitted by law. Further, there is a mutual agreement not to disparage the Board, its past and/or present board members, officers, administrators, agents, employees and their successors, nor make any comments, statements or the like to the media or to others that may be considered to be derogatory or detrimental in nature.

7. This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. This Agreement shall not be amended, changed or modified except in a writing signed by all parties. Each party acknowledges that the other party, nor any agent or attorney of the other party, have made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce them to execute the same.

8. This Agreement shall not be amended, modified or revised except by a written instrument duly signed by all of the parties hereto or their respective successors or assigns. No oral statement of any person shall in any manner or degree, modify the terms and provisions of this Agreement

9. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion, and with the opportunity for the parties to consult with representation of their choosing and at their option. Petitioners have been represented by Howard P. Lesnik, Esq. and are satisfied with his representation. The Board has been represented by Stephen M. Bacigalupo, II, Esq., of Schwartz Simon Edelstein & Celso LLC, and

is satisfied with his representation. The parties acknowledge that they understand the contents of this Agreement and that they were given the opportunity to review it with their respective representatives.

10. It is agreed that neither party is a prevailing party for any purpose, and that each party is fully responsible for any and all costs and expenses incurred in this matter, including but not limited to attorneys' fees.

11. This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original and all of which, when taken together, constitute one and the same document. The signature of any party to any counterpart shall be deemed a signature to, and may be appended to, any other counterpart.

12. This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board. This Agreement is without prejudice to either party if the terms are not ratified by the Board. When ratifying this Agreement, the Board shall not identify M.B. or her family and the Board Resolution ratifying this Agreement shall not contain any personally identifying information before or after ratification.

13. This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

14. This Agreement shall be construed in accordance with and governed by the laws of the State of New Jersey without reference to its conflict of laws provisions.

15. This Agreement, once approved by the Board; signed by the Board President; and signed by Petitioners, is final as to all of its terms. The pending Petition of Appeal before the Commissioner of Education, Agency Reference Number 80-4/17 and OAL Docket Number EDU 07007-17, shall be withdrawn with prejudice as a material part of this settlement.

MENDHAM TOWNSHIP BOARD OF EDUCATION

_____ Dated: 7/25/17
JEFFREY BRAUNER, Board President

PETITIONERS

_____ Dated: _____
M.B. individually and o/b/o M.B.

_____ Dated:
K.C. individually and o/b/o M.B.

STATE OF NEW JERSEY)
SS:
COUNTY OF MORRIS)

I CERTIFY that on July 20, 2017, M.B., Individually and o/b/o M.B., personally came before me and acknowledged under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his act and deed.

Howard P. Lesnik

HOWARD P. LESNIK
ATTORNEY AT LAW
Attorney or Notary Public
STATE OF NEW JERSEY

STATE OF NEW JERSEY)
SS:
COUNTY OF MORRIS)

I CERTIFY that on July 20, 2017, K.C., Individually and o/b/o M.B., personally came before me and acknowledged under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as her act and deed.

Howard P. Lesnik

Attorney or Notary Public

HOWARD P. LESNIK
ATTORNEY AT LAW
STATE OF NEW JERSEY

MENDHAM TOWNSHIP BOARD OF EDUCATION
MENDHAM TOWNSHIP, NEW JERSEY

RESOLUTION APPROVING SETTLEMENT

Moved by Mr. Jendryka, second by Ms. Holquist to approve the following resolution:

BE IT RESOLVED that the Mendham Township Board of Education hereby accepts and approves the negotiated Settlement Agreement and Release (the "Agreement") by and between the parties in the matter entitled M.B. and K.C. o/b/o M.B. v. Mendham Township Board of Education, OAL Docket No. EDU 07007-17; Agency Reference No.: 80-4/17, subject to the terms and conditions set forth therein; and

BE IT FURTHER RESOLVED that the Mendham Township Board of Education authorizes the Board President to execute the Agreement on behalf of the Board; and to take such further steps as may be necessary to effectuate the within settlement and carry out this action of the Board.

ROLL CALL VOTE: Mr. Elgarten, Ms. Holquist, Mr. Jendryka, Mr. Brauner, all Ayes. Motion passes by unanimous vote.

I hereby certify that the above is a correct excerpt from the Minutes of the Regular Meeting of the Mendham Township Board of Education on July 25, 2017 at 7:30 p.m. in the Mendham Township Elementary School.

Board Seal

Thomas H. Kryger
Board Secretary

340-17

OAL DKT. NO. EDU 03909-17
AGENCY DKT. NO. 28-2/17

K.M., ON BEHALF OF MINOR CHILD, M.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, it is noted that the settlement makes reference to certain actions to be taken on September 13, 2017. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the proposed terms.

Subject to the foregoing, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed – subject to compliance with the terms of the settlement – provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 11/20/17

Date of Mailing: 11/20/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03909-17
AGENCY DKT. NO. 28-2/17

K.M., ON BEHALF OF MINOR CHILD M.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,
Respondent.

Shira Baron, Esq., for petitioner (Education Law Center)

Avis Bishop-Thompson, Esq., for respondent (DeCotiis, Fitzpatrick, Cole & Giblin, attorneys)

Record Closed: October 13, 2017 Decided: October 17, 2017

BEFORE **KELLY J. KIRK**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on March 21, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement and General Release and Board Resolution indicating the terms thereof, which is attached and fully incorporated herein.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives and statements made in the record.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 17, 2017
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: 10-19-17

Date Mailed to Parties: OCT 19 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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2017 OCT 13 P 1:2
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (the "Agreement"), is entered into this 25th day of September 2017, by and between the East Orange Board of Education (the Board"), and K.M. o/b/o M.M.

For purposes of this Settlement Agreement, the term "Board" shall mean the East Orange Board of Education, East Orange School District ("District"), its past, present and future elected officials, officers, directors, agents, administrators, managers, employees, insurers, attorneys independent contractors and benefit plans, and all of their predecessors and successors, and any and all of their respective executors, administrators, successors, assigns, agents and representatives.

The Board, and K.M., on behalf of minor child, M.M., and M.M. are hereinafter jointly referred to as the "Parties".

This Agreement constitutes the complete and final resolution of any and all disputes arising from or relating to the Petition filed by K.M., o/b/o M.M., M.M. under OAL Docket No. EDU 03909-2017N, Agency Ref. No.: 28-2/17, as well as any and all other petitions, claims or actions that have been or could have been brought against the Board on behalf of M.M. challenging her expulsion from the District.

WITNESSETH:

WHEREAS, a Petition was filed by K.M., o/b/o, M.M. against the Board.

WHEREAS, the Parties have agreed that it is in the best interests of the Parties and the public interest to amicably resolve the pending OAL matter; and

WHEREAS, pursuant to the terms of this Agreement, K.M. agrees o/b/o M.M. to withdraw and/or dismiss this Petition, as well as resolve any and all other disputes by and between the Parties;

NOW, THEREFORE, in consideration of the promises and mutual covenants contained in this Agreement, the Parties hereby agree as follows:

1. K.M. agrees and acknowledges, on behalf of M.M., to accept the out-of-district alternative educational placement for the upcoming 2017-2018 school year at Essex Campus Academy located at 369 Passaic Avenue, Fairfield, NJ. The Board acknowledges that M.M. will begin Essex Campus Academy on September 13, 2017 as a twelfth grade student.

2. The Board further agrees to provide transportation to and from Essex Campus Academy starting September 13, 2017 and continuing through the 2017-18 school year.

3. K.M. agrees and acknowledges that any future disciplinary action taken against M.M. will be initiated by Essex Campus Academy pursuant to the policies and regulations of the

Essex Regional Educational Services Commission.

4. K.M. agrees and acknowledges, on behalf of M.M. that M.M. has earned a total of 87.25 credits as of June 2017.

5. K.M. agrees and acknowledges, on behalf of M.M. that M.M, must obtain a minimum of 34.75 credits to graduate in or about June 2018.

6. K.M. agrees and acknowledges, on behalf of M.M. that M.M shall meet with her assigned guidance counselor at Essex Campus Academy to determine the appropriate coursework and possible alternative ways to meet the state graduation requirements in order to graduate at the end of the 2017-2018 year.

7. K.M. agrees and acknowledges, on behalf of M.M. that in the event M.M. does not meet the state graduation requirements as of June 1, 2018, M.M. shall meet with her assigned guidance counselor at Essex Campus Academy and determine the appropriate course of action.

8. The Board agrees and acknowledges that in the event M.M. earns the 120 credits and does meet the state graduation requirements by the end of the 2017-2018, she will be awarded a diploma by the Board.

9. Further, K.M. agrees and acknowledges on behalf of M.M., that because M.M. was expelled from the District, M.M. will only participate in the commencement ceremony and no other District senior activities in or around June 2018.

10. The Board agrees to pay the tuition for the out-of-district alternative education placement for the 2017-2018 academic year ending on or about June 22, 2018.

11. It is further agreed the Board does not assume any responsibility for M.M.'s inability to meet the state graduation requirements.

12. The parties agree and acknowledge that the Board does not approve the curriculum at Essex Campus Academy, a board of education organized and existing pursuant to Title 18A:13-1 et. seq. of the laws of the State of New Jersey; and therefore, the Board cannot ensure that any course offerings given through the credit recovery program at Essex High School will satisfy all the minimum state graduation requirements.

13. If M.M. is found eligible to receive special education services, no provision of this Agreement may be construed as relieving the East Orange Board of Education of its obligations under federal and state law to provide M.M. with special education and/or related services constituting a free appropriate public education ("FAPE").

14. In consideration of the terms of this Agreement, K.M. agrees o/b/o M.M. to withdraw/dismiss the petition filed under OAL Docket No. EDU 03909-2017N, Agency Ref. No.: 28-2/17, with prejudice, as well as any and all claims that M.M. could have brought against the Board.

15. K.M. o/b/o M.M. and M.M. irrevocably and unconditionally releases, remises, waives and forever discharges and covenants not to sue the Board from all actions, causes of action, suits, debts, charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages and expenses of any nature whatsoever, in law or equity, known or unknown, suspected or unsuspected, fixed or contingent, which she has ever had or now has against the Board. This release covers all claims that known or unknown as of the date of the execution of this Agreement.

16. This Agreement is not and shall not in any way be deemed to constitute an admission by the Board or evidence of any wrongdoing or liability on the part of the Board, nor does this Agreement intend to address a violation of any contract, federal, state or local statute, rule, regulation or principle of common law or equity. Rather, this Agreement constitutes the good faith settlement and release of disputed claims, and it is acknowledged and agreed by the Parties that this Agreement is being entered into by the Parties solely to avoid the burden, expense, delay and uncertainty of further litigation and to fully and finally resolve, settle and dismiss with prejudice, any and all claims of any kind whatsoever, whether known or unknown, which M.M. has ever had or now has against the Board. Further, the Parties agree that this Agreement is in the public interest.

17. This Agreement may not be changed orally and no modification, amendment or waiver of any provision contained in this Agreement, or any future representation, promise or condition in connection with the subject matter of this Agreement shall be binding upon the Parties hereto unless made in writing and signed by both Parties.

18. This Agreement contains the entire agreement and complete settlement between the Parties and supersedes any and all previous agreements of any kind whatsoever between them, whether written or oral. This is an integrated document, and is not to be construed as being drafted by the Board or any legal representative of K.M. o/b/o M.M.

19. This Agreement is made and entered into, and shall be subject to, governed by and interpreted in accordance with the laws of the state of New Jersey and shall be fully enforceable in the courts of that state, without regard to principles of conflict of laws.

20. K.M. agrees and acknowledges o/b/o M.M. that M.M. was represented by counsel during the discussions and negotiations of this Agreement, and that M.M.'s legal representative(s) had a reasonable and sufficient period of time to consider the terms of this Agreement.

21. K.M. agrees and acknowledges o/b/o M.M. that this Agreement is subject to the approval of the East Orange Board of Education.

22. It is further stipulated and agreed that K.M., on behalf of minor child, M.M. and Board shall resolve the above-captioned matter without costs or expenses being awarded to any party.

23. The Parties agree and acknowledge that this Agreement, and its terms, shall remain confidential as provided by law.

24. The Parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement.

25. The Parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures

AGREED AND ACCEPTED ON BEHALF OF MM:

Katriece McDonald
K.M.

Subscribed and sworn to before me
this 25th day of September2017

Elizabeth Athos
Notary Public

Elizabeth Athos
Attorney at Law
State of New Jersey

EDUCATION LAW CENTER

Shira Baron, Esq.

Date: September 25, 2017

EAST ORANGE BOARD OF EDUCATION

Bergson Leneus, President

Date: 10/10/17

Dr. Kevin R. West, Superintendent

Date: 10/10/17

Victor R. Demming
Victor R. Demming
Business Administrator/Board Secretary

EXTRACT FROM THE MINUTES OF A MEETING
OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the City of East Orange in the County of Essex, New Jersey convened a Regular Meeting on Tuesday, October 10, 2017 at 6:31 p.m.

The following members of the Board were present:

Dr. Kristie M. Howard, Ms. Marjorie Perry, Mr. Jenabu C. Williams and Mr. Bergson Leneus

The following resolution was offered by Ms. Marjorie Perry, duly seconded by Mr. Jenabu C. Williams and adopted by the Board of Education

Approving Settlement of Litigation

WHEREAS, the Board is Respondent in a matter in the Office of Administrative Law, bearing docket number EDU 03909-2017, and

WHEREAS, the OAL action has been amicably settled subject to a fully executed settlement agreement; and

WHEREAS, the Board Attorney and the Superintendent, have recommended resolution of this matter pursuant to the terms set forth in a Settlement Agreement; and

WHEREAS, the Settlement Agreement does call for the expenditure of Board funds; and

WHEREAS, the Board finds that entering into a settlement pursuant to the terms set forth in the Settlement Agreement is in the best interest of the district; and

NOW, THEREFORE, BE IT RESOLVED by the East Orange Board of Education that it hereby approves the Settlement Agreement in this matter.

ROLL CALL: AYES: 4
ABSENT: 3

STATE OF NEW JERSEY}
} ss
COUNTY OF ESSEX}

RECEIVED
2017 OCT 13 P 1:28
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

I, Victor R. Demming, Secretary of the Board of Education, of the East Orange Board of Education, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of said district, fully called and held on Tuesday, October 10, 2017, has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Orange Board of Education, original minutes so far as the same related to the subject matter referred to in said extract, in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 11th day of October, 2017.

Victor R. Demming

Victor R. Demming, Board Secretary

~~3440~~
341-17

NEW JERSEY DEPARTMENT OF EDUCATION

Agency Docket No.: 199-9/17
Ralph H. Colflesh, Jr., Esq.
Arbitrator

IN THE MATTER of TENURE CHARGES AGAINST SUZANNE KULIK
by
BOARD OF EDUCATION of the TOWNSHIP OF GLOUCESTER,

Appearances
For Petitioner, the Board:
Daniel H. Long, Esq.
Wade, Long, Wood & Long, LLC
Laurel Springs, New Jersey
For Respondent, Suzanne Kulik:
Cosmas P. Diamantis, Esq.
Zeller & Wieliczko, LLP
Cherry Hill, New Jersey

DECISION and ORDER on STANDARD OF REVIEW

Pursuant to the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ" or "the Act"), P. L. 2012, c. 26, NJSA 18A:6-115 *et seq.*, and regulations adopted thereunder by the New Jersey Department of Education, the undersigned Arbitrator was appointed to hear and determine the above captioned matter which was appealed to arbitration by Respondent in this matter, Suzanne Kulik ("Kulik") after the Commissioner of Education did not find that the evaluation process that resulted in Kulik having been evaluated as less than

"effective" for two consecutive years had not followed the standards for such evaluations set forth in the Act and its attendant regulations.[1]

On October 6, 2017 a pre-hearing conference was conducted by the undersigned at which time counsel for Kulik raised the issue of the appropriate standard of review to be used by the undersigned. Kulik's counsel reasoned that since at all times material hereto she had been employed as a tenured Speech and Language Specialist and/or Speech Therapist by the District, the appropriate standard to be applied by the undersigned should not be the limited criteria set forth in NJSA 18A:6-17.2. Rather, counsel contended, the correct standard applicable to her case is the traditional "just cause" standard employed by tribunals in tenure removal cases adjudicated prior to the 2012 passage of the TEACHNJ Act ("the Act") under the still extant Tenured Employees Hearing Act.

At the conclusion of the October 6 conference, the undersigned agreed to accept a Motion by Respondent to arbitrate the case under the traditional, pre-TEACHNJ "just cause" standard and further agreed to accept written arguments and supporting documents from both parties in favor of and opposed to Respondent's Motion[2]. Pursuant thereto, a schedule was established for simultaneous submission of moving and opposing papers as well as the simultaneous submission of reply briefs. All papers were submitted by October 30, 2017, and this Motion is ready for a ruling.

Respondent's basic argument is that the position she held at all times material hereto was not that of a "teacher, principal, assistant principal and vice-principal" recited in the Act at NJSA 18A:6-17.3, which was Section 25 of the Act, and for that reason, Respondent believes the process and timelines for filing charges and responses to the Commissioner of Education that are

[1] Prior to the Commissioner's involvement, the Superintendent of the Petitioner District , having reviewed the charges and the evaluation process used in Kulik's last two years of teaching, found that there was probable cause to credit the evidence underlying the charge and that the charge merited dismissal or reduction in salary. The District Superintendent certified the charge to the Commissioner as required by NJSA 18A:6-11 and NJSA 18A:6-17.3.

[2] The undersigned also sought and secured from the Commissioner's Office an extension in time for hearings and an Award.

set forth under Section 17.3 Section do not apply to her. The Commissioner's Office ultimately agreed with Respondent on that issue.

More important for purposes of this Motion, Respondent further argues that the limits on defenses before an arbitrator set forth at NJSA 18A:6A-17.2 for a removal based on inefficiency, which is the case here, do not apply to Respondent for the same reason, *i.e.,* that NJSA 18A:6-17.3, which is Section 25 of the Act, only pertains "in the case of a teacher, principal, assistant principal, and vice-principal."[3]

Indeed, they are the only positions named at NJSA 18:6-17.3, and Respondent argues that elementary standards of statutory construction mandate that the plain language of the statute control, citing, *inter alia*, *Jen Elec., Inc., v. County of Essex*, 197 NJ.6217 (2009); *Real v. Radir Wheels*, Inc., 198 N.J. 511 (2009); *M. S. v. Millburn Police Dept.,* 197 N.J. 236 (2008).

Respondent further reasons that NJSA 18A:6-17.2, pertaining to teachers, principals, assistant principals and vice principals as per NJSA 18A:6-17.3 is an express exception to the more general scope of tribunal review in tenure removal cases found at NJSA 18A:6-11.

The separation of Speech and Language Specialists from the term "teachers," Respondent says, is found at that NJAC 6A:10-1.2, which sets forth the Administrative Code's definition of a teacher. There, the Code defines a teacher as "a teaching staff member who holds the appropriate standard, provisional or emergency instructional certificate issued by the State Board of Education and is assigned a class roster of students for at least one particular course." Respondent never was assigned a class roster for any course.

Respondent also argues that the thrust of the Act is to improve instruction, NJSA 18A:6-118(a). Although Speech and Language Specialists are important to instruction, Respondent says, they are not instructors in designated courses but rather assist students who may be challenged because of communications issues.

Last, Respondent cites the Department's Guide to the TEACHNJ Act and its omission of therapists specifically in certain places, despite the inclusion of "Other employees required to

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[3] Under the Act a Respondent's defenses where she is accused of inefficiency are limited to proof that (a) the evaluations leading to removal failed to adhere to the Act's mandated procedures; and/or (b) the evaluations contained a mistake of fact; and/or (c) removal was motivated by political affiliation, nepotism, union activity, discrimination, or other legally prohibited conduct; and/or (d) the removal was arbitrary and capricious. (Citation needed).

hold appropriate certificates issued by the board of examiners." Respondent says that because the guidance goes on to state that the "requirements [of the Act] do not apply to every teaching staff member in the same manner" there is an implied exception for Speech and Language Specialists from the limited standard of review set forth in NJSA 18A-6-17.2.[4]

By way of answer, Petitioner argues that legislative history pertinent to the Act and guidance provided by the New Jersey Department of Education both strongly indicate that the Act, including its grounds for removal and restrictions on defenses, applies to all "teaching staff members." Petitioner then points out that that phrase is defined at NJSA 18 A:6-119 as "member[s] of the professional staff of any district [or regional or county vocational school board of education], holding office, position or employment [that requires the staff member] to hold a valid and effective standard, provisional or emergency certificate appropriate to [his/her] office, position or employment, issued by the State Board of Examiners..." It is uncontroverted that Respondent, as a Speech and Language Specialist, held such a certificate.

Further, Petitioner underscores that the Act does not provide any alternative method of arbitration or scope of review for such arbitration for specialists or any professionals covered by it. Nor does the Act anywhere suggest an alternative review regime for Speech and Language Specialists.

Turning to legislative history, Petitioner refers to the preamble of the Act at NJSA 18A:6-118 where the Legislature found and declared that:

> The goal of [the Act] is to raise student achievement by improving instruction through the adoption of evaluations that provide specific feedback *to educators*, inform the provision of aligned professional development and inform personnel decisions. (Emphasis supplied).

[4] In addition, Respondent contends that the Department of Education has already recognized that Speech and Language Specialists are not teachers because it removed Respondent from the time requirements for responding to the charges against her imposed by NJSA 18A-6-17.2 and 17.3. The Department's decision in that regard was only for purposes of allowing additional response time for Respondent. The undersigned does not view it as a decision on the appropriate scope of review in this arbitration, which is the issue of Respondent's Motion.

Petitioner also posits that statutes must be construed in a manner that avoids unreasonable results when legislative intent is considered, citing, *inter alia*, *American Fire and Cas. Co. v. New Jersey Div. of Taxation,* 187 N.J. 65 (2006); *Realty LLC v. Law*, 406 NJ Super. 423, 425 (App. Div.2009); *Asbury Park Press v. Ocean County Prosecutor's Office*, 374 N.J. Super. 312 (Law Div. 2004).

Petitioner also states that the Department's Guide to the TEACHNJ Act delineates the Act's application to various staff members, including "therapists," a category into which Respondent would be placed and that the Guide further explains that the Act applies to "teaching staff" working in the State's public schools, a phrase Petitioner interprets as having a broader meaning than simply classroom teachers.

Moreover, Petitioner argues that certain portions of the Act affecting annual ratings clearly apply to a Speech Language Specialist in that the Act requires (1) more robust evaluations; (2) a regime of four rating categories; (3) constant professional development; (4) the implementation when needed of Corrective Action Plans; (4) an extended period in which a decision to grant tenure are made; and, (5) more expedient reviews of removal decisions through arbitration. There is nothing inimical, Petitioner says, in the application of these portions to the position of Speech and Language Specialists.

Finally[5], Respondent cites Petitioner's job responsibilities which include

> Provid[ing] individual and small intervention sessions with students who have [been] classified [and]
> Conducts classes in language stimulation

Petitioner contends that they are indices teaching and characteristics of a teacher's professional duties.

Opinion:

[5] Petitioner also rejects any claim that the Department's decision to relax time for Petitioner's response to the tenure removal charge is in any way relevant to this dispute.

TEACHNJ was a change of geologic proportions in New Jersey education. Its aim, as Respondent accurately represents, was to improve public education by assuring that even long-tenured teachers continue to be efficient at their profession. Given that goal, it is obvious that the Act, despite its inclusion of principals and others, was principally oriented toward the traditional classroom teacher, and I have little doubt that that position was the prototype for Assemblypersons and Senators considering the bill.

As is evident from the Act, the Legislature effected significant changes in the tenure system. At their heart is the insistence on a rigorous evaluation process with four new rating categories, partially based on "multiple objective measures of student learning" that measure "student growth from one year's measure to the next...", "specific measures" of growth, and standardized assessments, NJAC 18A:6-123, as well as a "calibration" of classroom observations "to ensure that the observation protocols are being implemented...consistently" and a district-wide model rubric for evaluations. (Id.).

All of these are consistent with the evaluation of classroom teachers on a common, district wide basis, and it would not be unexpected for the Legislature to guard against plenary attacks on the results of such evaluations.

However, while possible for use regarding specialists, the evaluative measures spoken of at NJSA 18A:6-123 are far from orthodox methods of judging the performance of individual specialists, most of whom have ever changing and highly individualized student case- loads throughout the year with few students having overlapping objectives. A specialist does not deal with typical class-size groups of students. Rather, they treat a collection of individual diagnoses under Individual Educational Prescriptions, making their achievement nearly impossible to measure by objective instruments designed and normed to assess class-wide group growth which the Legislature obviously favored.

It would hardly be surprising therefore, if the Legislature did not mandate "multiple objective measures of student learning" that provide "specific measures" of growth and the use of "standardized assessments" for specialists, despite the reasonable application of such things to teachers.

In fact, the Legislature did not. Besides never mentioning specialists in Section 25 of the TEACHNJ bill, NJSA 18A:6-17.3, which establishes the rigorous standardized, objective criteria for teachers described above, the Legislature exempted specialists from the restrictions on

defenses imposed by Section 23 of the bill, NJSA 18A:6-17.2. Section 23 itself expressly and exclusively refers only to those staff enumerated at NJSA 18A:6-17.3, *i. e.*. "teachers, principals, assistant principals and vice-principals."

As suggested above, the exemption from restricted defenses is consistent with the view that the Legislature, having placed so much faith in the standardized criteria for teachers and administrators, did not see a need to restrict the defenses of specialists during tenure removal reviews.

For me to hold that defenses for specialists is limited to those of teachers would be to import into the law something the Legislature left out for what appears to be a reasonable cause. To argue, as Petitioner does here, that because Respondent must be covered by NJSA 18A6-17.2 because she is covered by other areas of TEACHNJ is without a basis in law. As Respondent has argued, a statue's intent must begin with its plain language. *Jen Elec., supra.* Only where language is ambiguous can a tribunal seek further guidance as to the Legislature's intent.

Even were I to examine intent, I do not find that exempting specialists from restricted review vitiates the Legislature's overall goal of improving efficiency in the schoolhouse as to all professionals. Nor does it necessarily impede the Act's avowed goal of stream-lined appeals to tenure removal which is driven by the timing requirements set forth at NJSA 18A:6-17.1, -17.2, and -17.3.

Based on the above, I will enter an Order granting Respondent's Motion that the scope of review in Respondent's challenge to her tenure removal is the traditional just cause standard which would include the inefficiency with which she has been charged.

ORDER

And now this 13th Day of November, 2017 it is hereby ORDERED that Respondent's Motion is Granted and that the standard of review to be used in hearings before the Undersigned Arbitrator is that of "just cause" which must be supported by sufficient and credible evidence, subject to any and all defenses available to Respondent, including evidence supporting mitigation at the penalty stage of the arbitration proceeding.

Ralph H. Colflesh, Jr., Esq.
Arbitrator

342-17

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges Against
Donna DeMarco

WAYNE BOARD OF EDUCATION,
-PASSAIC COUNTY

Petitioner

320-12/16

Opinion and Award

- and -

DONNA DEMARCO

Respondent

Before: Deborah M. Gaines, Arbitrator

APPEARANCES:

FOR THE PETITIONER:

FOR THE RESPONDENT:
SPRINGSTEAD & MAURICE, ESQS.

Pursuant to NJSA 18A:6-16, as amended by P.L. 2012, c.26 and P.L. 2015, c. 109("TEACHNJ"), the tenure charges brought by the Wayne Board of Education ("the District" or "Petitioner") against Donna DeMarco ("DeMarco" or "Respondent") were referred to me by the Bureau of Controversies and Disputes for a hearing and Decision on January 13, 2016. I conducted hearings at the District's Offices in Wayne New Jersey, New Jersey on March 3, May 10, June 5, July 27 and August 24, 2017. The parties

received extension of time to conduct and complete the hearings based upon the need for records from the state and scheduling issues.

At the hearing, the parties had full and fair opportunity to examine and cross-examine witnesses, introduce documentary evidence and make argument in support of their respective positions. The hearings were transcribed. The parties submitted written closing statements whereupon the record was closed.

THE CHARGES

Respondent is charged with Conduct Unbecoming and Other Just Cause as described in 53 paragraphs in the Board's Statement of Tenure Charges.[1] The substance of these charges alleges: 1) Respondent improperly confined at least one student to a bathroom as a means of punishment and/or behavioral control; 2) Respondent referred to her students as "little assholes" and/or "little douchebags" to other faculty; and 3) Respondent's actions caused publicity that brought the District into disrepute. The undersigned has summarized the charges as they were not written in the form of charges with

[1] The paragraphs are not actual specifications, but rather recount all the steps the District took in bringing charges against Respondent.

specifications. The charges are attached to the decision as Attachment "A".

BACKGROUND

Respondent is a tenured pre-school teacher who, most recently, was assigned to Packanack Elementary School. The instant case arises out of allegations of misconduct during the 2015-2016 school year at which time Respondent was responsible for a pre-school class comprised of approximately 16 students, half of whom were special education students or fell on the autism spectrum. Respondent was assisted in the classroom by two paraprofessionals, Kathy Frega and Margaret Hickey.

Respondent's classroom at Packanack was a very large space with an alcove in which a student bathroom was located. The bathroom contained only a toilet and metal shelves. The walls were tiled. The bathroom was a narrow space with a heavy door that opened inward. The sink was located outside the bathroom.

On June 7, 2016, Principal Roger Rogalin received an email from case worker Cynthia Carey requesting a meeting to discuss an issue of concern. Carey told Rogalin that teacher Michelle Littman reported to her that Respondent bragged in the teachers' room she locks students in the bathroom to calm them down. At the direction of the Superintendent, Rogalin began an investigation into the allegation. He conducted interviews on

harm. Although Respondent denied placing RG in the bathroom, he determined the Respondent placed RG in the bathroom when he was upset. He found this to be potentially harmful because the child could have put himself "in danger and hurt himself." [Transcript II, p. 145] He believed this was a form of punishment and violated the school's disciplinary code.

Rogalin testified the school placed Respondent on an administrative leave on June 8, 2016. He noted that at that time, the investigation also uncovered allegations Respondent had referred to students in a derogatory manner, using terms such as "little assholes", "little douchebags" and specifically referring to a student with a dirty diaper as "Stinky Pete."

Michelle Littman testified at the hearing and confirmed she reported to Carey a remark made by Respondent regarding her placing kids in the bathroom when they act out. She testified she heard Respondent make a similar statement earlier in the year, but assumed she must have been joking. When she heard it again, she found it disturbing and believed it was unethical. Littman confirmed she also hear Respondent refer to students as little assholes.

Occupational Therapist Ali Lescowicz, Speech Therapist Dana Tengi testified and confirmed the statements they provided to Principal Rogalin and State Investigator Taflinski.

Paraprofessional Kathy Frega also testified. She admitted Respondent had placed RG in the bathroom for 3-5 minutes at a time when he was very disruptive in the classroom.[2] Frega testified the child was approximately four years old and was often disruptive. She testified RG had thrown himself on he on the floor on one occasion in April or May 2016. She noted he was pushing his backpack into other students as well.

Frega testified RG consistently had behavioral issues. She noted they would normally him aside, speak to him, call the principal or child study team if he was too disruptive. On this day, she testified, there was no response from the CST. She testified Respondent asked RG to stand up moved him by the hand toward the bathroom. She testified the student was crying, but did not bang on the door of the bathroom. She noted Respondent left the bathroom area and went back to the other students. Frega testified RG came out of the bathroom and stopped crying. Frega testified she did not tell anyone and did not believe it was necessary.

Frega testified Respondent gave students pet names. She had heard Respondent call a student "Stinky Pete."

Superintendent Toback testified as to the impact of the Respondent's actions within the District. He confirmed he

[2] Frega initially denied the allegations when she was first interviewed by Rogalin.

oversaw the investigation and made the decision to place Respondent on administrative leave. He testified in late June numerous news outlets picked up the story after the investigation interviewed parents. He testified he received many calls and communications from outraged parents about Respondent.

As to the decision to terminate Respondent, he noted the investigation raised many concerns. He testified Respondent described her students as assholes and/or douchebags and locked students in bathrooms. Toback testified Respondent's conduct violated numerous District policies. He noted the District implemented a specific Behavior Management System entitled "Handle with Care" [Employer Exhibit 19] which prohibits confinement and requires reporting and review of such incidents.

Respondent, Donna DeMarco testified. She noted she has consistently received above average ratings. Respondent testified she helped develop the "Little Learners Program" in the District. It was the first inclusion classroom for students with IEPs and allowed the District the opportunity to educate these students with general education students.

Respondent testified she is familiar with the behavioral programs and techniques employed by the District. She noted safety is the primary concern. She testified some of the behavioral techniques she employs involve positive

reinforcement, such as giving students stars for behavior, small parties for the class, and other positive reinforcing behaviors. She noted there is a Child Study Team (CST) and a consisting behaviorist for support.

Respondent acknowledged using the bathroom as a de-escalation technique for two students during the 2015-2016 school year. She testified one student, KJ was in her class from September until January. She testified he was removed because he needed a more structured environment. She testified on one occasion, he got very agitated because other students were looking at him. She told him to relax and that he can use the bathroom and then wash his hands. Respondent testified the door was always kept open so that paraprofessional Kathy Frega could observe.

Respondent testified she also used the technique for student RG. She testified she recalled one day because RG was very distressed after transitioning from the cafeteria. She testified he was crying and throwing himself to the ground near the cubbies. She testified she initially used "I" statements with him and directed him to the bathroom, told him to use the bathroom and wash his hands after which she would then put lotion on his hands. Respondent testified she left the door open two to three inches so that Frega could watch him. She testified she then went back to the other students.

According to Respondent, she was never told not to use such a technique, although she acknowledged she never specifically discussed it with anyone.

Respondent acknowledged referring to her students on occasion as little assholes or douchebags. She testified she did so out of frustration to other staff members. She apologized for this behavior and testified upon reflection she realized it was wrong.

However, while she acknowledged calling a student Stinky Pete, she testified that is was not a derogatory term. Rather, she testified all her students were given nicknames derived from the movie Toy Story. She testified Stinky Pete is an old prospector in this movie. She did not believe any student took offense. Rather, they enjoyed the names.

Positions of the Parties

Position of the Board

The Board argues it has demonstrated just cause for discharge. It maintains the credible evidence proves Respondent confined at least two students to the bathroom as a form of discipline or punishment. It argues her conduct violates the Board's policies regarding restraint, corporal punishment, and professional conduct.

It contends Respondent's assertion that she used the bathroom as a de-escalation technique is belied by the evidence

in this case. It cites Cathy Frega's testimony that Respondent closed the door on students KW and RG when she placed them in the bathroom. The evidence showed the door stuck on the bathroom and was difficult to open. Moreover, it notes Respondent bragged about her actions to colleagues that she locked kids in the bathroom until they calmed down.

Moreover, it maintains Respondent's failure to report her placement of the student in the bathroom belies her contention. It notes the "Handle with Care" program requires reporting of such a technique, and given that she claims the student was acting out in such a disruptive way, it would have been incumbent upon her to do so.

The District notes its expert witness, DiCesare, testified credibly that his review of the interviews in this case that Respondent's conduct violated school policies on professional conduct, and Restraint. It notes he found her conduct to have posed a risk to the students involved. Likewise, it argues the IAUA investigation also found Respondent's actions placed the students in harm.

Likewise, the District argues Respondent's use of derogatory language toward students - such as little assholes and douchebags constitutes unprofessional conduct also subjecting her to discipline. It cites many cases in support of its position.

Finally, the District maintains Respondent's misconduct is a separate ground for discharge as it diminished the public trust of the school system. It cites the numerous news stories regarding Respondent and the outcry from parents in the District.

Position of Respondent

Respondent maintains the District has failed to demonstrate grounds for discharge. It maintains first, the IAIU report specifically provided abuse was "Not Established." It argues this report was investigative and not adjudicative. It notes other arbitrators have found such reports do not establish harm occurred.

Respondent argues the District prematurely concluded Respondent committed misconduct and, thereby pre-determined the outcome of the investigation. It notes Investigator Taflinski's testimony that he was told by Principal Rogolin advised the teacher was suspended and the Superintendent did not want her to return to school the following year.

Respondent argues the District was aware the door to the bathroom stuck and clearly did not believe it constituted a risk since it failed to repair it prior to the instant case. It further argues that any alleged danger posed by any of the clutter seen in pictures of the bathroom was also known to the District.

Respondent maintains her use of the bathroom as part of a de-escalation technique is an appropriate behavioral strategy. It cites its behavioral expert Dr. Spano, who testified that given there was no behavioral plan in place for the students, the decision to use the bathroom for a "time out" was an appropriate strategy.

Respondent maintains the record does not demonstrate the students were harmed in any way. Rather, it asserts, the record evidence demonstrates Respondent was an effective teacher and well-liked by parents.

Moreover, Respondent argues the administration was on notice that she used the bathroom on occasion as a de-escalation technique. She testified prior Vice Principal Cathy Gaynor was aware of an incident with student KJ, where she asked him if he wanted to use the bathroom to calm down. Respondent argues no member of the administration ever told her such a technique violated any policy.

Respondent admits using improper language toward students in the teacher staffroom as a means of venting. It notes Rogalin heard her on one occasion and did not reprimand her. However, Respondent acknowledges it was improper.

Respondent argues the evidence fails to establish she called a student "Stinky Pete" because he wore a dirty diaper. Rather, Respondent contends Stinky Pete was one of many

nicknames given to the students based on the characters in the animated movie, Toy Story.

Respondent contends Michelle Littman reported her out of animus because she was going to be transferred the following school year and believed Respondent should have been the teacher selected.

Respondent argues that, to the extent any misconduct is found, termination is too harsh a penalty. Respondent argues her long history of exemplary service must be considered. In addition to numerous prior arbitration decisions, Respondent maintains application of the *Fulcomer* standard also warrants a lesser penalty. Respondent notes the court in *Fulcomer* requires certain factors to be considered, such as the impact on the charged teachers career, the longevity of the teacher, the teachers record, prior disciplinary and the gravity of the offense. It maintains examination of these factors warrants a lesser penalty.

Decision

After carefully considering the entire record before me, including my assessment of witnesses' credibility and the probative value of evidence, I find the Board has met its burden under the statute to sustain the charges of Conduct Unbecoming and Other Just Cause for termination. My reasons follow.

The credible record evidence establishes Respondent improperly confined students in the bathroom during the 2015-2016 school year. Respondent acknowledged placing students KW and RG in the bathroom on separate occasions. While she asserts she did so to de-escalate their emotional and potentially dangerous behavior, the credible record evidence establishes her actions violated District policy and placed the students in potentially harmful situations.

District Policy 5561 specifically prohibits the use of restraint against a child for the purpose of punishment. Likewise, the school's corporal punishment policy also prohibits such conduct. All the school's policies provide that confinement can constitute such restraint. Based upon my own inspection of the classroom and bathroom at issue, I find the students were confined when placed in the bathroom.

The bathroom within Respondent's classroom is small and narrow. It has a large heavy door that opens inward close to the toiler. Moreover, the credible evidence establishes the door was prone to sticking at the time. Given that the students were four years old, and the heavy door had to be pulled, placement in the bathroom (even without a lock) constitutes confinement since the student could not easily leave the room.

More importantly, Respondent's testimony established she left the students unsupervised when placing them in the

bathroom. Regardless of whether the door was opened two inches or fully closed, as described by Frega, the students were unsupervised when inside. Frega was nowhere near the students and there is no evidence Respondent charged Frega with overseeing them. In fact, Frega testified the bathroom door was closed when RG was in the bathroom.

The potential for harm to the students was substantial. The students in question had behavioral issues according to Respondent and paraprofessional Frega. The record evidence shows they were emotionally distressed when put into the bathroom. The students could have hit their heads on the toilet, gotten their hands caught in the door or any number of foreseeable problems could have arisen with children of such a young age confined to that space.

To the extent that placement in the bathroom could ever be deemed an acceptable de-escalation technique, as described by Specialist Spano, I do not find those conditions to have existed in the instant matter. Spano described its use where the students were closely supervised, which was not the case here.

Moreover, Respondent's failure to report any of the incidents discredits her assertion that the students were placing others in a dangerous situation. The District's behavioral plan requires a teacher to report the situation to administration and if the technique is used more than once to

undergo a review. Respondent testified she reported issues to the Child Study Team, but never reported the use of the bathroom on any of these occasions.

In fact, Respondent told other teachers she locked kids in the bathroom until they behaved, which demonstrates this one occasion was not so unusual. I credit Littman's testimony that she heard Respondent mention this more than once.

That the misconduct had an impact is demonstrated by the fact that student RG remembered being put in the bathroom the following school year and reported it to his teacher in October 2016 at his new school.

As to the charges relating to derogatory language, Respondent admits to using inappropriate language to describe her students to other teachers. The evidence does not establish the language was used in front of students.

However, I find insufficient record evidence to find she called a student "Stinky Pete" because he was wearing a dirty diaper. I credit Respondent's explanation she gave students nicknames. Moreover, the record evidence does not indicate the student was offended.

Finally, while I find the negative publicity that resulted from the investigations impacted the school, I find the District has shared culpability in this matter. The news stories indicate that parents were upset because the school had not

informed them about the investigation and they did not learn until the state investigator called. It would appear had the District notified parents of an investigation involving their children, the response from parents may have been very different.

Having found Respondent guilty of misconduct, I turn to the issue of penalty. Respondent's improper confinement of special education students to a bathroom is serious misconduct. Foremost in a teacher's responsibility is the need to protect and safeguard their students. This is especially true of special education students who are particularly vulnerable. Respondent on more than one occasion placed the students in potentially harmful situation. The students were unsupervised, while emotionally distraught, in a tiny room with the potential to bump their head become more distraught.

Respondent had numerous alternatives to her course of action. Even if the CST had not responded immediately, she could have moved the child to a chair in another part of the classroom away from other students or gone to the administration for help. Her lack of judgement is a clear instance of unprofessional conduct.

While Respondent's derogatory language in the teacher's room alone would, most likely, not subject her to termination, under these circumstances, I find her conduct is demonstrative

of a lack of empathy for her students which contributes to the determination she should not be returned to the classroom.

In reaching this determination, I have considered Respondent's lack of a prior disciplinary history. However, given the severity of her misconduct, the potential harm to her students and the inability of the District to place its trust in her stewardship, I find termination to be the appropriate penalty.

AWARD

The charges of conduct unbecoming and other just cause are substantiated. The District has demonstrated just cause for termination.

Deborah Gaines

Dated: November 20, 2017

Deborah Gaines, Arbitrator

Affirmation
State of New York }
County of New York } ss:

I, DEBORAH GAINES, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

Date: November 20, 2017

Debah Harris

Text

J-1

Dr. Mark Toback
Superintendent of Schools
Wayne Board of Education
50 Nellis Drive
Wayne, New Jersey 07470

WAYNE BOARD OF EDUCATION, Petitioner, v. DONNA DeMARCO, Respondent.	STATEMENT OF TENURE CHARGES AND STATEMENT OF EVIDENCE UNDER OATH

I, Dr. MARK TOBACK, of full age, being duly sworn upon my oath according to law, depose and say:

1. I am the Superintendent for the Wayne Board of Education.

2. I have read the Statement of Tenure Charges and Statement of Evidence Under Oath in the above captioned matter.

3. I am fully familiar with the contents and facts alleged therein and the same are true to the best of my knowledge, information, and belief.

Dr. Mark Toback

Dated: 11 · 30 · 16

Sworn to and subscribed before
me on this 30th day of November, 2016

Notary Public, State of New Jersey

ANN MARIE CASSERA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 2/26/2021

Dr. Mark Toback
Superintendent of Schools
Wayne Board of Education
50 Nellis Drive
Wayne, New Jersey 07470

----------X

WAYNE BOARD OF EDUCATION,

Petitioner,

v.

DONNA DeMARCO,

Respondent.

----------X

STATEMENT OF TENURE CHARGES AND STATEMENT OF EVIDENCE UNDER OATH

TO: Mr. Emidio D'Andrea
Business Administrator/Board Secretary
Wayne Board of Education
50 Nellis Drive
Wayne, New Jersey 07470

Mr. D'Andrea:

I, Dr. Mark Toback, Superintendent of Schools of the Wayne Board of Education ("Board"), hereby state, based upon my personal knowledge and upon information, that Donna DeMarco ("Respondent"), a tenured teacher of preschool students in the Wayne Township School District ("District"), should be dismissed from her position for (1) conduct unbecoming and (2) other just cause.

CHARGE ONE: CONDUCT UNBECOMING

1. Respondent is a tenured teacher of preschool students in the District.

2. During the 2015-2016 School Year, Respondent was a preschool teacher at Packanack Elementary School.

3. On or about Tuesday, June 7, 2016, Ms. Cynthia Carey, a member of the school's preschool child study team, e-mailed Roger R. Rogalin, the Principal of Packanack Elementary School in order to request a meeting. See Exhibit 1.

4. On or about Wednesday, June 8, 2016, at approximately 8:00 A.M., Mr. Rogalin met with Ms. Carey. See Exhibit 1.

5. During the meeting, Ms. Carey stated that, on the evening of Monday, June 6, 2016, Michelle Littman, a preschool teacher at Packanack, informed her that, while in the Packanack Teacher's lounge, she had heard Respondent state that she places children who misbehave in the classroom bathroom. According to Ms. Carey's recollection of her conversation with Ms. Littman, once the child was in the bathroom, Respondent would hold the bathroom room door closed so that the child would be unable to exit. See Exhibit 1.

6. Following the meeting Mr. Rogalin informed the Human Resource Specialist, Claudia Olivo, of the allegations. Thereafter, Ms. Olivo informed District Superintendent, Dr. Mark Toback, of the allegations. See Exhibit 1.

7. While Mr. Rogalin contacted Ms. Olivo, Ms. Carey contacted the Division of Child Protection and Permanency ("DCP&P") to report Respondent's comments. DCP&P declined to investigate the matter. See Exhibit 1.

8. On June 8, 2016, Mr. Rogalin interviewed the following District employees: Ms. Dana Tengi, preschool speech teacher; Ms. Ally Leszkowicz, occupational therapist; Ms. Margaret Hickey, paraprofessional; Ms. Michelle Littman, preschool teacher; Ms. Kim Lippman, preschool teacher; Ms. Jamie Meigh, first grade teacher; and Ms. Jenna Furgaro, first grade teacher. See Exhibit 1.

9. On June 8, 2016, Ms. Leszkowicz informed Mr. Rogalin that a paraprofessional, Ms. Hickey, had reported to her that a student was upset because he had just been locked in a bathroom. Specifically, Ms. Hickey had stated: "You would be upset too if you were locked in the bathroom." See Exhibit 1.

10. On June 8, 2016, Mr. Rogalin interviewed Ms. Littman. During the interview, Ms. Littman recounted hearing Respondent state that she places children who misbehave in the classroom bathroom and that she holds the door closed so that the child is unable to leave. See Exhibit 1.

11. During the interview, Ms. Littman indicated that Ms. Lippman, Ms. Meigh, and Ms. Furgaro were present when Respondent made the aforementioned statement. See Exhibit 1.

12. On June 8, 2016, Mr. Rogalin interviewed Ms. Lippman. During the interview, Ms. Lippman indicated that Respondent had previously admitted to confining students in the bathroom. According to Ms. Lippman, Respondent would talk about holding the door closed while students were in the bathroom. See Exhibit 1.

13. On June 8, 2016, at approximately 11:15 A.M., Mr. Rogalin met with Respondent; her Building Union Representative, Jessica O'Heir; and Assistant Principal, Cathy Gaynor. See Exhibit 1.

14. During the meeting, Respondent was informed of the nature of the allegations against her. Respondent denied the allegations. See Exhibit 1.

15. At the conclusion of the meeting, Respondent was placed on paid administrative leave. See Exhibit 1.

16. On June 10, 2016, a series of follow-up interviews were conducted by Paula Clark, Esq., District Coordinator of Compliance, along with Mr. Rogalin. All employees were interviewed in the presence of union representation. See Exhibit 2.

17. On June 10, 2016, Ms. Carey was interviewed by Mr. Rogalin and Ms. Clark. Ms. Carey reiterated that on June 6, 2016, her co-worker, Ms. Littman, informed her that she had overheard Respondent state the following: "[T]he way I deal with the kids who are acting up to I put them in the bathroom and I hold the door." See Exhibit 2.

18. During the interview process, Ms. Carey further indicated that she has heard from others that Respondent frequently calls her students "little assholes." See Exhibit 2.

19. On June 10, 2016, Ms. Littman was interviewed by Mr. Rogalin and Ms. Clark. During the interview, she stated that she had overheard Respondent state the following in the Packanack teacher's lounge: "[T]he way I deal with the kids who are acting up is I put them in the bathroom and I hold the door." See Exhibit 2.

20. Ms. Littman further stated that Respondent had stated that she "[H]eld the door closed until I felt he was ready to come out." See Exhibit 2.

21. Ms. Littman also indicated that Respondent frequently refers to her students as "little assholes" and that she refers to students who wear diapers as "Stinky Pete." See Exhibit 2.

22. During the interview process, Ms. Littman stated that she was afraid of Respondent, as she has undergone a significant change in the past year. See Exhibit 2.

23. Ms. Littman concluded the interview by stating that Respondent is occasionally late to class and that she becomes responsible for Respondent's class when this occurs. See Exhibit 2.

24. On June 10, 2016, Ms. Lippman was interviewed by Mr. Rogalin and Ms. Clark. During the interview process, Ms. Lippman acknowledged hearing Respondent refer to her students as "little assholes." See Exhibit 2.

25. On June 10, 2016, Ms. Tengi was interviewed by Mr. Rogalin and Ms. Clark. During the interview process, Ms. Tengi stated that she had heard Respondent refer to her students as "little assholes" on at least five occasions. See Exhibit 2.

26. On June 10, 2016, Kathy Frega, a paraprofessional in Respondent's classroom, was interviewed by Mr. Rogalin and Ms. Clark. During the interview, Ms. Frega acknowledged that she previously heard Respondent refer to a student as "Stinky Pete." See Exhibit 2.

27. On June 10, 2016, Ms. Hickey, a paraprofessional in Respondent's classroom, was interviewed by Mr. Rogalin and Ms. Clark. During the interview, Ms. Hickey acknowledged that she previously heard Respondent refer to a student as "Stinky Pete." See Exhibit 2.

28. On June 10, 2016, Ms. Leszkowicz was interviewed by Mr. Rogalin and Ms. Clark. During the interview, Ms. Leszkowicz indicated that she previously heard Respondent refer to her students as "little assholes" and "little douchebags" in the presence of other District staff. See Exhibit 2.

29. Ms. Leszkowicz reiterated that she had previously heard Ms. Hickey state: "Wouldn't you be upset if you were locked in the bathroom." See Exhibit 2.

30. On June 22, 2016, a second series of interviews were conducted by myself, Mr. Rogalin, Ms. Clark, and Michael Reinknecht, Director of Student Support Services. All employees were interviewed in the presence of union representation. See Exhibit 2.

31. Prior to the interviews, staff were provided with a copy of Board Policy and Regulation 3281 and 4281, Inappropriate Staff Conduct. See Exhibits 2 and 3.

32. On June 22, 2016 and June 23, 2016, Ms. Hickey was again interviewed by me, with Mr. Rogalin, Ms. Clark, and Mr. Reinknecht in attendance. During the interview, she again acknowledged hearing Respondent call a student who wore diapers, "Stinky Pete." See Exhibit 2.

33. On June 22, 2016, Ms. Lippman was interviewed by me, with Mr. Rogalin, Ms. Clark, and Mr. Reinknecht in attendance. During the interview, Ms. Lippman acknowledged hearing Respondent refer to her students as "little assholes" on one or two occasions. See Exhibit 2.

34. On June 22, 2016, Ms. Frega was twice interviewed by me, with Mr. Rogalin, Ms. Clark, and Mr. Reinknecht in attendance. During the second interview, Ms. Frega stated that she had witnessed Respondent place two students in the bathroom as a form of discipline "a few times over the year." See Exhibit 2.

35. Specifically, Ms. Frega stated that she had witnessed Respondent place a student, K.J., in the bathroom at least two times during the year, between September and December. See Exhibit 2.

35. Ms. Frega also stated that she witnessed Respondent place a second student, R.G., in the bathroom as a form of discipline two or three times during the second half of the school year. See Exhibit 2.

36. On June 22, 2016, Respondent's actions were again reported to DCP&P.

37. On June 23, 2016, The Institutional Abuse Investigation Unit ("IAIU") of DCP&P initiated an investigation into the allegation that Respondent had inappropriately confined a child to the bathroom as a form of discipline. In light of the confidentiality requirements contained in N.J.S.A. 9:6-8.10a, information regarding the investigatory process and corresponding documentation have been not yet been provided to the District.

38. Following the incident, multiple news outlets reported that a Packanack preschool teacher had locked two students inside a bathroom.

39. On June 28, 2016, CBS New York published an article entitled: "NJ Preschool Teacher Accused Of Locking 2 Students Inside Bathroom." Within same, the article notes that a preschool teacher at Packanack Elementary School has been accused of locking at least two students, ages 3-4, inside a bathroom as a form of punishment. The report was also televised by CBS 2 New York. See Exhibit 4.

40. On June 28, 2016, NJ.com published an article entitled: "N.J. Teacher Allegedly Locked Toddlers in Bathroom, Report Says." Within same, the article notes that a preschool teacher at Packanack Elementary School has been accused of punishing at least two students, ages 3-4, by locking them in a bathroom. See Exhibit 5.

41. On June 28, 2016, New York Daily News published an article entitled: "N.J. Preschool Teacher Accused of Locking Students in Bathroom." Within same, the article notes that a preschool teacher at Packanack Elementary School has been accused of punishing at least two students, ages 3-4, by locking them in a bathroom. See Exhibit 6.

42. On June 29, 2016, the Wayne Patch published an article entitled: "Wayne Teacher Accused of Locking Preschool Student in Bathroom, Parent Says." Within same, the article notes that a preschool teacher at Packanack Elementary School has been accused of locking at least one student inside a bathroom as a form of punishment. The article further indicates that on at least one occasion Respondent spanked a boy on the butt, pushed him into the bathroom and locked him in it until he calmed down. See Exhibit 7.

43. On June 29, 2016, New Jersey 101.5 published an article entitled: "Teacher Accused of Locking Wayne Preschoolers in Bathroom as Punishment." Within same, the article notes that a preschool teacher at Packanack Elementary School has been accused of locking at least one student inside a bathroom as a form of punishment. The article further indicates that on at least one occasion spanked a boy on the butt, pushed him into the bathroom and locked him in it until he calmed down. See Exhibit 8.

44. On June 29, 2016, North New Jersey News published an article entitled: "State, Wayne District Probe Allegations Teacher Locked Students in Bathroom as Punishment." Within same, the article notes that a preschool teacher at Packanack Elementary School has been accused of punishing at least two students, ages 3-5, by locking them in a bathroom. See Exhibit 9.

45. The press coverage brought on by Respondent's actions has adversely impacted the morale and efficiency of the District and has begun to negatively impact public respect and confidence on the operation of the District.

46. On August 5, 2016, the IAIU issued a findings report indicating that the allegations against Respondent were "Not Established, in accordance with N.J.S.A. 9:6-

8.21. A finding of "Not Established" means that while "[t]here is not a preponderance of the evidence that the child is an abused or neglected child as defined by statute,...evidence indicates that the child **was** harmed or placed at risk of harm." See Exhibits 10 and 11.

47. On September 2, 2016, Ms. Clark completed a report of the allegations levied against Respondent. See Exhibit 2.

48. Pursuant to same, Ms. Clark made the following determinations:

- Based upon interviews with District staff, Respondent likely stated that she held the door closed while a student was in the bathroom.
- Respondent used inappropriate language on a regular basis to refer to children.
    - Specifically, Respondent referred to students as "little assholes" and "little douchebags" on a regular basis.
    - Respondent referred to a student wearing a diaper as "Stinky Pete."

See Exhibit 2.

49. On September 23, 2016, the District was served with a Tort Claim Notice on behalf of one of Respondent's students, R.G., by his parents. Within same, the student's parents indicated that Respondent locked their son "in a bathroom as a measure of discipline for an undetermined period of time." See Exhibit 12.

50. Within same, R.G.'s parents assert that their son has suffered psychological damage as a result of Respondent's action. See Exhibit 12.

51. Respondent's actions are in violation of Board Policy and Regulation 5561, Use of Physical Restraints, which provides guidance for restricting the movement

of District students, as well as Board Policy and Regulation 3217, Corporal Punishment, which prohibits the use of fear when disciplining a student. See Exhibits 13 and 14.

52. On October 24, 2016, a student at Theunis Dey Elementary School, R.G. shared with his classmates that he was locked in the bathroom during the 2015-2016 school year while attending Packanack Elementary School. In response, a second student, B.S., shared that he had been locked in the bathroom during the 2015-2016 school year as well. This information was reported to administration by the student's teacher, Char-Len Gorski. See Exhibit 15.

53. Upon receiving this information, School Principal Necole Jadick, as well as Anti-Bullying Specialist Josephine Ramirez, informed DCP&P, the Passaic County Prosecutor's Office, and the Wayne Township Police Department of this newly obtained information. See Exhibit 15.

CHARGE TWO: OTHER JUST CAUSE

54. All statements in Charge One above are incorporated herein by reference.

The aforesaid facts demonstrate Respondent warrants dismissal from her position as a tenured preschool teacher in the District for (1) conduct unbecoming, and (2) other just cause

Dr. Mark Toback
Superintendent of Schools

DATED: 11.30.16

Sworn to and subscribed before
me on this 30th day of November, 2016

Notary Public, State of New Jersey

ANN MARIE CASSERA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 2/26/2021

STATEMENT OF EVIDENCE

1. The foregoing tenure charges are supported by the personal knowledge of the following persons:

- Dr. Mark Toback, Superintendent of Schools
- Roger R. Rogalin, Principal of Packanack Elementary School
- Cathy Gaynor, Assistant Principal of Packanack Elementary School
- Cynthia Carey, Case Manager, Preschool Child Study Team
- Ally Leszkowicz, Occupational Therapist
- Michelle Littman, Preschool Teacher
- Kim Lippman, Preschool Teacher
- Paula Clark, Esq., District Coordinator of Compliance
- Dana Tengi, Speech/Language Therapist
- Michael Reinknecht, Director of Student Support Services
- Margaret Hickey, Paraprofessional
- Kathy Frega, Paraprofessional
- R.G., Parent of R.G. (Name will be released upon request and with protective order)
- R.G., Student (Name will be released upon request and with protective order)
- B.S., Student (Name will be released upon request and with protective order)
- L.S./J.S., Guardians of B.S. (Name will be released upon request and with protective order)
- Necole Jadick, Principal of Theunis Dey Elementary School
- Char-Len Gorski, Teacher
- Irek Taflinski, IAIU Investigator
- Any IAIU Representative identified in the IAIU file

The Board reserves the right to supplement the witness list as information becomes available. Specifically, the Board reserves the right to identify witnesses after

an in-camera review of Respondent's IAIU file has been conducted. It is the Board's intention to have the arbitrator issue a subpoena to have IAIU file released.

2. The following documentary evidence attached hereto is submitted in support of the foregoing tenure charges:

Exhibit 1 Principal Roger R. Rogalin's June 8, 2016 Report

Exhibit 2 Paula Clark, Esq.'s September 2, 2016 Report

Exhibit 3 Board Policy and Regulation 3281 and 4281, Inappropriate Staff Conduct

Exhibit 4 June 28, 2016 CBS New York Article

Exhibit 5 June 28, 2016 N.J.com Article

Exhibit 6 June 28, 2016 Daily News Article

Exhibit 7 June 29, 2016 Wayne Patch Article

Exhibit 8 June 29, 2016 New Jersey 101.5 Article

Exhibit 9 June 29, 2016 North New Jersey News Article

Exhibit 10 September 22, 2016 Tort Claim Notice

Exhibit 11 August 5, 2016 IAIU Findings Report

Exhibit 12 DCP&P Investigation Findings Policy

Exhibit 13 Board Policy and Regulation 5561, Use of Physical Restraints

Exhibit 14 Board Policy 3217, Corporal Punishment

Exhibit 15 October 24, 2016 Memorandum from Necole Jadick to Paula Clark, Esq.

The Board reserves the right to supplement the exhibits as information becomes available. Specifically, in the event the matter is transmitted to an arbitrator, the Board respectfully requests that the arbitrator request an in-camera review of all records which

DCP&P currently maintains as it relates to allegations made against Respondent. Such a request should be made pursuant to N.J.S.A. 9:6-8.10a(b)(6) and (b)(14).

3. The foregoing tenure charges may be supported further by other information discovered and/or revealed during the pendency of this proceeding including, but not limited to, documentary and testimonial evidence.

4. Based upon the foregoing evidence, I submit the within Statement of Tenure Charges.

Dr. Mark Toback
Superintendent of Schools

DATED: 11.30.16

Sworn to and subscribed before
me on this 30th day of November, 2016

Notary Public, State of New Jersey

ANN MARIE CASSERA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 2/26/2021

343-17

OAL DKT. NO. EDU 15742-17
AGENCY DKT. NO. 244-10/17

GINA CINOTTI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF NETCONG, MORRIS COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that the petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. The present proceeding has fully disposed of all issues in dispute between the parties; therefore, no further proceedings are necessary. The petition of appeal is dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[1]

DEPUTY COMMISSIONER OF EDUCATION[2]

Date of Decision: 11/22/17
Date of Mailing: 11/22/17

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

[2] This matter has been delegated to the Deputy Commissioner pursuant to *N.J.S.A.* 18A:4-33.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 15742-17
AGENCY DKT. NO. 244-10/17

GINA CINOTTI,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NETCONG, MORRIS COUNTY,
Respondent.

Robert M. Tosti, Esq., for petitioner

Adam S. Herman, Esq., for respondent (Adams, Gutierrez & Lattiboudere, attorneys)

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

Gina Cinotti (petitioner) filed a petition with the Commissioner of Education seeking emergent relief for a fifteen-day extension for the time to respond to the tenure charges served upon the petitioner by the respondent. In conjunction with the petition, petitioner filed a motion for emergent relief based upon the applicable legal standard.

The matter was transmitted to the Office of Administrative Law (OAL) and filed on October 23, 2017, for determination of the motion for emergent relief. The Borough of Netcong Board of Education (Board or respondent) filed papers in opposition to the motion for emergent relief on October 25, 2017. Oral argument with reference to petitioner's motion for emergent relief was conducted on October 27, 2017, at the OAL. For the record, in a conference call between the parties held on Wednesday, October 25, 2017, it was agreed to move oral argument until the morning of Friday, October 27, 2017, and the parties have agreed to permit the petitioner to file her written position with the School District until Monday, October 30, 2017, at noon for its consideration, despite the deadline of the close of business on Friday, October 27, 2017.

Petitioner filed her motion for emergent relief pursuant to N.J.A.C. 6A:3-1.6(a). As set forth in N.J.A.C. 6A:3-1.6(b), the factors to consider regarding an application for emergent relief are as follows:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying the petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

In her verified petition, petitioner made various factual assertions. Petitioner also filed a motion for emergent relief. Respondent submitted a statement of facts and brief supported by exhibits attached. The parties differ as to their conclusions and certain assertions, but the statements of fact reflect essentially the same course of events. Respondent's statement of facts is concise and accurate and is adopted herein. The facts as set forth in respondent's statement are as follows:

1. Dr. Gina Cinotti (Cinotti) is employed by the School District as the Chief School Administrator (CSA).

2. Cinotti has been represented by her current counsel, Robert Tosti, Esq., during the course of an employment dispute between the parties.

3. By letter dated September 25, 2017, Derlys Gutierrez, Esq., inquired as to the status of a possible separation agreement between the School District and Cinotti.

4. Since the School District had not yet received a response from Cinotti, Ms. Gutierrez forwarded draft tenure charges the respondent intended on filing to Mr. Tosti.

5. The above letter advised Tosti that the District was planning to formally serve the tenure charges on October 6, 2017.

6. By letter dated October 10, 2017, the School District formally served the above referenced tenure charges on Cinotti. These charges were received by Cinotti on October 12, 2017.

7. Based on the above date of service, Cinotti's position statement, if she opts to file same, is due to be served on the School District by the end of the business day on Friday, October 27, 2017.

8. In a letter, dated October 16, 2017, Tosti requested a fifteen-day extension of time to submit a written statement of position.

9. In a reply letter from Gutierrez dated October 16, 2017, Tosti was advised that the School District did not consent to the extension request.

10. In a letter, dated October 17, 2017, Tosti asked the School District to reconsider its decision not to agree to an extension of time to submit a written statement of position on behalf of Cinotti.

11. By letter dated October 18, 2017, Gutierrez advised Tosti that the School District discussed and considered his request for a reconsideration and again the School District did not agree to grant an extension. Tosti was also advised that the Board of Education was holding a special meeting on October 30, 2017 to consider the tenure charges for certification to the Commissioner of Education.

LEGAL ARGUMENT

The standards which must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 1:1-12.6 and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;

2. The legal right underlying the petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

It is well-established that the petitioner who is making the application for emergent relief must satisfy all four prongs of the Crowe test, set forth herein above.

With reference to prong number one, "irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, supra, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). However, pecuniary damages may sometimes be inadequate because of the nature of the injury or the right affected. Crowe, supra, 90 N.J. at 133. For example, in Crowe the

Court determined neither an unwarranted eviction nor reduction to poverty could be compensated adequately by monetary damages awarded after a distant hearing. Ibid.

Petitioner argues that she will suffer irreparable harm if immediate relief (the requested extension of time) is not granted because her career is at stake and "there is no reason for the Netcong Board to deny its CSA the right to respond comprehensively to the charges." (Petitioners' Brief, ¶ 4.) According to petitioner, Cinotti believes she should be permitted adequate time to respond to this potentially career threatening process. (Id. at ¶ 4.) Petitioner further maintains that she needs to be able to show the full membership of the Netcong Board of Education through her written submission that the charges are not warranted.

As set forth in the facts above, Cinotti has been in possession of a draft of tenure charges since September 25, 2017 and the charges were formally served upon her on October 12, 2017, which were basically the same as the former. Thus, as pointed out by the respondent, Cinotti had more than sufficient time to respond to same without the need for any extension. As further set forth in the respondent's submission, the action to be taken by the Board of Education on October 30, 2017, will be to consider as to whether to certify the tenure charges against Cinotti. The Board does not have the power to terminate Cinotti and thus end her employment at this point in time. If the charges are certified, they will then be filed with the Commissioner of Education and then assigned to an arbitrator, who will then render a decision on the charges. In the event that the arbitrator does not sustain the tenure charges, or decides not to terminate Cinotti, the petitioner will be entitled to monetary relief from the respondent to cover any period of unpaid suspension. At the time the Commissioner had the certified charges, the petitioner will have ample opportunity to submit and argue her side of the charges.

Accordingly, the petitioner has failed to identify any harm, let alone any irreparable harm, she will suffer if her motion for emergent relief is not granted. For instance, petitioner do not allege any specific irreparable harm other than broad allegations of her career at stake and potential career threatening process if petitioner's motion is not granted. Petitioner has also failed to show how she has been or will be irreparably harmed by the Board's failure to

grant the extension to submit a position response to the allegations and charges. It should be noted that the petitioner's dire need for an extension must be placed, to some extent, at the feet of the petitioner.

At the hearing on their motion, petitioner argued that the respondent unwillingness to consent to the extension constitutes irreparable harm as her reputation will be harmed even if not supported by the Commissioner. Despite the petitioner's argument, the petitioner has not pointed to any statutory provision which requires the School Board to grant the requested extension, especially after the petitioner had the information since the end of September 2017, and provided the statutory time to the petitioner to respond.

Finally, even if the Board's actions, as alleged, constituted irreparable harm, petitioners cannot show that they will suffer irreparable harm if the requested relief is not granted. Specifically, the Board may or may not certify the tenure charges and the arbitrator may or may not uphold such charges. This prevents the petitioner from showing that she will suffer irreparable harm if the Board is required to give an extension for the petitioner to file its position.

For the foregoing reasons, I **CONCLUDE** that the petitioner has failed to demonstrate that she will suffer irreparable harm if emergent relief is not granted.

Consideration of petitioner's motion for emergent relief must also address the second factor which is whether the legal right underlying petitioner's claim is settled. N.J.A.C. 6A:3-1.6(b). Petitioner relies on N.J.A.C. 6A:3-5.4(f) for the position that once the tenure charge process itself, reaches the Commissioner stage, it permits extensions of time for good cause. Without further explanation, the petitioner then cites, Berkowitz v. Soper, 443 N.J. Super. 391 (App. Div. 2016) for the proposition that a failure to grant a "brief adjournment" for a medical condition was reversible error. There is no direct claim in this case in the petition or in the motion, including the certification of counsel, nor the supporting brief which fully explains any medical condition for Cinotti. The petitioner fails to advocate that a medical condition is the basis for the need for the requested extension, instead the petitioner relies primarily on Cinotti's pre-planned vacation.

Respondent cites the procedural statute which sets forth the manner in which tenure charges are served and heard. N.J.S.A. 18A:6-11. See also N.J.A.C. 6A:3-5.1(b)3. It seems clear from the facts of this case, that the respondent has adhered to the process so directed therein. There is no requirement set forth in those laws and regulations directing the respondent to grant an extension of time to an employee who was served with tenure charges, nor has the petitioner pointed to any provision therein that requires such an extension.

For the foregoing reasons, I **CONCLUDE** that the petitioner has failed to demonstrate that her legal right to her claim is settled. It follows that petitioner has not demonstrated that the legal right underlying her claim is settled.

The next factor is whether petitioner has a likelihood of prevailing on the merits of the underlying claim. N.J.A.C. 6A:3-1.6(b)3. Here, petitioner lacks a legal theory to support his petition, as Cinotti states that this third factor is not implicated as this is a procedural issue only. It follows that petitioner has not demonstrated a likelihood of prevailing on the merits.

The final requirement is that when the equities and interests of the parties are balanced, petitioner will suffer greater harm than respondent will suffer if the requested relief is not granted. N.J.A.C. 6A:3-1.6(b)4. Here, petitioner has not established that she will suffer any real harm in this case. Petitioner had and will have adequate time to submit a comprehensive response to the charges she had since September 25, 2017. Respondent has agreed to extend the deadline for the petitioner's submission until noon on Monday, October 30, 2017, despite the statutory deadline at 5:00 p.m. on Friday, October 27, 2017. It follows that petitioner has not established that she will suffer greater harm if the requested relief is not granted.

In order to prevail on a motion for emergent relief, the movant must satisfy all four requirements under N.J.A.C. 6A:3-1.6(b). Here, petitioner does not satisfy any of the four requirements. Under the circumstances, I **CONCLUDE** that petitioner does not satisfy the applicable standard for emergent relief.

ORDER

Accordingly, it is **ORDERED** that petitioner's request for emergent relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

October 27, 2017
DATE

MICHAEL ANTONIEWICZ, ALJ

jb

344-17

In the Matter of the Tenure Hearing of

Michele Perito,
Hudson County Schools of Technology,
Hudson County

Agency Docket 163-7/17

Award of Arbitrator

The undersigned arbitrator, having been appointed, pursuant to P.L 2012, c 26, as amended by P.L. 2015, c. 109, to hear and decide the above-captioned matter, rules as follows:

The tenure charges against teacher Michele Perito shall be resolved according to the terms of the October 4, 2017, Stipulation of Settlement entered into by the parties, providing that he shall be terminated from employment by HCST, effective October 1, 2017. He shall retain his rights to his pension, under applicable law, along with accumulated sick and vacation time. Lastly, the HCST will not object to Mr. Perito applying for unemployment benefits. The settlement is hereby approved pursuant to N.J.A.C. 6A:3-5.6.

Tia Schneider Denenberg
Arbitrator

Dated: October 16, 2017

State of New York
County of Columbia

On this 16th day of October, 2017 before me personally came and appeared TIA SCHNEIDER DENENBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she acknowledged to me that she executed the same.

Kristy Lee Brailey
Notary Public State of New York
No. 01BR6326865
Qualified in Columbia County
Commission Expires June 29, 2019

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MICHAEL A. JIMENEZ, ESQ. (Atty. ID 017201999)
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Email. Mjimenez@sh-law.com
Attorneys for Hudson County Schools of Technology "HCST")

IN THE MATTER OF THE TENURE HEARING OF MICHELE PERITO, HUDSON COUNTY SCHOOL OF TECHNOLOGY ("HCST"), HUDSON COUNTY, AGENCY.	STATE OF NEW JERSEY NEW JERSEY COMMISSIONER EDUCATION/ OFFICE OF ADMINISTRATIVE LAW **Docket No.: 163-7/17** **STIPULATION OF SETTLEMENT**

IT IS HEREBY STIPULATED AND AGREED by the parties and their respective attorneys that this matter shall be settled in accordance with *N.J.A.C.* 6A:3-5.6 as follows:

1. Michele Perito ("Perito") is a tenured employee holding the position of Janitor Maintenance and is employed by the Hudson County Schools of Technology ("HCST"), in the County of Hudson since August 2008.

2. The New Jersey First Act, ("Act") *N.J.S.A.* 52:14-7 (L. 2011, Chapter 70) requires that all public employees appointed, on or after September 1, 2011, to be residents of the State of New Jersey.

3. On June 6, 2017, the Board filed with Joseph M. Muniz, the Board Secretary, Tenure Charges and a Statement of Evidence against Perito alleging that he was a legal resident of the State of Pennsylvania in violation of the Act.

4. Copies of the Tenure Charges and Statement of Evidence were served upon Perito. Upon notice to Perito, on July 21, 2017, the HCST approved a resolution certifying the charges by a

majority vote of the full membership of the HCST. Perito was not suspended at that time. The certified tenure charges were mailed to the Commissioner on July 21, 2017.

5. On or about August 9, 2017, Perito filed an Answer to the Tenure Charges. The Commissioner referred the matter to Tia Schneider Denenberg to arbitrate the matter pursuant to *N.J.S.A.* 18A:6-16 as amended by *P.L. 2012*, c. 26 and *P.L. 2015*, c. 109.

6. On or about June 13, 2017, Perito filed an Application for Exemption from the provisions of the New Jersey First Act. The HCST filed opposition to this application. In that application, Perito admitted that he resided at 185 Dover Drive, Bushkill, Pennsylvania (the "Property"). On September 12, 2017, a hearing was held by the Employee Residency Review Committee of the Department of Labor and Workforce Development ("Review Committee"). At that hearing, Perito testified that he resided in Pennsylvania. The Committee denied her application for exemption from the New Jersey First Act on the grounds that based on the evidence presented and arguments made, Perito did not demonstrate a "critical need" or "hardship" which would warrant an exemption.

7. Based on the HCST's investigation of this matter, and the submission and testimony of Perito for exemption, it is clear that Perito was in violation of the Act. By way of example, the following events and/or documents (*previously submitted with the tenure charges and opposition to exemption papers*) evidence that by February of 2017, Perito was a resident of Pennsylvania for purposes of the Act:

a. Perito is the owner of the Property where he resides with his family

b. By letter dated February 1, 2017, Perito informed the payroll department at the Board that he was moving to Pennsylvania permanently and was claiming exemption from withholding of NJ gross income tax. His address at the top of that letter is the Property.

c. On February 1, 2017, Perito executed an Employee's Certificate of Nonresidence in New Jersey in which he declared, under penalty of perjury, that he was a resident of Pennsylvania.

d. A search of the voter registration website of the State of Pennsylvania indicates that Perito is registered to vote in Pike County, Pennsylvania and that his status is active.

e. The Application for Exemption lists Perito's address as the Property and at the hearing, Perito testified that he is a resident of Pennsylvania.

8. After the ruling by the Review Committee, the arbitrator and counsel for the parties conferenced the matter. All parties concluded that Perito could not comply with the Act and, therefore, was ineligible for continued employment by the HCST. To continue with the matter through discovery and hearing could not change that conclusion.

9. As a result of the foregoing, the parties agreed that Perito shall be terminated from employment by the HCST effective October 1, 2017. He will retain his rights to a pension under applicable law, and his rights to accumulated sick and/or vacation pay (if any) under applicable law and contract. To the extent that Perito is entitled to any reimbursement for sick and/or vacation pay, that determination shall be made by the HCST and payment tendered within 45 days of the approval of this Stipulation by the Commissioner and arbitrator. As Perito was terminated he will qualify to collect unemployment benefits and the HCST shall not object to the collection of such benefits.

10. The Act constitutes the public policy of the State of New Jersey and requires that employees be bona fide residents of New Jersey. Settlement of this matter is in furtherance of the public policy set forth in the Act.

11. This Stipulation of Settlement is conditioned upon and subject to approval by the HCST. The Stipulation will be presented to the Board upon agreement by the parties as to

the terms thereof. The HCST will provide to the attorney for Perito and the arbitrator a copy of the Resolution approving the settlement.

12. The parties agree that the Stipulation may be executed in counterparts. The individual executed copies of this Stipulation, taken together, shall constitute a fully executed copy of this Stipulation.

I hereby declare that my attorney has reviewed with me the terms of this Stipulation and that I execute the Stipulation understanding of its terms and conditions and as my voluntary act.

MICHELE PERITO

Dated: / /

MARK BLANCH, ESQ.
Attorney for Michele Perito

Dated: 10/3/17

HUDSON COUNTY SCHOOLS OF TECHNOLOGY

FRANK GARGIULO
Superintendent of Schools

Dated: 10-04-17

MICHAEL A. JIMENEZ, ESQ.
Labor Counsel
Hudson County Schools of Technology

Dated: 10/4/17

4843-8334-1137, v. 1

346-17

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

IN THE MATTER OF THE TENURE CHARGES AGAINST	:	
	:	**Arbitrator's**
NIECY DELLA CORTE	:	**Decision and Award**
	:	**Approving Settlement**
	:	
BY	:	
	:	**Agency Docket No. 74-316**
THE ELIZABETH BOARD OF EDUCATION, UNION COUNTY NEW JERSEY	:	

Peter Adomeit, Esq.
Arbitrator

APPEARANCES

For NIECY DELLA CORTE
Gail Oxfeld Kanef Esq.
Oxfeld Cohen, P.C.
60 Park Place, Suite 600
Newark, New Jersey 07102

FOR ELIZABETH BOARD OF EDUCATION
Jenna A. Rottenberg, Esq.
Florio Perrucci Steinhardt & Fader LLC
235 Broubalow Way
Phillipsburg, New Jersey 08865

Procedural Statement

1. On January 7, 2016, pursuant to N.J.S.A 18A:28-5 and 18A:6-10, Olga Hugelmeyer, the Elizabeth Board of Education Superintendent, filed with Harold E. Kennedy, Jr, the Board Secretary/School Business Administrator, Sworn Tenure Charges and a Sworn Statement Statement of Evidence against Niecy Della Corte (hereinafter "Teacher"), employed by the Board as a tenured teacher. Superintendent Hugelmeyer charged the Teacher with Unbecoming Conduct and/or Just Cause Including Misconduct and Dishonesty Warranting Dismissal and/or Reduction in Salary of a Board of Education employee based on an OFAC evaluation following administration of the 2012 NY ASK 3 Test.
2. On January 7, 2016, the above documents were sent to the Teacher by Federal Express, Certified Mail, and Regular mail, along with a statement of her rights to submit a Written Statement of Position and a statement of Evidence.
3. On February 18, 2016, after considering the charges and evidence and the Teacher's response, at a duly convened meeting and in closed executive session, the Board determined there was probable cause to credit the evidence in support of the Charges and that the Sworn Tenure Charges were sufficient, if credited, to warrant dismissal and/or reduction of salary of the Teacher
4. On March 3, 2016, the attorneys for the Board sent to M. Kathleen Duncan, Director, Bureau of Controversies and Disputes, New Jersey Department of Education, the Sworn Charges, Certification of Determination and Proof of Service upon the Teacher and attorney.

5. On March 7, 2016, Director Duncan contacted me to determine availability and on by letter of March 14, 2016 appointed me to hear and decide this tenure matter.

6. On March 14, 2016, undersigned by email contacted the attorneys for the parties to set up a conference call the following day.

7. As a result of the conference call of March 15, 2016, the parties reached the following stipulations, as outlined in the following email from the undersigned:

> The parties are in settlement discussions. They have agreed to set the first two hearing dates, with the understanding that approximately 4 more dates will be needed if the matter does not settle.
> First Hearing: By conference call, April 25, 2016 @ 2 p.m.
> Second Hearing: Evidentiary Hearing. May 6, 2016
> Subsequent Hearings: Approximately 4, TBD.

8. On March 18, 2016 the undersigned inquired of the attorneys by email whether the discussions were fruitful, but learned the discussions had been rescheduled.

9. On April 25, 2016, the date of the next conference call, Attorney Gail Oxfeld Kanef informed me the parties had reached a settlement:

> I am writing just to confirm that we will have a conference call with you this afternoon at 2 pm as our first hearing date in the above matter. The good news is that the parties have agreed to the terms of a settlement and are working on the paperwork.

10. On May 25, 2016 Attorney Rottenberg by email send me a copy of the settlement agreement, writing:

> Attached is a copy of the settlement agreement that the parties are working to have signed/finalized. Once we have a signed contract, we will send you a copy.

11. On May 25, 2016, by email, I replied as follows:

> Congratulations on your settlement,
> When the final document is signed, please forward so I can send it to Kathleen Duncan.

12. On June 27, 2016, by email to both attorneys, I renewed my request for a signed copy of the settlement agreement.
13. On or about August 4, after an email from Director Duncan, I renewed my request to the parties for a signed copy.
14. While I had been told the signed copy existed, I was unable to obtain a copy from the attorneys, despite requests, and could not issue a brief award without the signed document showing the matter was in fact settled.
15. After subsequent communications to me from Director Duncan, and phone calls by me to the law firm for the Board, on February 24, 2017, Attorney Joseph Castellucci, Jr. informed me there had been a change in attorneys assigned the case, and attached the signed copy of the settlement agreement.

The Settlement Agreement Is In the Public Interest and Is Approved

1. The Board and the Teacher were both represented by attorneys who are experienced and competent in handling teacher termination cases.
2. The Settlement Agreement contains the usual protections and provisions: "Tenure Charges Moot/No Further Board Action"; "Resignation"; "No Admissions"; "No Further Compensation/Benefits"; "Leave Period"; "Due Diligence"; "Release"; "Inquiries"; "Non-Disparagement"; "Surrender of Board Property"; "Board Approval"; "Assent to Terms"; Successors and Assigns"; "Public Interest"; "Entire Agreement"; "Severability"; "Governing Law."
3. As a result of the Settlement Agreement, both parties resolved the dispute amicably and avoided the burden and costs of litigation.

4. The terms of the Settlement Agreement are fair to both sides and are in the public interest.

5. Under the terms of the Settlement Agreement, which the Teacher signed on May 10, 2016, she tendered her "irrevocable resignation effective June 30, 2016 from all employment with the Elizabeth Board of Education." On May 12, 2016, the Board passed a "RESOLUTION ACCEPTING RESIGNATION" which 1) Approves the "Separation Agreement"; 2) Accepts the Teacher's "irrevocable resignation effective June 30, 2016"; and 3) "Authorizes the Board President and School Business Administrator/Board Secretary to execute the Employment Settlement Agreement on behalf of the board...." Those signatures were signed and dated August 4, 2016.

6. The Separation Agreement states that because the teacher "does not wish for the Board to proceed to a hearing but intends to continue employment through and resign effective June 30, 2016."

7. The Separation Agreement states that following the Teacher's fulfillment of the terms of settlement, "the subject tenure charges shall be moot and shall be deemed withdrawn, and no further action shall be initiated by the Board regarding the underlying charges."

8. The Separation Agreement states that "the parties, now desiring to resolve the within matter amicably and without the need for further litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein."

9. The Separation Agreement states that it shall not "be an admission of liability or wrongdoing by any of the parties ...."

10. The Separation Agreement states that the teacher had been on an unpaid administrative

leave of absence from February 23, 2016 through March 31, 2016; and that she shall be entitled to salary and benefits from April 1, 2016 to June 30, 2016.

AWARD

I conclude the settlement is consistent with the requirements of N.J.A.C. 6A:3-5.6.

The terms of the Separation Agreement, having negotiated by competent counsel representing the interests of their parties, and are fair and balanced to both parties, and reflect the desire of both parties, and are in the public interest to avoid the cost of litigation, are hereby approved.

Dated: Nov 21, 2017 _____

Peter Adomeit, Arbitrator

State of Connecticut)
ss: West Hartford
County of Hartford)

On this 21st day of November, 2017, before me personally came Peter Adomeit, Esq., to be known and known to me to be the individual described herein, and who executed the foregoing instrument and acknowledged to me that he executed same.

_____
Notary Public

My Commission expires on _____

EMPLOYMENT SEPARATION AGREEMENT AND RELEASE

This Agreement and Release ("Agreement") is entered into and effective as of the 10th day of May, 2016 by and between the Elizabeth Board of Education ("Board") and Neicy Della Corte.

WHEREAS, the Board is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A: 11-1, which is entrusted with maintaining and conducting the public schools of said school district; and

WHEREAS, the Board has its administrative offices located at 500 North Broad Street, Elizabeth, New Jersey 07028; and

WHEREAS, Ms. Della Corte, a tenured teacher employed by the Board, has her current address located at 366 Salem Road Union, New Jersey 07083; and

WHEREAS, on or about January 7, 2016, Olga Hugelmeyer, Superintendent of Schools, filed Sworn Tenure Charges, together with a Sworn Statement of Evidence in support of the charges, against Ms. Della Corte, with the Board; and

WHEREAS, on or about February 18, 2016, the Board certified the Charges to the Commissioner of Education; and

WHEREAS, Ms. Della Corte does not wish for the Board to proceed to a hearing regarding the subject tenure charges, but intends to continue employment through and resign effective June 30, 2016; and

WHEREAS, the parties, now desiring to resolve the within matter amicably and without the need for further litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein; and

NOW, THEREFORE, the parties hereby agree, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged, as follows:

1. TENURE CHARGES TO BE MOOT/NO FURTHER BOARD ACTION

The Board agrees that upon execution of the within Agreement by the parties and Ms. Della Corte's fulfillment of the obligations as set forth herein, that the subject tenure charges shall be moot and shall be deemed withdrawn, and that no further action shall be initiated by the Board regarding the underlying charges. The Board reserves all rights in the event this Agreement is breached by Ms. Della Corte, as well as with respect to any third party claims that may be made against the Board as a result of any acts and/or omissions by Ms. Della Corte during her employment with the Board. Ms. Della Corte retains her rights to enforce this agreement should the Board breach same.

2. RESIGNATION

Ms. Della Corte, by signing this Agreement, hereby tenders her irrevocable resignation (annexed hereto as Attachment A) effective June 30, 2016. Ms. Della Corte shall not be responsible for providing the Board with sixty (60) days' notice of her irrevocable resignation. Ms. Della Corte's resignation shall be irrevocable upon approval of this Agreement by the Board. Ms. Della Corte agrees that she will not seek any future employment or consultant relationship with the Board in perpetuity and that the Board has no obligation, contractual or otherwise, to re-hire or re-employ her.

3. **NO ADMISSIONS**

This Agreement is entered into for the sole purpose of resolving issues related to Ms. Della Corte's employment, and neither the execution, delivery, nor performance of this Agreement, nor Ms. Della Corte's resignation shall constitute or be construed at any time or for any purpose to be an admission of liability or wrongdoing by any of the parties; the parties further agree that neither this Agreement and Release nor Ms. Della Corte's resignation shall be used as evidence in any judicial, administrative, or quasi-judicial proceedings, except to enforce the terms of this Agreement.

4. **NO FURTHER COMPENSATION/BENEFITS**

Prior to the effective date of Ms. Della Corte's resignation, she shall be entitled to salary and benefits during the period April 1, 2016 through June 30, 2016. She shall be entitled to no further compensation or fringe benefit of any kind with the exception of any summer pay to which she is entitled. Ms. Della Corte specifically waives her right to any additional pay and benefits, except for any [illegible] which she may lawfully be entitled under the Workers' Compensation Act or the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"). Ms. Della Corte represents that as of the date of this agreement, she has not filed and does not intend to file any Workers' Compensation claim related to her employment with the Board.

5. **LEAVE PERIOD**

The parties recognize that during the period February 23, 2016 through March 31, 2016 Ms. Della Corte has been on an unpaid administrative leave of absence.

6. **DUE DILIGENCE**

The Board shall cooperate fully with the Pension Board and/or any other State or Local governmental body and comply promptly and completely with all requests and requirements in conjunction with Ms. Della Corte's future pension application.

7. **RELEASE**

In exchange for the above consideration, Ms. Della Corte, her heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any and all claims or rights stemming from the facts and circumstances which gave rise to the tenure charges referred to herein or the basis for same, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, all officers and administrators, its attorneys, agents and employees, personally and officially, as well as their successors, and assigns, including, but not limited to any and all claims for attorney's fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this Agreement, and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Act of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retraining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any and all other claims that could be initiated in any venue, for harassment, discrimination or retaliation of any kind,

breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims arising under the Workers' Compensation Act, N.J.S.A. 34: 15-1 *et seq.*, for health insurance continuation coverage under and pursuant to COBRA, and any claims concerning enforcement of this agreement.

8. **INQUIRIES**

The Board agrees not to make any disparaging remarks regarding Ms. Della Corte in response to any future employment inquiries and will limit any statements made, either orally or in writing, to confirming the dates of Ms. Della Corte's employment within the District, the amount of Ms. Della Corte's salary in the final year of her employment, and the position(s) that Ms. Della Corte held with the District. Nothing herein shall be deemed to limit the Board's actions in compliance with the Open Public Records Act, or its obligation to respond fully and accurately to any and all inquiries from State agencies, such as, without limitation, the Public Employees Retirement System, the State Department of Education and the State Board of Examiners and its agents.

9. **NON-DISPARAGEMENT**

The parties and their agents shall refrain from public negative comments regarding each other, and each other's employees and/or agents. However, nothing in this Agreement shall be construed to limit Ms. Della Corte or the Board and its agents' obligation to provide accurate information in response to legitimate requests for public information, including copies of the Tenure Charge documents, nor to provide information requested by various State Agencies, including, but not limited to, the State Department of Education, the State Board of Examiners and its agents, the Division of Pensions and Benefits and the Unemployment Compensation Board and/or their agents

10. **SURRENDER OF BOARD PROPERTY**

Ms. Della Corte shall surrender all school keys and property in her possession to the Superintendent of Schools or her designee. If necessary, the Superintendent of Schools shall arrange an appointment for Ms. Della Corte to retrieve her personal property.

11. **BOARD APPROVAL**

This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

12. **ASSENT TO TERMS**

Ms. Della Corte hereby acknowledges that she enters into this Agreement with a full understanding of her rights and that she was fully informed of the implications of this Agreement by her attorney, and does so without duress, of her own free will and volition.

Ms. Della Corte further acknowledges that she was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and was given seven (7) days from the execution of this document to revoke this Agreement, by delivering written notification to Jenna A. Rottenberg, Esq., Florio Perrucci Steinhardt & Fader, LLC, 235 Broubalow Way, Phillipsburg, New Jersey 08865. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Ms. Della Corte will not be entitled to the consideration described herein. Furthermore, it is understood that if this Agreement is revoked, the subject/underlying tenure charges shall be reinstated and the Board will not be obligated to re-serve Ms. Della Corte and/or her attorney with a copy of same but may consider and

certify, if it so chooses, said tenure charges at its next Board of Education meeting following said revocation.

13. **SUCCESSORS AND ASSIGNS**

This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

14. **PUBLIC INTEREST**

This proposed settlement will serve the public interest. As a result of Ms. Della Corte having tendered her irrevocable letter of resignation, the Board will not have to engage in litigation related to her employment.

15. **ENTIRE AGREEMENT**

This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, and understandings and agreements, whether oral or written. This Agreement shall not be amended, changed or modified, except in a writing signed by all parties. Each party acknowledges that the other party, nor any agent or attorney or the other party, have made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

16. **SEVERABILITY**

If any non-material portion of this Agreement shall be determined by any court agency of competent jurisdiction to be contrary to law, then it shall be deemed to be severed from the remainder of this agreement, which shall continue in full force and effect. Should any material provision be stricken by a court or agency of competent jurisdiction, then the entire Agreement shall by null and void, *ab initio.*

17. **GOVERNING LAW**

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

NEICY DELLA CORTE
Dated: 5-10-16

Witness:
Dated: 5-10-16

For the Elizabeth Board of Education

CHARLENE BATHELUS
Board President
Dated: 8/4/16

HAROLD E. KENNEDY, JR.
Board Secretary/Business Administrator
Dated: 8/4/2016

Attachment A

Irrevocable Letter of Resignation

Elizabeth Board of Education
c/o Harold E. Kennedy, Jr., Board Secretary/Business Administrator
500 North Broad Street
Elizabeth, New Jersey 07208

Re: Irrevocable Letter of Resignation

Dear Ladies and Gentleman,

Subject to the terms and conditions of our Separation from Employment Agreement and Release, and approval of same by the Board of Education, I hereby tender my irrevocable resignation effective June 30, 2016 from all employment with the Elizabeth Board of Education.

Very truly yours,

Neicy Della Corte

C
O
P
Y

10x

BOARD OF EDUCATION

RESOLUTION ACCEPTING RESIGNATION

BE IT RESOLVED that the Elizabeth Board of Education hereby approves the attached Employment Separation Agreement with Neicy DellaCorte (Employee 105548); and

BE IT FURTHER RESOLVED that the Elizabeth Board of Education hereby accepts Neicy DellaCorte's (Employee 105548) irrevocable resignation effective June 30, 2016.

NOW, THEREFORE, BE IT RESOLVED that the Elizabeth Board of Education authorizes the Board President and the School Business Administrator/Board Secretary to execute the Employment Separation Agreement on behalf of the Board; and to take such further steps as may be necessary to effectuate the within Employment Separation Agreement and carry out this action of the Board.

Elizabeth, New Jersey
May 12, 2016

15-240

347-17
AGENCY DKT. NO. 299-12/13

E.H., ON BEHALF OF MINOR CHILD, G.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,	:	ORDER
RESPONDENT.	:	

On October 2, 2014, a final agency decision was rendered in this matter, wherein the Commissioner approved a settlement in which E.H. agreed to pay Eight Thousand Three Hundred Sixty Five Dollars ($8,365.00) in monthly installments of $348.54. The Board subsequently notified the Commissioner that E.H. had failed to comply with the terms of the settlement after making five payments, leaving an outstanding balance of Six Thousand Six Hundred Twenty Two Dollars and Thirty Cents ($6,622.30), and it requested that the Commissioner seek entry of the assessments on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. In response to the Board's request, E.H. submitted documentation indicating that she had made six payments and has an outstanding balance of Six Thousand Two Hundred Seventy Three Dollars and Thirty Cents ($6,273.30). Thereafter, the Board acknowledged that it had erroneously omitted one payment from its calculation, and agreed that the outstanding balance is $6,273.30. E.H. then urged the Commissioner not to take legal action because she is undergoing a financial hardship and is unable to pay the total amount at the current time, but will attempt to resume her monthly payments to the best of her ability. The

Commissioner notes that according to the settlement agreement, the final payment was to be made no later than August 31, 2016, more than one year ago.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Ellen Haviland is now subject to entry of a judgment by the court in the amount of $6,273.30, which represents the outstanding balance of the payment agreed upon by the parties in a settlement agreement that was approved by the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 11/28/17

Date of Mailing: 11/29/17

OAL DKT. NO. EDU 06078-14
(EDU 388-14 ON REMAND)
AGENCY DKT. NO. 299-12/13

E.H., on behalf of minor child, G.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision on Remand issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/02/14
Date of Mailing: 10/02/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6078-14
(ON REMAND EDU 388-14)
AGENCY DKT. NO. 299-12/13

E.H. O/B/O MINOR CHILD
G.H.,

Petitioner,

v.

BOARD OF EDUCATION OF
THE CITY OF OCEAN CITY,
CAPE MAY COUNTY,

Respondent.

E.H., parent, pro se

Michael Stanton, Esq., for respondent (McCrosson & Stanton PC, attorneys)

Record Closed: August 8, 2014 Decided: August 14, 2014

BEFORE **W. TODD MILLER**, ALJ:

This matter was originally transmitted to the Office of Administrative Law on December 5, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On April 3, 2014, an Initial Decision was issued determining that petitioner was not a resident in the district and therefore tuition

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 14, 2014
DATE

W. TODD MILLER, ALJ

Date Received at Agency: _____

Date Mailed to Parties: August 21, 2014

/jb/lam

RESIDENCY/TUITION SETTLEMENT AGREEMENT

THIS AGREEMENT, between the Ocean City Board of Education and Ellen Haviland,, on behalf of her daughter, a minor, G.H., hereby agree to the following settlement agreement:

$8,365 to be paid as follows:

1. Starting September 1, 2014, and every month thereafter on the first day of the month, payment shall be made in the amount of $348.54 to the Ocean City Board of Education at 501 Atlantic Avenue, Ocean City, New Jersey 08226. The total sum due shall be paid in 24 months, with final payment being made no later than August 31, 2016.

2. In the event payment is not received by the 10th of every month, all outstanding balances will be due and owing.

3. All parties shall be responsible for their own attorney fees.

4. The purpose of this Settlement Agreement is to release all outstanding issues and claims.

ELLEN HAVILAND

BY: MICHAEL P. STANTON, on behalf of
The Ocean City Board of Education

Dated: 31 July 2014

348-17

348-17L

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

KIMBERLEY HARRINGTON
Commissioner

November 27, 2017

Noel Crowley, Esq.
Crowley and Crowley
20 N. Park Place, Suite 206
Morristown, New Jersey 07960

Derlys Gutierrez, Esq.
Adams, Guiterrez & Lattiboudere, LLC
1037 Raymond Blvd., Suite 900
Newark, New Jersey 07102

Re: *Ali Feti v. Board of Education of the Borough of Netcong, Morris County, et al.*, OAL Dkt. No. EDU 14826-13; Agency Dkt. No. 231-9/13

Dear Counsel:

I have reviewed the Appellate Division's decision dated August 8, 2017 (August 2017) in the above-captioned matter. In the August 2017 decision, the Appellate Division affirmed the Commissioner's decision dated January 14, 2016 (January 2016) finding that at the time of his discharge, the petitioner – Ali Feti – was not a tenured custodian in the Netcong School District (District), and that his claims to reinstatement and back pay due to a violation of his due process rights were meritless. The Appellate Division also found that a remand of this matter was required for the limited purpose of addressing the discrepancy between the Administrative Law Judge's (ALJ) and the Commissioner's statements of the payment due from the Netcong Board of Education (Board) to the petitioner, relating to his salary for the 2012-2013 school year and his accrued vacation time.

It is undisputed that the petitioner was paid $45,000.00 for the 2012-2013 school year – his final year of employment as a custodian in the District. At the hearing at the Office of Administrative Law, the Board conceded that the petitioner should have been paid $46,000.00 for the 2012-2013 school year in accordance with the Board's resolution. Therefore, the Board was required to compensate the petitioner in the amount of $1,000.00. Additionally, when the petitioner's employment was not renewed at the end of the 2012-2013 school year, he was paid for his unused vacation days. However, his payment for those days was calculated based on a salary of $45,000.00 for the 2012-2013 school year, instead of the accurate amount of $46,000.00. Therefore, the ALJ determined that the amount paid to the petitioner for his accrued vacation time should be adjusted to reflect petitioner's correct salary of $46,000 for the 2012-2013 school year.

Although it may not have been clear from the January 2016 decision, the Commissioner intended to adopt all of the recommendations and findings of the ALJ.[1] Accordingly, the Board is directed to pay the petitioner $1,000.00 – reflecting the difference between the $45,000.00 previously paid to him, and the $46,000.00 actually owed to him for his last year of employment. The amount of the petitioner's vacation pay should likewise be adjusted to reflect pro rata payment at the rate of $46,000.00 per annum.[2]

Sincerely,

Kimberley Harrington

Kimberley Harrington
Commissioner

c: County Superintendent
State Law Library

VIA REGULAR MAIL

[1] The language in the final paragraph of the January 2016 decision stated that the Initial Decision is adopted as the final decision in this matter. The following sentence regarding the payment owed to the petitioner should have likewise mirrored the recommendation of the ALJ. It should be noted that footnote 3 of the January 2016 decision did state, "[t]he Commissioner also agrees with the remaining determinations made by the ALJ regarding various claims advanced by the petitioner, including his entitlement to additional compensation for vacation and sick time."

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2584-15T2

ALI FETI,

Petitioner-Appellant,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NETCONG, MORRIS COUNTY, BERNADETTE DALESANDRO and KEVIN CARROLL,

Respondents-Respondents.

Argued June 6, 2017 – Decided August 8, 2017

Before Judges Suter and Grall.

On appeal from the New Jersey Commissioner on Education, Docket No. 231-9/13.

Noel C. Crowley argued the cause for appellant (Crowley & Crowley, attorneys; Mr. Crowley, of counsel and on the briefs).

Derlys Maria Gutierrez argued the cause for respondents Netcong Board of Education, Bernadette Dalesandro and Kevin J. Carrol (Adams, Gutierrez & Lattiboudere, LLC, attorneys; Ms. Gutierrez, of counsel and on the brief; Ruby Kumar-Thompson, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent Commissioner of Education (Lori Prapas, Deputy Attorney General, on the statement in lieu of brief).

PER CURIAM

Petitioner Ali Feti, formerly a custodian for the Netcong Board of Education (Board), appeals from a final decision of the Commissioner of Education. The Commissioner accepted the findings of fact and credibility determinations made by the Administrative Law Judge (ALJ). See N.J.S.A. 52:14B-10(c). "[F]or reasons thoroughly set forth" in the ALJ's Initial Decision, the Commissioner adopted it as his final decision, determined Feti did not acquire tenure pursuant to N.J.S.A. 18A:17-3 and directed the Board to award Feti an additional $1000 "owed to him based on the miscalculation of the payment received for his accrued vacation time."[1]

[1] The ALJ and the Commissioner rejected other claims, which Feti does not raise on appeal. Feti's due process claim was denied, because he did not invoke the process available upon receiving notice of the Board's decision not to renew his contract. See N.J.S.A. 18A:27-4.1(b); Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 578 (2009). The ALJ dismissed Feti's claims for relief due to violations of the civil service laws, N.J.S.A. 11A:2-13 and -24, and violations of the collective bargaining agreement, as outside the Commissioner's jurisdiction, N.J.S.A. 18A:16-9.

Because Feti does not challenge those determinations on appeal, he effectively abandoned them. Muto v. Kemper Reinsurance Co., 189 N.J. Super. 417, 420-21 (App. Div. 1983).

Feti urges us to reverse the Commissioner's decision on tenure and contends the ALJ's calculation of monetary relief lacks support in the record. The Board and the Commissioner, in his statement in lieu of brief, urge us to affirm.[2]

For reasons that follow, we affirm the Commissioner's decision on tenure. We reject Feti's claim that the ALJ's decision on pay for work done and vacation accrued after June 30, 2013 lacks support in the record, because it is amply supported by a payroll record and a separate handwritten check for vacation time as the Board's President, Bernadette Dalesandro, explained during her testimony. Feti's arguments to the contrary have insufficient merit to warrant discussion in a written opinion. Accordingly, we affirm that determination in conformity with Rule 2:11-3(e)(1)(D)-(E).

A limited remand to address monetary relief is necessary, however, because there is a discrepancy between the amount the Commissioner awarded and the ALJ recommended, which the Commissioner did not explain.

Turning to the Commissioner's decision on tenure, appellate review is limited. Courts are not obligated to follow an agency's interpretation of a statute. U.S. Bank, N.A. v. Hough,

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[2] On June 1, 2017, we granted Feti leave to file a letter in opposition to the Commissioner's statement in lieu of brief.

210 N.J. 187, 200 (2012). But courts accord a strong presumption of reasonableness to an agency's exercise of statutorily delegated responsibility, City of Newark v. Nat. Res. Council, Dep't of Envtl. Prot., 82 N.J. 530, 539, cert. denied, 449 U.S. 983, 101 S. Ct. 400, 66 L. Ed. 2d 245 (1980), and defer to the agency's findings of fact, Lavezzi v. State, 219 N.J. 163, 172 (2014). Courts disturb an agency's determination only if it is arbitrary, capricious, unreasonable, unsupported by the evidence or contrary to legislative policy. In re Musick, 143 N.J. 206, 216 (1996).

The tenure dispute in this case concerns the Commissioner's application of N.J.S.A. 18A:17-3, which addresses tenure for custodians employed by school districts. In pertinent part, N.J.S.A. 18A:17-3 provides:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure . . . .
>
> [(Emphasis added).]

In Wright v. Board of Education of the City of East Orange, 99 N.J. 112, 119 (1985), the Supreme Court interpreted this statute to mean that a "janitor employed without a fixed term contract will gain tenure immediately upon beginning appointment."

Neither Wright nor N.J.S.A. 18A:17-3 expressly requires an individual contract signed by the employer or the school custodian. Indeed, N.J.S.A. 18A:17-3 does not refer to a contract; it refers to an appointment "for a fixed term," and in Wright, the Supreme Court enforced a collective bargaining agreement providing tenure for custodians after three years even though the custodian had a fixed-term contract. 99 N.J. at 115-23. When Wright was decided, as now, the Court interprets statutes to effectuate the Legislature's intent and views the "the statutory language" as "the best indicator of that intent." DiProspero v. Penn, 183 N.J. 477, 492 (2005); accord In re Closing of Jamesburg High School, 83 N.J. 540, 548 (1980) (declining to "engage in conjecture or surmise which will circumvent the plain meaning of the act").

The documentary and testimonial evidence admitted by the ALJ adequately establishes Feti was appointed for a "fixed term" that in this case can be summarized as follows. The Board first appointed Feti in April 2001 under a contract commencing on April 6 of that year and ending on June 30, 2001. Thereafter, the Board employed Feti under a successive series of contracts commencing on July 1 and ending on June 30 of the next year. The last of Feti's contracts produced at the hearing in the Office of Administrative Law expired on June 30, 2012.

On May 11, 2012, the district's superintendent wrote to Feti and advised him the Board had taken action "not to renew all members of the custodial staff, effective July 1, 2012." On June 12, the superintendent advised the Board there would be no head custodian and recommended the Board appoint Feti and another custodian, Peterson, to serve "as the district's custodians for the ensuing school year." (emphasis added).

Two weeks later, on June 26, 2012, the Board unanimously approved Feti's employment "as a Full-Time Custodian, effective July 1, 2012 with an annual salary of $46,000." The Board also passed a resolution appointing Peterson at an annual salary of $36,000. Neither resolution expressly limited the term to the "ensuing school year."

A Board policy adopted about seven years earlier, Policy 4360, precludes appointment for other than a fixed term. Policy 4360 addresses "Support Staff Member Tenure," and it refers to N.J.S.A. 18A:17-3. It requires fixed-term contracts as follows:

> The Board of Education directs that the tenure status of support staff members be determined only in accordance with law and this policy and such contractual terms as may have been negotiated with the employee's majority representative.
>
> Persons employed as janitors, custodians, and maintenance personnel including supervisory personnel will be employed on

> fixed term contracts and will not acquire tenure in their positions.
>
> The Board will not grant tenure to any employee for whom such tenure has not been provided in law.

The Board's position on tenure for custodians is also memorialized in the Board's collective bargaining agreement with the Netcong Teachers' Association, Inc., which was in place from July 1, 2010 through June 30, 2013. Paragraph E of Article XV states: "Custodians shall continue the practice of executing annual employment contracts with the Board. Custodians shall not receive tenure."

According to Feti's testimony, he was given a contract for 2012-2013, which he signed and returned to the superintendent's secretary. To Feti, the contract "looked like every year." He signed it and gave it back to the secretary because it needed the signature of the Board President or a Board member. Feti returned to the superintendent's office more than once to get a signed copy of the contract, but he gave up trying when he did not receive it through the mail as the secretary promised.

On cross-examination, Feti testified he had not read the contract before signing it and did not "pay attention" to it. He did not, however, retract his initial testimony describing

the 2012-2013 contract as looking like the others he had received.

The Board also presented evidence to explain its inability to produce Feti's written contract for 2012-2013. Collectively, the Board's testimonial and photographic evidence demonstrated the business office was not well run during the time at issue. The person responsible for records, including contracts and personnel records, did not maintain files, stored unrelated records in unlabeled boxes, and kept the boxes in different rooms of the building and even in her car. On that evidence, the ALJ determined the Board's inability to produce a contract was attributable to the "dysfunction of the Board's business office" and its prior administrator's poor performance. The Commissioner accepted that determination.

The ALJ concluded the parties' mutual inability to produce Feti's contract for school year 2012-2013 did not preclude a finding that Feti was appointed for a fixed, one-year term. Relying upon Feti's past contracts, the Board's Policy 4360 and the collective bargaining agreement, the ALJ concluded Feti was appointed for a fixed-term, as he had been in the past. There was no evidence even suggesting the Board would have appointed Feti for an indeterminate period in violation of its Policy 4360 and its agreement with the Association. The only testimony on a

contract for 2012-2013 was Feti's describing it as looking like the others.

The ALJ reasoned, and the Commissioner agreed, that reliance on the collective bargaining agreement was consistent with the Court's reasoning in Wright. We agree.

In Wright, the Supreme Court recognized the Legislature adopted N.J.S.A. 18A:17-3 intending to "leave employing boards with some flexibility," and the Court concluded N.J.S.A. 18A:17-3 left room for negotiated agreements addressing "custodians' tenure rights." 99 N.J. at 119-20. Having resolved that question of negotiability, the Court enforced the provision of collective bargaining agreement providing tenure for all members of the Association "after three years of employment," even though the employee had a fixed-term contract. Id. at 116. The Court reasoned that if the "representative unit of the custodians were prohibited from negotiating job security, the result would frustrate, rather than promote, the intent of the janitors' tenure statute," which was to provide some prospect for job security. Id. at 122-23.

While the provision of the Netcong Association's negotiated contract, unlike the one in Wright, did not expand the statutory tenure rights of custodians, neither did it narrow them. In fact, inclusion of this provision in the bargaining agreement

effectively recognized negotiability and preserved tenure for custodians as a topic for future negotiations.

Neither the ALJ nor the Commissioner focused on the plain language of N.J.S.A. 18A:17-3, but it is worth restating: "Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure. . . ." (emphasis added). Given that the statute does not expressly require a formal, written contract signed by the Board and each custodian, we decline to interpret it to require one or to preclude reliance on Policy 4360, the collective bargaining agreement and Feti's prior contracts.

For all of the foregoing reasons, we affirm. The Commissioner's decision is amply supported by the evidence, not inconsistent with legislative policy and reasonable. R. 2:11-3(e)(1)(D). Moreover, Feti's claim that the Commissioner erroneously shifted the burden of proof to him has insufficient merit to warrant any comment beyond reference to Policy 4360 and the Board's agreement with the Association, which prohibited unlimited appointments for custodians. R. 2:11-3(e)(1)(E). Viewed in light of the evidence, Feti's argument urges tenure based on a technical defect unrelated to the Legislature's purpose.

As previously noted, we also affirm the Commissioner's decision to adopt the ALJ's findings and conclusions relevant to the payment Feti was due for work performed and vacation days accrued after the 2012-2013 school year. R. 2:11-3(e)(1)(D). A remand is required and directed for the limited purpose of addressing the unexplained discrepancy between the ALJ's and the Commissioner's statements of the additional payment due from the Board to Feti.

Specifically, the ALJ recommended the Commissioner direct the Board to pay "$1000, reflecting" a $1000 increase in Feti's salary and that Feti's "payment for vacation pay should likewise be adjusted to reflect pro rata payment" at that higher annual rate. In contrast, the Commissioner directed the Board "to pay the petitioner $1000 owed to him for the miscalculation of the payment received for his accrued vacation time" and did not require a $1000 salary adjustment. On remand, the Commissioner should reconsider and explain the payment due.

Affirmed in part; remanded in part; jurisdiction is not retained.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 14826-13
AGENCY DKT. NO. 231-9/13

ALI FETI,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NETCONG, MORRIS COUNTY, BERNADETTE DALESANDRO AND KEVIN J. CARROLL,

Respondents.

Noel Crowley, Esq., for petitioner (Crowley and Crowley, attorneys)

Derlys Gutierrez, Esq., for respondents (Adams, Gutierrez and Lattiboudere, attorneys)

Record Closed: September 25, 2015 Decided: October 14, 2015

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Ali Feti (Feti), challenges the termination of his employment as a custodian by the Netcong Board of Education (the Board). He seeks reinstatement, back pay, and compensation for unused sick and vacation days. Feti's petition of

appeal was filed with the Commissioner of Education (the Commissioner) on September 24, 2013. An answer was filed by respondents on October 15, 2013, and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on October 16, 2013. The case was initially assigned to the Honorable Tahesha Way, ALJ, and was reassigned to me on August 20, 2014.

A motion to amend the petition was denied via letter order dated October 16, 2014. A motion for summary decision was filed by respondents on January 6, 2015. Petitioner responded via cross-motion on February 27, 2015. Respondents replied via letter brief on March 16, 2015. Oral argument took place on April 16, 2015. Finding that the parties' submissions revealed disputed material facts, the motions were both denied via order dated April 21, 2015. Feti sought interlocutory review of the April 21, 2015, order; his request was denied by the Commissioner via letter dated May 13, 2015.

Hearings were conducted on July 13, 2015, and August 3, 2015. Post-hearing submissions were received on August 31, 2015, September 1, 2015, and September 25, 2015, at which time the record closed.

ISSUES PRESENTED

1. Did Feti hold his position of employment under tenure, pursuant to N.J.S.A. 18A:17-3?

2. If not, was the Board's termination of Feti's employment at the end of the 2012-2013 year otherwise compliant with applicable law? If not, what should be the remedy?

3. Is Feti entitled to additional compensation for unused vacation and sick days?

FACTUAL DISCUSSION AND FINDINGS OF FACT

The following background facts are uncontroverted, and I **FIND**:

Feti had been employed by the Board as a custodian since on or about April 1, 2001, when his employment was not renewed at the close of the 2012-2013 school year. He was given thirty days' notice, making his termination effective July 26, 2013. Feti never requested a formal written statement of reasons for his non-renewal, nor did he request an informal appearance before the Board.

For each year prior to 2012-2013, Feti had been appointed via a one-year fixed-term contract. Initially appointed as a custodian, Feti's October 2, 2002, contract promoted him to head custodian, a position he retained via annual reappointment through the 2011-2012 year. Effective July 1, 2012, Feti was demoted to custodian at a salary of $46,000 per annum. Neither Feti nor the Board could produce a written contract specifying the terms of his appointment for 2012-2013.

Feti's Appointment for the 2012-2013 School Year

Minutes of the Board's Education Committee meeting on June 12, 2012, reveal concerns about the quality of District custodial services. Interim Superintendent Dwight Pfennig recommended that no head custodian be appointed for the 2012-2013 school year, and that Feti and Stephen Peterson be appointed as custodians. (R-6.) This reflected a change in heart by Pfennig, as Feti previously had received a May 11, 2012, letter in which Pfennig had non-renewed his employment, effective July 1, 2012. (R-4.)

The Board acted on Feti's employment on June 26, 2012, via a resolution appointing him at a salary of $45,000. Discussion ensued, with one Board member questioning the decision not to appoint a head custodian, and likewise questioning the amount of salary. It was agreed that Feti's salary should be $46,000, and an amended resolution unanimously carried, as follows:

> **BE IT RESOLVED** that the Netcong Board of Education, upon the recommendation of the Interim Superintendent, approve the employment of Mr. Ali Feti as a Full-Time Custodian, effective July 1, 2012 with an annual salary of $46,000.

The resolution language for other appointments made that night, to include custodial and secretarial staff, was similar. Conversely, resolutions appointing an assistant principal and an interim business administrator explicitly stated that these individuals had been hired for a one-year term.

The events leading up to Feti's reappointment for 2012-2013 were described by Board President Bernadette Dalesandro (Dalesandro). Dalesandro is an experienced Board member, having served the public for nearly twenty years. From 1995-2004 she simultaneously served on the Netcong Board and on the Lenape Valley Regional Board of Education. She has served as a member of the negotiating committee continuously since 2004, with the exception of the 2009-2010 year, when she took a leave from service for health reasons. Dalesandro testified that Pfennig did not wish to renew either Feti's or Richardson's employment, and she indicated that the letter of May 11, 2012, was sent to Feti because Pfennig was dissatisfied with Feti's performance. But Pfennig was leaving the District. It was decided to give Feti an additional chance; allow him to work for the 2012-2013 school year; and let Pfennig's successor, Kevin Carroll, determine the future of Feti's employment.

Dalesandro was adamant, notwithstanding her inability to produce a written contract, that it was never the intention of the Board to appoint Feti for anything more than a one-year term. Dalesandro pointed to the history of contracts awarded to Feti previously each year. She pointed to the language in the Collective Bargaining Agreement (CBA) between the Board and the Netcong Teacher's Association, which provides at Article XV, paragraph E that, "[c]ustodians shall continue the practice of executing annual employment contracts with the Board. Custodians shall not receive tenure." (R-5.) Likewise, Board Policy Number 4360 provides that "[p]ersons employed as janitors, custodians, and maintenance personnel including supervisory personnel will be employed on fixed term contracts and will not acquire tenure in their positions." (R-9.)

As for why there was no contract, Dalesandro described a business office that was in complete disarray. Her description was confirmed by Business Administrator Nicole Sylvester, who had attempted to locate Feti's contract in District files, but to no

avail. Since 2011, the District had employed so many different business administrators that Sylvester could not recall their names or dates of employment without the assistance of a previously prepared certification. That document confirmed that there have been five different individuals holding the position since 2011. (R-1.) Both Sylvester and Dalesandro shared that Christine Werner, who held the position for the 2011-2012 school year, kept important school documents in her car; only with the intervention of Board counsel were some of these documents later returned. Sylvester provided a photograph of the office "filing system," which consisted of piles of boxes containing personnel files and other critical business office files stacked against a wall. This photograph depicted the files after some effort had been undertaken to organize them, but nonetheless continued to reflect an appalling way to maintain important public records. Additionally, there was a constant turnover of school superintendents. Many were appointed as interims as the Board explored the cost savings that could result from a shared arrangement with neighboring districts. This background was offered to further explain both why Feti's 2012-2013 contract could not be located, and why the resolution appointing him did not expressly state that his appointment was for a one-year term.

Feti likewise could not produce a fully executed copy of a contract for the 2012-2013 year, although he contended that he signed a contract, and unsuccessfully requested a finalized copy several times. But Feti urged that he anticipated that he would not be given a contract that year, because Dalesandro was the president of the Board and she disliked him. He pointed to events that transpired in or about 2009. Then Interim Superintendent of Schools Arthur DeBenedetto also served as Superintendent for the Stanhope Schools in a shared-services arrangement. According to Feti, DeBenedetto insisted that the husband of the Stanhope Board of Education president, John Thomas, be hired as a custodian in Netcong. Thomas was ultimately fired in the aftermath of an incident in which he threw his keys at DeBenedetto. Feti perceived that shortly thereafter, DeBenedetto was fired as well. In Feti's view, DeBenedetto and Dalesandro were close friends; she blamed him for DeBenedetto's discharge; and for this reason, his contract went unsigned.

Feti's theory is nonsensical for multiple reasons. Dalesandro explained that DeBenedetto was a retired superintendent who was retained in an interim capacity. DeBenedetto was not fired, as Feti contended, but rather, had simply reached the end of his term. It moreover strains credibility that Dalesandro would harbor a grudge and non-renew Feti's employment in 2013 to retaliate for an affront years earlier. Nor is it credible that Dalesandro, a highly experienced Board member, would fail to provide a contract to Feti when doing so might create an issue relative to his acquisition of tenure. According to Feti, she did not return his contract because she disliked him; but query then, why would Dalesandro appoint someone she so disliked for an indeterminate term?

In summary, I **FIND** that on June 26, 2012, Feti was appointed at an annual salary of $46,000 to serve as custodian effective July 1, 2012. The resolution so appointing him does not expressly state that his appointment was for a one-year term. But I also **FIND** that the Board does not grant tenure to custodial staff, and routinely appoints custodians for a one-year term. I **FIND** that Feti himself was always appointed via a one-year contract until July 2012. I **FIND** that for the last year of Feti's employment, neither party was able to produce a fully executed contract, either because the contract could not be located, or does not exist. But I **FIND** that any failure to fully execute such a contract was in no way intended to confer tenure upon Feti. To the contrary, a contract could not be produced only due to the dysfunction of the Board's business office, and the misfeasance of its prior administrators. Finally, I **FIND** that the CBA expressly stipulates that District custodians will not earn tenure.

Vacation and Sick Pay

Sick Pay

Feti has made a claim for payment for unused sick pay, and has made the bald statement that the Board owes him compensation for forty days. Accompanying his motion for summary decision was no evidence that this number of days remains in his sick leave bank. Feti cites Article IV, paragraph A(1) of the CBA to support his request for sick leave, which provides that "[a] teacher having been in the employ of the Board

for (10) or more years shall be entitled to severance allowance for unused sick leave . . . ." The agreement makes no reference to such benefits for custodians, however. [1]

Vacation Pay

I **FIND** that Feti was already paid for the twenty days of unused vacation pay that he seeks via this petition. Business records produced by the Board confirm that he received payment both for working in July 2013, and for unused vacation days.[2]

Sylvester shared a copy of a handwritten check dated July 24, 2013, in the amount of $2677.05, reflecting net pay on a gross amount of $3750. That amount of payment was later formalized in a non-negotiable check issued officially through payroll. Feti urged that this check does not say "vacation pay," and insisted that it was actually payment for his work in July 2013. His argument is unavailing. Dalesandro related that among the issues surrounding the revolving door of business administrators in Netcong was a former administrator who wrote what Dalesandro described as "hand checks," and defrauded the District in the process. Thereafter, Dalesandro kept a closer eye on the business office, and expressly prohibited the issuance of handwritten checks. The check issued to Feti was a notable exception; Dalesandro expressly recalled being asked to permit the check to be issued, and being expressly informed that it was for Feti's vacation pay. Her testimony was credible.

Moreover, the Board produced documentary evidence that payment was made both for the vacation days and for the period of notice in July 2013. Dalesandro produced a payroll register for the period ending July 31, 2013. It reflects a gross payment for the period from January 1, 2013, through July 31, 2013, of $26,250. This is the equivalent of seven months' pay at the rate of $3750 per month; twelve months of payment at $3750 per month would equal $45,000. Thus, Feti was paid through July

[1] A copy of the CBA accompanies the certification of counsel filed in support of the Board's motion for summary decision.

[2] Feti was paid at the rate of $45,000 per annum during the 2012-2013 year, and the additional pay was calculated at this erroneous rate. The Board conceded at hearing that Feti should have been paid at the rate of $46,000 per annum and that it should compensate Feti in the amount of $1,000.

31, 2013; since his termination date was July 26, 2013, Dalesandro correctly testified that he was actually overpaid by a few days. (See R-10.)

The payroll register also reveals a separate payment in the gross amount of $3750; this was the payment made for Feti's unused vacation days. It is thus clear, and I **FIND**, that no further vacation pay is due or owing to Feti.

CONCLUSIONS OF LAW

Burden of Proof

Feti unsuccessfully asserts that the Board bears the burden of proving that it has appointed him for a fixed term. He urges that in the absence of such proof, his employment status must be deemed to be protected by tenure. The following language in Schaffer v. Weast, 546 U.S. 49, 56,126 S. Ct. 528, 534, 163 L. Ed. 2d 387, 396 (2005), is instructive:

> . . . the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims. McCormick § 337, at 412 ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion"); C. Mueller & L. Kirkpatrick, Evidence § 3.1, p 104 (3d ed. 2003) ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims").

Feti points to no statutory authority that would support a departure from the default rule. Accordingly, Feti must prove his claims by a preponderance of the credible evidence. See also N.J.S.A. 52:14B-10(c).

Feti's Entitlement to Tenure

Tenure is a legislative status. It is earned by operation of law, and upon meeting the precise requirements of the tenure statute. Spiewak v. Rutherford Bd. of Educ., 90

N.J. 63 (1982); Zimmerman v. Newark Bd. of Educ., 38 N.J. 65 (1962). Feti's claims spring from N.J.S.A. 18A:17-3, which provides:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.
>
> [Emphasis supplied.]

Thus, local public school districts retain the discretion to deny tenure to custodial staff, or alternatively, to confer that status upon them. Wright v. Bd. of Educ. of the City of Orange, 99 N.J. 112 (1985). Our Supreme Court has held that, "[b]oards may, without contravening the terms of the statute, permissibly pick and choose between the statutory minimum of no tenure for any custodial employee and the statutory maximum of instant tenure for all custodians." Id. at 119.

In Strincoski v Board of Education of East Brunswick, 94 N.J.A.R.2d (EDU) 37, the State Board of Education relied on Wright to award tenure to a custodian where the CBA provided that tenure would be earned after three years of service. The State Board so determined notwithstanding evidence proffered by the board that it awarded its custodians fixed term contracts. Although these individual contracts evinced an intent to deny tenure, the CBA was held to govern the rights of the parties. When the reasoning in Strincoski and Wright is applied here, it is plain that Feti's claim to tenure must fail.

In Netcong, the CBA clearly and unequivocally denies tenure to custodians. Thus, the inability of the Board to produce an executed fixed term contract for the 2012-2013 school year does not dictate a result in favor of Feti. Moreover, unlike Strincoski, the course of conduct between the parties here is consistent with the CBA, and lends further support to the Board's contention that it has consistently exercised its discretion

under N.J.S.A. 18A:17-3 to deny its custodians tenure. Each year the Board awarded Feti a fixed-term one-year contract, and but for the malfeasance of its administrative staff, would have done so again in 2012-2013. Our courts have considered the course of conduct between the parties when determining if tenure should be granted to school district custodians. See Hunterdon Central High Sch. Educ. Ass'n. v Hunterdon Central Reg'l High Sch. Bd. of Educ., 1988 S.L.D. 2468, 2473, aff'd, A-5036-87T2 (App. Div. June 28, 1989).

I **CONCLUDE** that at the time of his discharge, Feti was not tenured. In his post-hearing memorandum Feti urges that his demotion to custodian from head custodian violated his tenure rights because he suffered a reduction in compensation. He moreover urges that the CBA's terms are inapplicable to his employment as a head custodian. But until 2012-2013, Feti was unequivocally appointed for repeated fixed terms; was not tenured; and was subject to demotion at the discretion of the Board. At the time of his termination, and throughout the 2012-2013 year, Feti was serving in a position that fell within the CBA's recognition clause. Accordingly, I **CONCLUDE** that these additional claims are without merit.

The Termination of Feti's Employment

In the alternative, Feti argues that the Board violated his due process rights when it non-renewed his non-tenured employment. Feti asserts that the Board improperly failed to alert him of his right to a formal statement of reasons and an opportunity for a hearing. But the statutes that afford Feti due process place the clear burden on him to request a statement of reasons and a hearing, and place no concomitant burden on the Board to invite him to do so. N.J.S.A. 18A:27-4.1(b); see also N.J.S.A. 18A:27-3.2.[3] As the court stated in Hubbard v. Springfield Board of Education, 2003 U.S. App. LEXIS 23118 (November 12, 2003), the statute affords no automatic right to reasons or to a hearing, and "[t]he information and opportunity need only be provided upon written

[3] The latter statute references "teaching staff members," which is defined to include only professional staff. But the language of N.J.S.A. 18:27-4.1 clearly appears to extend the right to a statement of reasons to non-professional personnel such as Feti.

request . . . ." Id. at *8. Likewise, in Leang v. Jersey City Board of Education, 198 N.J. 557, 578-79 (2009), the court held:

> Upon plaintiff's receipt of the notification from the Board that her contract would not be renewed, she had a statutory right to request and to receive a written statement of reasons for the Board's decision not to renew her contract. N.J.S.A. 18A:27-3.2. In addition, she had a statutory right to demand an "informal appearance" before the Board during which she would be permitted "to convince the members of the board to offer reemployment." N.J.S.A. 18A:27-4.1.
>
> Those statutory rights are the embodiment of the process created by the Legislature through which plaintiff could seek to challenge and to be heard about the Board's non-renewal decision. Plaintiff did not avail herself of those statutory rights and therefore failed to take advantage of the avenues of relief that would have afforded her the due process she now complains was denied to her. We will not permit her to expand upon her statutorily protected right to be heard by authorizing her to pursue a claim that she was in some way deprived of due process in the Board's non-renewal decision.

Accordingly, it was incumbent upon Feti avail himself of the applicable statutory due process procedures, and there is no basis for his claim that his rights were violated by the Board's failure to affirmatively invite him to do so.

The remaining due process contentions of the petition demand little analysis or discussion. The claimed violations of N.J.S.A. 11A:2-13 and N.J.S.A. 11A:2-24 are brought in the incorrect forum. The Commissioner's jurisdiction is defined by statute, and is limited to "controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9. Our courts have held that where a controversy does not arise under the school laws, it is outside the jurisdiction of the Commissioner, even if the dispute pertains to school personnel. Bd. of Educ. of E. Brunswick Twp. v. Twp. Council of E. Brunswick, 48 N.J. 94, 102 (1966). Feti's demand for arbitration under the CBA likewise must be dismissed for lack of jurisdiction.

I **CONCLUDE** that Feti's claims to reinstatement and back pay due to a violation of his due process rights are meritless.

Sick and Vacation Days

Feti has no entitlement to payment for either sick or vacation days. Relative to vacation days, there is no factual basis for his claim to additional compensation and I **CONCLUDE** that he was paid for his vacation days. The Board readily conceded, and I **CONCLUDE** however, that the amount paid to him should be adjusted to reflect pro rata payment at the rate of $46,000 per annum.

Feti's demand for payment for unused sick days is meritless. He cites no provision of Title 18A of the New Jersey School Laws, and accordingly, I **CONCLUDE** that Feti's claims are outside the Commissioner's jurisdiction. See: Bd. of Educ. of E. Brunswick Twp., supra, 48 N.J. at 102. But it bears reiteration that even the collective bargaining language upon which Feti relies lends no support to his claim.

ORDER

Based on the foregoing, the Board is **ORDERED** to compensate Feti in the amount of $1000, reflecting the difference between the $45,000 it paid him and the $46,000 it owed him for his last year of employment. His payment for vacation pay should likewise be adjusted to reflect pro rata payment at the rate of $46,000 per annum. The remaining claims of the petition are **DISMISSED** in their entirety and with prejudice.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 14, 2015

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: October 14, 2015

Date Mailed to Parties: OCT 15 2015

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner:

Ali Feti

For Respondent:

Nicole Sylvester
Bernadette Dalesandro

Exhibits

For Petitioner:

P-1 Letter dated June 26, 2013
P-2 March 25, 2013, Evaluation excerpt
P-3 Letter dated April 15, 2013
P-4 Letter dated May 24, 2013
P-5 Memorandum dated May 27, 2013
P-6 Admitted as R-6
P-7 Employment contract
P-8 Admitted as R-8
P-9 Admitted as R-3
P-10 Admitted as R-7
P-11 Letter dated December 19, 2013
P-12 Letter of reference
P-13 Letter of reference
P-14 Letter of reference
P-15 Letter of reference
P-16 Job posting
P-17 Admitted as R-3

P-18 Page 2 of Collective Bargaining Agreement

For Respondent:

R-1 Certification
R-2 Photograph
R-3 Employment history documents, including checks
R-4 Letter dated May 11, 2012
R-5 Excerpt from Collective Bargaining Agreement
R-6 Board committee minutes
R-7 Minutes of Board meeting, June 26, 2012
R-8 Minutes of Board meeting, July 23, 2012
R-9 Board Policy Number 4360
R-10 Payroll register
R-11 Record of absences

ALI FETI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NETCONG, MORRIS COUNTY, BERNADETTE DALESANDRO AND KEVIN CARROLL,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

In this case, petitioner – formerly employed as a custodian for the respondent Board – challenged the termination of his employment and sought reinstatement, back pay, and compensation for unused sick and vacation days. Petitioner contended, *inter alia*, that he acquired tenure when he was appointed via Board resolution on June 26, 2012 to the position of custodian for an indeterminate term, effective July 1, 2012; accordingly, petitioner argued that he was improperly terminated in violation of his tenure rights at the end of the 2012-2013 school year. The respondent Board asserted that – pursuant to the collective bargaining agreement (CBA) and Board Policy Number 4360, both of which expressly state that custodians are not entitled to acquire tenure – petitioner had been employed under a series of annual contracts with fixed terms since his initial hiring in 2001, and never acquired tenure with the Board.

The ALJ found, *inter alia*, that: for each year prior to 2012-2013, petitioner had been appointed via a one-year fixed term contract; he was initially appointed in 2001 as a custodian, but promoted in his second year to head custodian – a position he retained via annual reappointment through the 2011-2012 school year; petitioner was demoted to custodian effective July 1, 2012 because of performance issues; although the Board's resolution appointing petitioner as custodian for the 2012-2013 school year – at an annual salary of $46,000 – did not expressly state that his appointment was for a one-year term, the Board does not grant tenure to custodial staff, and routinely appoints custodians for a one year term; petitioner had always been appointed via a one-year contract until July 2012; although no fully executed contract for 2012-2013 could be produced by either party, any failure to execute such a contract was clearly not intended to confer tenure upon petitioner; in fact, a contract could not be produced only due to the dysfunction of the Board's business office, and the misfeasance of its prior administrators; the CBA expressly stipulates that custodians in the Netcong school district will not earn tenure; records produced by the Board confirm that petitioner was already paid for 20 unused vacation days; and no further vacation pay is due or owing to petitioner. The ALJ concluded that petitioner was not tenured at the time of his discharge, and that his claims are meritless and/or outside of the Commissioner's jurisdiction. The ALJ noted that at hearing, the Board did concede that petitioner should have been paid at the rate of $46,000 for the 2012-2013 school year, and was paid only $45,000. Accordingly, the ALJ ordered the Board to compensate petitioner in the amount of $1,000 for the amount owed him for his last year of employment. The remaining claims were dismissed.

Upon comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

January 14, 2016

11-16

OAL DKT. NO. EDU 14826-13
AGENCY DKT. NO. 231-9/13

ALI FETI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NETCONG, MORRIS COUNTY, BERNADETTE DALESANDRO AND KEVIN CARROLL,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Ali Feti, and the respondents' reply thereto. In this matter, the petitioner is challenging the Board's non-renewal of his employment as a custodian in the school district following the 2012-2013 school year.

The petitioner takes exception to the Administrative Law Judge's (ALJ) determination that he did not have tenure as a custodian at the time of his discharge. Specifically, the petitioner maintains that since he had no written contract for the 2012-2013 school year, he was a custodian with no fixed term of employment and entitled to tenure under *N.J.S.A.* 18A:17-3 as a matter of law. The petitioner emphasizes that the intent of the Netcong Board of Education (Board) is not relevant to whether he acquired tenure pursuant to *N.J.S.A.* 18A:17-3, and where a board of education does not invoke its power to prevent tenure for custodians, it accrues by default.

Additionally, the petitioner asserts that his demotion from head custodian to custodian for the 2012-2013 school year violated his newly acquired tenure rights. Therefore, the ALJ

wrongfully found that he was covered by the collective bargaining agreement[1] (CBA) because the anti-tenure strictures of the CBA do not include head custodians and, since his demotion violated his tenure rights, he should have remained head custodian. Finally, the petitioner contends that the ALJ's decision on the claim for unpaid wages and vacation pay misinterprets the documentary evidence and is incorrect.

In reply, the respondents maintain that the ALJ had the opportunity to review numerous documents, as well as the opportunity to assess the credibility of the witnesses at the hearing. There is nothing in the petitioner's exceptions that points to any inappropriate or incorrect findings or conclusions made by the ALJ. The respondents stress that it would have been completely illogical for the Board to decide to grant tenure to the petitioner when it had been appointing him and other custodians on annual contracts for at least a dozen years. Further, the CBA and Board Policy Number 4360[2] both expressly state that custodians are not entitled to acquire tenure. In light of the petitioner's employment history – coupled with the relevant provisions of the CBA and Policy Number 4360, and the applicable case law – it was reasonable for the ALJ to conclude that the petitioner's 2012-2013 contract was for a fixed one-year period. As a result, the petitioner did not acquire tenure under *N.J.S.A.* 18A:17-3 and his non-renewal in 2013 was consistent with the law.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the petitioner did not have tenure as a custodian at the time of his discharge. The Commissioner is also in accord with the ALJ's determination that the Board did not violate the petitioner's due process rights when it non-renewed his employment. Finally, based on the Board's concession at the hearing, it is undisputed that

[1] The CBA states that, "[c]ustodians shall continue the practice of executing annual employment contracts with the Board. Custodians shall not receive tenure."

[2] Board Policy Number 4360 states that, "[p]ersons employed as janitors, custodians, and maintenance personnel including supervisory personnel will be employed on fixed term contracts and will not acquire tenure in their positions."

the Board is required to pay the petitioner $1000.00 that is owed to him based on the miscalculation of the payment he received for his accrued vacation time.[3]

Pursuant to *N.J.S.A.* 18A:17-3, boards of education have the discretion to deny tenure to custodial staff or to confer that status upon them. In order to exercise the discretion to deny tenure to custodial staff, a board of education must appoint the custodians for a fixed term. In this case, it is undisputed that in each year – beginning in 2001 and continuing through the 2011-2012 school year – the Board awarded the petitioner a fixed term, one-year contract; thus, he did not acquire tenure during those years. The dispute concerns whether the petitioner acquired tenure pursuant to *N.J.S.A.*18A:17-3 when he was reappointed on July 1, 2012, in light of the fact that neither party was able to produce a written contract that included the fixed term of his appointment.[4]

In reaching her conclusion, the ALJ had the opportunity to assess the credibility of the various witnesses who appeared before her and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [*N.J.S.A.* 52:14B-10(c)].

The Commissioner finds no basis in the record to reject either the ALJ's recitations of testimony or her determinations of witness credibility.

The ALJ found the petitioner's theory of what happened in connection with the circumstances of his reappointment for the 2012-2013 school year to be nonsensical. In contrast, the Board's witnesses testified consistently regarding the events leading up to the petitioner's

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[3] The Commissioner also agrees with the remaining determinations made by the ALJ regarding various claims advanced by the petitioner, including his entitlement to additional compensation for vacation and sick time.

[4] The record contains a copy of the Board resolution approving the petitioner's employment as a custodian effective July 1, 2012, with an annual salary of $46,000; however, the resolution does not include any additional terms of his employment.

reappointment for the 2012-2013 school year, and the intention of the Board to again appoint the petitioner to a fixed one-year term. The ALJ found that a contract for the 2012-2013 school year could not be produced because of dysfunction in the Board's business office and misfeasance on the part of prior administrative staff; the Board's intention would have been to again enter into a one-year fixed contract with the petitioner for the 2012-2013 school year. As a result, the petitioner was not tenured under *N.J.S.A.* 18A:17-3 when his employment was non-renewed following the 2012-2013 school year. The totality of the evidence in the record amply supports the ALJ's determination, including petitioner's contractual history with the Board and the anti-tenure provisions outlined in both the CBA and Board Policy Number 4360. Finally, the Commissioner finds the petitioner's exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and taken into account by her in weighing the testimony and the documentary evidence.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board is directed to pay the petitioner $1000.00 owed to him for the miscalculation of the payment received for his accrued vacation time. The remaining claims in the petition of appeal are hereby dismissed.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 1/14/16

Date of Mailing: 1/14/16

[5] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

349-17

349-17L

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

KIMBERLEY HARRINGTON
Commissioner

December 7, 2017

Casey P. Acker, Esq.
Lenox, Socey, Formidoni, Giordano,
Cooley, Lang & Casey, LLC
136 Franklin Corner Road, Unit B2
Lawrenceville, New Jersey, 08648

Re: *Jamie Burick v. Board of Education of the Township of Hamilton, Mercer County Agency Dkt. No. 126-6/17, OAL Dkt. No. EDU 09195-17.*

Dear Mr. Acker:

I have reviewed your correspondence seeking an "advisory opinion at the behest of the OAL" in the above-captioned matter, wherein the Board posits that petitioner has no right to appeal the District's sick bank committee's decision, and requests that I address the following issues: (1) whether there exists a right to appeal; (2) if a right to appeal does exist, who is the correct party in interest; and (3) if a right to appeal does not exist and the Hamilton School District is not the correct party in interest, how should the case proceed procedurally.

Notwithstanding its submission as a request for an advisory opinion, the Board's correspondence in this matter effectively seeks a declaratory judgment as to the aforementioned issues. Upon review of the request, I have determined not to entertain this matter – pursuant to *N.J.A.C.* 6A:3-2.1 – for the reasons set forth below.

The request for declaratory relief, in effect, undermines the ongoing proceeding at the Office of Administrative Law (OAL). It is not the role of the Commissioner to preempt the discretion of Administrative Law Judges (ALJ) in matters pending before the OAL. Once the ALJ issues a recommended decision, the Commissioner will have an opportunity at that time to determine the legal issues with the benefit of a full record. Moreover, the issues raised are not appropriate for declaratory ruling.

Accordingly, pursuant to *N.J.A.C.* 6:24-2.1, your request for declaratory judgment is denied.

Sincerely,

Kimberley Harrington

Kimberley Harrington
Commissioner

KH/SLP/ATA

c: Jamie Burick, *pro se*
Board Secretary
Clerk, OAL

350-17

350-17

JAMES BALDINI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE SUSSEX COUNTY CHARTER SCHOOL FOR TECHNOLOGY, SUSSEX COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner – who was hired by the respondent Board in 2010 as Vice Principal/Technology Consultant – claimed that his tenure rights were violated when the Board abolished his position during a reduction in force (RIF) in August 2015 and reassigned him as a Teacher of Social Studies, a position for which he had tenure rights. Petitioner contended that the RIF had been conducted in bad faith and in an arbitrary and capricious manner, and sought a directive from the Commissioner that he be placed in the position of Administrative Principal with respondent's charter school and restored to the grade of his previous position as Vice Principal. The Board filed a motion to dismiss, asserting that it acted in good faith in implementing the RIF as part of a reorganization plan in response to the school being placed on probationary status by the Department of Education in February 2015; further, the petitioner never served in the position of Principal and accordingly had no right to that position.

The ALJ found, *inter alia,* that: the respondent Board in this case was faced with non-renewal of its charter and the closing of the school; the RIF was undertaken as part of the school's reorganization plan to address this situation, and the decision to abolish the petitioner's position was well within the Board's discretion; petitioner offered no credible evidence whatsoever that the RIF was done in bad faith; while petitioner does hold a Principal certificate, it is undisputed that he never served in the position of Principal; the position of Principal is not substantially identical to petitioner's past position as Vice Principal/Technology Consultant as it encompasses significantly more duties than those previously performed by petitioner in his former role; the newly hired Principal is responsible for special education and discipline, which were not part of petitioner's duties as Vice Principal/Technology; further, petitioner is not qualified to act as supervisor of special education. The ALJ concluded that petitioner has not met his burden to show that he is entitled to tenure in the position of Principal, and the RIF was not done in bad faith. Accordingly, the ALJ dismissed the petition.

Upon a comprehensive review, the Commissioner concurred with the ALJ's determinations and adopted the recommended decision of the OAL with modification.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 07, 2017

350-17

OAL DKT. NO. EDU 20523-15
AGENCY DKT. NO. 339-10/15

JAMES BALDINI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE SUSSEX COUNTY CHARTER SCHOOL FOR TECHNOLOGY, SUSSEX COUNTY,	:	DECISION
RESPONDENTS.	:	

This dispute concerns whether petitioner has a tenure right to the position of Principal following abolishment of his tenured position as Vice Principal at the Sussex County Charter School for Technology (SCCST), and whether petitioner's termination through reduction in force (RIF) was for good cause.[1] The Administrative Law Judge (ALJ) determined that petitioner did not have a tenure right to the position of Principal and that the RIF was implemented in good faith.

The record of this matter, along with the Initial Decision of the Office of Administrative Law (OAL), have been reviewed. Additionally, petitioner's exceptions and respondent's replies thereto – submitted in accordance with *N.J.A.C.* 1:1-18.4 – were also considered by the Commissioner. Upon comprehensive review, the Commissioner is in accord with the ALJ's determinations, as modified herein.

[1] Petitioner's abolished position was entitled Vice Principal/Technology Consultant. The record uses "consultant" and "coordinator" interchangeably; however, the Commissioner will use "consultant" for purposes of consistency in her decision.

While reflecting his obvious disagreement with the findings and conclusions contained within the Initial Decision, petitioner's exceptions are unpersuasive, and substantially recast and reiterate the arguments made below. Petitioner takes exception to the ALJ's determination that petitioner did not have a tenure right to the Principal position. Petitioner contends that the ALJ did not properly consider important events relating to the "creation" of the Principal position, and that the ALJ did not analyze same under the "substantially identical" standard.[2] Petitioner argues that he is qualified for the Principal position by virtue of his certifications and his tenure as Vice Principal. Petitioner further contends that the ALJ erred in concluding that the RIF was not implemented in bad faith. Petitioner argues that the RIF was not for reasons of economy and that petitioner was improperly overlooked for the Principal position.

Petitioner has proffered a revised argument in his exceptions, *i.e.*, that the job responsibilities of the Principal position held by Jill Eckel following the RIF were substantially the same as the abolished Vice Principal/Technology Consultant position. Petitioner argues that at the "initial stage" of the RIF, Eckel was "doing [his] job, which ha[d] been recast as Principal," and that petitioner was "passed in favor of [] Eckel" despite his qualification for the position and his tenure as Vice Principal. Petitioner reasons that the "re-named" Principal position occupied by Eckel was the "second-in-command position" following the RIF, which is akin to his "second-in-command" position as Vice Principal prior to the RIF.[3] Petitioner,

[2] The ALJ found that although there was an overlap of duties, the Principal position encompassed significantly more duties and, therefore, was not "substantially identical" to the abolished Vice Principal/Technology Consultant position.

[3] Petitioner's repeated reliance on this notion of "second-in-command" connotes his misunderstanding of the right to a new position based on tenure. The Commissioner clarifies that entitlement to a new position arises when the duties of the position are substantially similar; it is not based on the hierarchy of the position within the structure of a school or district, as petitioner proposes.

therefore, contends that he is entitled to the Principal position held by Eckel and that the ALJ should have applied the "substantially identical" analysis to *that* Principal position.[4]

In reply, respondent argues that the ALJ properly concluded that petitioner does not have tenure in the Principal position because: petitioner never held the position of principal and was not automatically entitled to assume such role; petitioner's claim to the principal position held by Eckel – which was raised for the first time in his exceptions – is improper and untimely; the Principal position held by Eckel existed prior to the RIF and therefore there was no vacancy in that position until after Eckel's retirement, at which point the Principal position was "restructured", and that new position is the subject matter of this litigation. Respondent also reiterates its arguments below that the newly created Principal position is not substantially similar to the abolished Vice Principal/Technology Consultant position. Respondent further argues that the RIF was implemented in good faith, as it was conducted for good cause – for reasons of economy and efficiency – and there is no credible evidence that petitioner's position was abolished in bad faith.

It is well-settled that tenure rights in an administrative or a supervisory position – such as the separately tenurable positions of principal or vice principal – is accrued only by

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[4] In his petition of appeal, petitioner sought placement in the "Administrative Principal" position, which petitioner alleged was the Principal position presently held by Deirdre Mastandrea. Specifically, petitioner alleged that the "top two positions in [SCCST] ha[d] been recast from Administrative Principal and Vice Principal to Executive Director and Principal" and that the "[n]ew position of Principal is effectively a recreation of the abolished Vice Principal position." *See* Pet. of Appeal ¶ 6. In essence, petitioner did not see a difference between Eckel's and Mastandrea's respective terms as Principal. Additionally, throughout the course of the litigation, petitioner has maintained that the subject Principal position is indistinguishable from his position as Vice Principal and, therefore, he is entitled to the position currently occupied by Mastandrea. After all, petitioner only filed this action after Mastandrea was hired for the "new Principal position," not when Eckel's title changed from Administrative Principal to Principal. Following the ALJ's finding that the Principal and the Vice Principal positions were not substantially similar, petitioner has now bifurcated the Principal position into two separate positions based on the term served by Eckel, and the term served by Mastandrea and wants the Commissioner to determine *de novo* that petitioner has entitlement in the Principal position held by Eckel and that Mastandrea was improperly hired to serve as Principal. Even if the Commissioner were to disregard petitioner's prior position and review this matter as petitioner now proposes, the outcome would remain the same, as the distinction between Eckel's term and Mastandrea's term is a distinction without a difference for the purposes of determining petitioner's tenure claim to the position.

employment in that position, and is not transferable to another administrative or supervisory position. *See N.J.S.A.* 18A:28-5(c). In the context of a RIF, it is intended to prevent tenured employees from asserting claim to another position in which they have not served. *See Nelson v. Bd. of Educ. of the Twp. of Old Bridge*, 148 *N.J.* 358 (1997) (holding that service is required in the enumerated positions before tenure is achieved in said position, and finding that petitioner did not have tenure right to the principal position following a RIF – despite having an administrative certificate with a principal endorsement – as he never served in the capacity of principal).

After a RIF, an employee may claim tenure rights in a new position based on tenure in the abolished position when the two positions are substantially identical. *See Dennery v. Bd. of Educ. of the Passaic Cnty. Reg'l High Sch. Dist. #1*, 131 *N.J.* 626, 639 (1992) (finding "[w]hen the duties of the position in which a teaching-staff member has acquired tenure are substantially identical to those of the position that the person seeks, a local school board may not sidestep an educator's tenure rights by simply renaming the position or tacking on additional meaningless requirements[,]" and tenure rights must be extended to the "newly-created position") (citing *Viemeister v. Bd. of Educ. of the Boro of Prospect Park*, 5 *N.J. Super.* 215, 218 (App. Div. 1949). A position is not substantially identical if there is a "mere overlap in duties." *Id.* at 640. In fact, if the new position is similar to an employee's abolished position but also requires additional duties or different responsibilities, then the two positions are not considered substantially similar. *Id.* In this matter – as detailed below – petitioner cannot overcome the substantially identical requirement, as the Vice Principal and the Principal positions are separate and distinct in title and duties. Therefore, by asserting tenure rights to the Principal position on

the basis of his tenure as a Vice Principal, petitioner seeks to extend his accrued tenure from one administrative position to another in direct contravention of *N.J.S.A.* 18A:28-5(c).

For the purpose of clarity, the Commissioner outlines some of the undisputed facts as follows. Prior to the RIF, there were four administrative positions at the SCCST: Administrative Principal (Jill Eckel); Vice Principal/Technology Consultant (James Baldini); Supervisor of Curriculum and Instruction (Barbara Zappile); and Special Education Supervisor/Disciplinarian (Deirdre Mastandrea). Immediately following the RIF – when the Vice Principal/Technology Consultant and Supervisor of Curriculum and Instruction positions were abolished – the administration consisted of the Turnaround Specialist (Noreen Lazariuk), Principal (Eckel), and Special Education Supervisor/Disciplinarian (Mastandrea). At which time, the duties of the two eliminated positions were consolidated with the positions of Turnaround Specialist and Principal. The record does not reflect that Eckel surrendered her previous duties in her new role as Principal. Instead, the record supports that the Administrative Principal role evolved into Principal, with the Turnaround Specialist overseeing implementation of SCCST's remedial plan.

Within two weeks of the RIF, however, further changes were made to the administration as a result of Eckel's retirement. Specifically, the Board created an Executive Director position and appointed Lazariuk. The Board also hired Mastandrea for the vacant Principal position, at which time the duties she had performed in her previous capacity as Special Education Supervisor/Disciplinarian were subsumed in the Principal position. A review of the job responsibilities in the record of the two positions reveal that apart from the Special Education Disciplinary and Supervisory duties, the Executive Director and the Principal continued to share and maintain the division of responsibilities of the previously abolished positions.

Petitioner's duties as Vice Principal were reported to be as follows: a. Assist the principal in duties related to instruction, supervision, evaluation and the overall administration of the school, including walk throughs as well as evaluations in coordination with the Supervisor of Curriculum; b. Serve as building administrator in the absence of the principal; c. Responsible for introduction of the school to the students during the first two days of school; d. Assist in conducting safety drill practice activities; e. Assist the principal in coordinating transportation, custodial, cafeteria, and other support services; f. Greet and interact with parents and visitors in the absence of the principal; g. Responsible for dance and special programs, with the exception of drama. (Initial Decision at 4) As such, it is axiomatic that Eckel's duties as Administrative Principal were separate and unique from those of the petitioner. When SCCST hired Lazariuk to serve as Turnaround Specialist, it is uncontroverted that Eckel's previous duties as Administrative Principal continued in her role as the Principal, and the duties of the abolished positions were distributed between the Turnaround Specialist and the Principal. Therefore, it follows that many of the duties of the Principal position were the same job responsibilities Eckel had prior to the RIF, and petitioner could not have tenure rights in a position in which he did not serve and where the duties are not substantially similar to his abolished position.

The parties do not dispute that the duties presented in the record as responsibilities of the Principal position were to be performed by Eckel following the RIF, and the only significant difference in the position after Eckel's retirement was that Mastandrea retained her duties as Special Education Supervisor/Disciplinarian when she was hired as Principal. Therefore, petitioner's renewed claim in his exceptions is tenuous. Notably, at the time of Eckel's appointment following the RIF, petitioner did not assert tenure rights in the Principal position on the basis that it was indistinguishable from the Vice Principal position and

that it was the same "second-in-command" position as the abolished Vice Principal. Instead, petitioner exercised his bumping rights and acquired a teaching assignment in SCCST. The Commissioner finds that implicit in petitioner's tenure rights claim to the Principal position only after Eckel's retirement is the tacit acceptance that the new Principal position assumed by Eckel was not the same as the abolished Vice Principal position, rather it was a restructuring of the Administrative Principal position previously held by Eckel, in which position petitioner has no tenure rights.

Significantly, and contrary to petitioner's assertion, the Principal position is plainly *distinguishable* from petitioner's previous position of Vice Principal/Technology Consultant. A review of the "performance responsibilities" in petitioner's role as Vice Principal[5] and the "duties" of the Principal position establish that a majority of the tasks and duties of the Principal position are separate and apart from those of the abolished Vice Principal position. Specifically, the following Principal duties cited in the record are some of the job responsibilities that are irreconcilable with the duties of the Vice Principal position: a. Assisting with leading the school through renewal and probation; daily decision-making to ensure the changes the State seeks; b. Assisting in the completion of the Charter renewal application; c. Teacher professional development; d. Review of lesson plans; e. Participation in revisions of curriculum; f. Affirmative Action Office duties; g. Supervision of Teachers, Staff, and Students; h. Department Meeting; i. Parent contact and Communication; j. Community involvement; and k. Climate and Culture.[6] (Respondent's Motion for Summary Decision at 28) The only

[5] For purposes of brevity, the Commissioner will not reiterate the job responsibilities of the Vice Principal position, as they have been listed above, are well-documented in the record, and there is no dispute over same.

[6] The Commissioner intentionally did not include Discipline and Supervision of Special Education as petitioner has already conceded to the distinction; notwithstanding the inclusion of the duties following Eckel's departure. Additionally, the Commissioner acknowledges that some of the duties, such as parent contact and communication, and supervision of teachers, staff and students, are also duties that were listed as part of petitioner's responsibilities

reconcilable overlap in duties are "teacher evaluations/observations," "PARCC implementation" and "classroom walkthrough and feedback."[7] A mere overlap of duties is insufficient to confer tenure rights to a new position. Petitioner cannot prove that his duties were the same as Administrative Principal and later, Principal. As such, petitioner's arguments relating to his purported tenure right in the Principal position – irrespective of whether it was held by Eckel or Mastandrea – are without merit.

Petitioner's exception relating to the ALJ's finding that the RIF was not in bad faith is equally without merit and unpersuasive. The Commissioner finds that the substantial evidence in the record supports that the ALJ properly determined that the RIF was implemented for good cause and that petitioner failed to offer credible evidence proving that the RIF was conducted in bad faith.

Accordingly, the recommended decision of the OAL is adopted – as modified herein – as the final decision in this matter, and the petition is dismissed.

IT IS SO ORDERED.[8]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 12/07/17

Date of Mailing: 12/08/17

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as Vice Principal, but such duties – among others – were the Vice Principal's responsibility in the absence of the principal and/or in a subordinate capacity.

[7] The Commissioner notes that under petitioner's broad definition of his job responsibilities, some of the duties listed under the Executive Director position also appear to overlap with the abolished Vice Principal position.

[8] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 20523-15
AGENCY REF. NO. 339-10/15

JAMES BALDINI,

Petitioner,

v.

BOARD OF TRUSTEES OF THE SUSSEX COUNTY CHARTER SCHOOL FOR TECHNOLOGY,

Respondent.

Frank S. Gaudio, Esq., for Petitioner (Miller and Gaudio, attorneys)

Cherie L. Adams, Esq., for Respondent (Adams, Guitierrez & Lattiboudere, attorneys)

Record Closed: August 22, 2017 Decided: September 12, 2017

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, James Baldini, filed a Petition of Appeal with the Commissioner of the Department of Education (DOE) on October 20, 2015, requesting that respondent be directed to place him in the position of Principal and restore him to a grade of his

previous position. Petitioner's previous position of Vice Principal/Technology had been eliminated by the Respondent School Board.

Respondent filed a motion to dismiss with the Commissioner of the New Jersey Department of Education, which was filed on December 18, 2015.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on December 21, 2015, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Petitioner filed his brief in opposition to Respondent's motion to dismiss with the OAL on January 5, 2016.

A prehearing conference was held on January 15, 2016, and a prehearing Order was entered on January 19, 2016, wherein the undersigned determined the motion to dismiss would be considered a motion for summary decision pursuant to N.J.A.C. 1:1-12.5, and that said motion would be held in abeyance pending completion of discovery. The discovery completion date was set in the prehearing order at March 15, 2016. There were no additional filings as to the motion by either Petitioner or Respondent.

Respondent filed its Answer to Petition of Appeal with the OAL on March 18, 2016.

By Order dated April 14, 2016, Respondent's motion for summary decision was denied.

A Substitution of Attorney was filed on July 6, 2016.

Respondent again filed a motion for summary decision with the OAL on December 23, 2016. Petitioner filed its brief in opposition on January 5, 2017. Respondent filed its reply brief on January 13, 2017.

By Order dated January 26, 2017, Respondent's motion for summary decision was denied.

On February 6, 2017, Respondent filed a request with the Acting Commissioner of DOE for interlocutory review of the Order of the undersigned dated January 26, 2017. By letter dated February 14, 2017, the Acting Commissioner denied Respondent's request for interlocutory review.

A hearing was held on August 21, 2017, and August 22, 2017. The record closed on August 22, 2017.

ISSUES

Whether the RIF was done in good faith; and, whether Petitioner has a tenure claim to the newly created position of Principal based upon his tenure in the abolished position of Vice Principal/Technology.

STIPULATED FACTS

1. The State of New Jersey Department of Education (DOE) placed SCCST on probationary status in February 2015.

2. Upon its review of SCCST, the DOE found that the school failed to meet all nine (9) standards within the Performance Framework in the 2013-2014 school year for student achievement.

3. As a condition of probation, the school was required to submit a remedial plan to the DOE addressing the eight (8) federal turnaround principles: 1) School Leadership; 2) School Climate and Culture; 3) Effective Instruction; 4) Curriculum, Assessment and Intervention System; 5) Effective Staff Practices; 6) Enabling the Effective Use of Data; 7) Effective Use of Time; and 8) Effective Family and Community Engagement.

4. Respondent prepared and submitted a Remedial Plan in March 2015, which was amended in May 2015 and resubmitted in June 2015.

5. In June 2015, the DOE reviewed SCCST's probationary status and proposed remedial plan.

6. In the report, the DOE reviewed its findings from its February 5, 2015, site visit, after which it placed SCCST on probation due, in part, to its conclusion that the school "lacks an effective way of administering and utilizing assessment data to drive ongoing instruction and strategic planning that will impact immediate and long-term student outcomes." The DOE further concluded that the administrators lacked the skill set and understanding to utilize and/or analyze data effectively.

7. As to the remedial plan, the DOE concluded that it was unclear how the school would track its progress and that the student achievement goals highlighted within the plan lacked rigor.

8. Baldini himself detailed his "performance responsibilities" in his role as Vice Principal as follows:

> a. Assist the principal in duties related to instruction, supervision, evaluation and the overall administration of the school, including walk throughs as well as evaluations in coordination with the Supervisor of Curriculum and Instruction;
> b. Serve as building administrator in the absence of the principal;
> c. Responsible for introduction of the school to the students during the first two days of school;
> d. Assist in conducting safety inspections and safety drill practice activities;
> e. Assist the principal in coordinating transportation, custodial, cafeteria, and other support services;
> f. Greet and interact with parents and visitors in the absence of the principal;
> g. Responsible for dance and special programs, with the exception of drama.

9. In his role as District Data Analyst/Technology Coordinator, Baldini described his job functions as follows:

> a. Guides and supports staff in better use of data-based decision making in regards to student instruction;

b. Research and develop models to keep staff and administration updated on data;
c. Integrate data analysis with student, parent, and teacher understanding;
d. Perform record-keeping functions as the principal may direct;
e. Responsible for asset management of technology;
f. Maintain technology improvement plan;
g. PARCC coordinator;
h. Order and maintain the necessary equipment as needed;
i. Manage technology budget and resources;
j. Organize and maintain School Technology Committee;
k. Provide support to obtain ERATE improvements;
l. Manage technology contracts;
m. Supervise computer lab and audio lab improvements;
n. Maintain network security;
o. Direct and manage school IT personnel as necessary;
p. Maintain student guardian program;
q. Provide support for technology concerns of staff; and
r. Research potential technology products.

10. Charles Culver has approximately twenty (20) years of experience in Information Technology (IT). He worked as a Helpdesk/Tech Support/Intern at ITT from March 1996-July 1996, a PC Bench Technician at Computer Discount of New Jersey from July 1996-June 1997, and an Onsite/Field Technician for TAP Computer Services from September 1997-August 1999.

11. For school year 2007-2008, Sussex Technical School awarded Culver with the honor of Staff Member of the Year.

12. Culver has developed skills in the following IT:

a. Microsoft: Windows Server, Active Directory, Exchange;
b. Apple: MacOS;
c. Mobile: Android iOS;
d. Linux: Various Operating Systems, as well as Apache, PHP, and MySQL (LAMP);
e. Networking: HP, Cisco 802.1x Wireless, Radius, and VLANS;
f. Programming: PHP, HTML/CSS, Python, Javascript, and JQuery;
g. ITSM: Freshdesk, Nagios, and Zabbix; and
h. Other: Google Apps, Cisco Unity/CM, Photoshop, Acrobat Pro, Meraki, Ubiquity, Genesis SIS, and NJSmart.

13. Culver holds a Computer Science, Data Center Support degree from Chubb Institute (January 1996). He is also a Certified Fiber Optic Technician and Certified Fiber Optic Specialist/Testing.

14. Baldini was Culver's immediate supervisor beginning in or about April 2010, when he was promoted to the position of Vice Principal/Technology Coordinator, until the position was eliminated in or around August 2015.

15. In July 2015, the Board resolved to approve Noreen Lazariuk's hiring as School Turnaround Specialist for the 2015-2016 school year. Lazariuk was tasked with implementing Respondent's remedial plan, addressing the DOE's concerns, and responding to the Board's investigative findings concerning the administration. Lazariuk then assumed the Executive Director role at SCCST.

16. The Board also hired Deirdre Mastandrea (Mastandrea) to the newly created role of Principal during its August 24, 2016, meeting.

17. Mastandrea applied for the vacant position of Principal. Mastandrea has approximately twenty (20) years of experience working in schools. She worked as a School Social Worker for the Hamburg Public School and the Stillwater Public School from 1996-1997, and the Rockaway Township School from 1997-2002. Mastandrea then worked as the Family Outreach Coordinator for Rockaway Township School from 2002-2010.

18. Mastandrea began her employment at SCCST in 2012 in the position of Supervisor of Special Education, which position she held until she was elevated to Principal in August 2015. She also was appointed as the District Disciplinarian from January 2015 through the time she was elevated to her current position.

19. Mastandrea holds a Principal's License (April 2015), Supervisor's Certificate (January 2013), and School Social Worker Certificate (August 1996). Mastandrea obtained her Bachelor of Arts from Rutgers College in May 1994, Master of Social Work from Rutgers University in May 1996, and Master of Educational Leadership from Thomas Edison State College in March 2015.

20. At the Special Meeting of the Board of Trustees on August 24, 2015, the Board resolved to approve Mastandrea's hiring as Principal beginning Tuesday, August 25, 2015, at her current rate of employment under her 10-month contract of $77,400 from September 1, 2015, to June 30, 2016.

21. Mastandrea's newly created role as Principal of SCCST continues to evolve in order to meet the challenges identified by DOE's probationary review of the school. However, as of August 24, 2015, her duties included the following:

a. Assisting with leading the school through renewal and probation; daily decision-making to ensure the changes the State seeks;
b. Assisting with the completion of the Charter Renewal application;
c. Teacher professional development;
d. Review of lesson plans;
e. Participation in revisions of curriculum;
f. Teacher evaluations/observations;
g. Discipline;
h. Supervision of Special Education;
i. Department meeting;
j. PARCC implementation;
k. Classroom walkthrough and feedback; and
l. Affirmative Action Officer duties.

22. As further set forth in Respondent's Renewal Application for 2015-2016, Mastandrea's roles broadly include: Supervision of Teachers, Staff and Students, Climate and Culture, Parent Contact and Communication, Community Involvement.

23. Mastandrea's duties also include hiring, interfacing with parents (e.g. providing tours and focusing on recruitment), supervising and organizing afterschool activities, and schedule building.

24. As a result of the reorganization, the administration of SCCST changed as follows:

Former Administration (3.5 Administrators)		
Position	**Employee**	**Compensation in 2015**
Administrative Principal (1, 12-mo. Administrative Position)	Jill Eckel	Salary: $105,053.00 Longevity: $1,500.00
Vice Principal/Technology Coordinator (0.5, 12-mo. Administrative Position)	James Baldini	Salary: $80,323.00 Longevity: $1000.00
Supervisor of Curriculum and Instruction	Barbara Zappile	Salary: $80,323.00

(1, 12-mo. Administrative Position)		
Special Education Supervisor/Disciplinarian (1, 10-mo. Administrative Position)	Deirdre Mastandrea	Salary: $77,400.00
TOTAL		$345,599.00
Current Administration (2 Administrators)		
Position	**Employee**	**Compensation in 2015**
Executive Director (1, 12-mo. Administrative Position)	Noreen Lazariuk	Salary: $96,000.00
Principal (1, 12-mo. Administrative Position)	Deirdre Mastandrea	Salary: $77,400.00
TOTAL		$173,400.00

25. As set forth in Respondent's Renewal Application for 2015-2016, Lazariuk's roles also broadly include: Curriculum, Human Resources, State Reporting, Professional Development, Recruitment, and Ensuring of Mission and Vision.

26. As set forth in the October 15, 2015, Probation Site Visit Summary, Respondent's "Organizational Capacity" now "Meets the Standard" of the federal principles due to the following improvements:

The School's new leadership team has clear priorities and plans for improving student achievement.

- The school has a new leadership team, and interviewed stakeholders described clear roles and responsibilities.
- Interviewed teachers indicated regular support in developing lesson plans as well as instructional observation and feedback.
- The school has a formal evaluation system in place, but school leaders are developing walk-through protocols to enhance formative feedback to teachers.
- The school has increased opportunities for common planning and promoted more collaboration among faculty, particularly around curriculum and use of data.
- The school leaders have a professional development plan with clear priorities, including an ongoing focus on curriculum development, student-centered learning through co-teaching,

assessment and use of data. The school is using internal expertise as well as consultants to improve instructional practices.
- Interviewed stakeholders, such as faculty and parents, note improved communication from the school's administration.

27. The DOE specifically noted the strength of the new organizational structure of SCCST in its Renewal Site Visit Summary dated January 28, 2016. (Lazariuk Cert., ¶36, Exh. Q, Renewal Site Visit Summary dated January 28, 2016.) That summary also reflects that the "Organizational Capacity" of Respondent "Meets the Standard" set forth by the federal principles, and specifically found the following:

The school has a clear and well-functioning organizational structure that leads to continuous improvement.

- The school has clear and well-understood systems for decision-making.
- The school provides strong instructional leadership to teachers.
- The school has an effective, comprehensive professional development program that improves the implementation of the curriculum and instructional practices.
- The school has developed systems for proactively addressing areas such as communication with stakeholders, community outreach, and teacher evaluations.

28. The DOE renewed SCCST's charter for a period of five (5) years, through and including June 30, 2021. Respondent remains on probation through February 28, 2017, during which time Respondent must continue to demonstrate effective implementation of its remedial plan and demonstrable growth on State assessment data.

29. The DOE specifically praised the new administration in its correspondence advising of Respondent's five (5) year renewal. It stated as follows:

> In August 2015, the Board hired a new executive director and promoted the former special education supervisor to the role of principal. Since the start of the school year, the new administration has directed several key initiatives that align to the school's remedial plan. With the help of consultants,

> teachers have developed the school's curriculum to ensure its alignment to State standards. Teachers have received professional development pertaining to student-centered learning, lesson planning, assessment, and use of data. Administrators have been consistently reviewing lesson plans, conducting classroom observations, and providing teachers with feedback and the school is making progress on developing a data-driven culture at the school.

30. As reflected in the data, student academic proficiency has improved in Math (Overall) by 6.4% and in ELA (Overall) by 18.1% when compared to 2015.

31. Shortly after Respondent implemented its administrative reorganization, Baldini filed a Petition of Appeal on October 29, 2015.

32. This matter was transferred to the New Jersey Office of Administrative Law, where it was filed on December 21, 2015, as a contested case.

33. Baldini holds the appropriate certification for the position of principal.

SUMMARY OF RELEVANT TESTIMONY

Petitioner's Case

James Baldini, Petitioner, testified as follows:

Mr. Baldini reviewed his resume and the various certifications and training he has received. He explained how his previous position as Vice Principal/Technology evolved. He explained the various duties he had as Vice Principal. He reviewed various contracts he had with Respondent. He noted that his job as Vice Principal/Technology had no formal job description. He drafted a job description himself at some point. Mr. Baldini described himself as "Second in Charge" of the school.

The State of New Jersey Department of Education came to SCCST on February 11, 2015. He was out on family leave from January 12, 2015, to March 2, 2015.

He was the supervisor of the Supervisor of Special Education, Deirdre Mastandrea. At that time the Supervisor of Special Education was a part time position. When Ms. Mastandrea was hired to a full-time position Mr. Baldini was no longer her supervisor.

Mr. Baldini explained that he was in charge of SCCST when the principal, Jill Eckel, was absent.

Mr. Baldini described the Technology part of his job title as being more a supervisory role. He made sure the systems were working. He prepared a technology plan. He updated as needed. Mr. Baldini stated that running the school comes first and the technology part comes second.

Mr. Baldini described the duties of Charles Culver as being his assistant.

Mr. Baldini spent a great deal of his testimony describing his background and qualifications for the position of principal. He detailed the various training courses he took, as well as the fact he has the requisite Principal certificate.

Mr. Baldini described how he attended several Board meetings in 2015 and complained of Principal Eckel. He also noted he complained about the purchase of computers that were inadequate, using the term "garbage," to the Board in 2013. He also stated that school staff did not like he was gone too often (a reference to his family leave time).

Respondent's Case

Edwin Selby testified as follows:

He is the president of the Board of Trustees for SCCST. He has been a board member for ten years and president for four years.

In 2013 the State of New Jersey DOE advised SCCST that it was not keeping up with comparable schools. A warning was issued, but there was no specific directive.

In 2015 the DOE again became involved and visited the school twice. One visit was a surprise visit and the other was a scheduled visit. SCCST was placed on probation and advised that its charter would not be renewed if there was no improvement. The charter was due for renewal in 2015. DOE required a remedial plan. Additionally, the school needed to submit its re-charter application.

The Board undertook an investigation and looked for suggestions to address the school's shortcomings. The Board reviewed staffing. The Board formed a committed to address these issues. The Charter Office of DOE also had concerns about the school's administrative staff. The Charter Office was concerned that the administrative staff structure was inadequate to move the school forward and would need changes. The Charter Office disagreed with the Board and did not think the administrative staff would be able to carry forward a remedial plan and bring the school up to expectations.

The Charter Office wanted a change in leadership. The school needed someone with experience in turning around a school. The school advertised for a turn-around specialist. The turn-around specialist was to mentor the staff and give them skills to implement data-driven instruction. The Board inquired of the school's business administrator on how to afford the position. In order to afford hiring a turn-around specialist the school needed to consolidate administrative positions. This was the only option. The Board did not consider eliminating teaching staff.

The Board spoke with its administrators and looked for suggestions. Administrators were asked to provide job descriptions. The Board reviewed the job description submitted by Mr. Baldini.

The Board hired Noreen Lazariuk as the turn-around specialist. The Board also hired Jill Eckel as Principal. Lazariuk and Eckel would share the duties of vice principal, supervisor of curriculum and instruction, which included data collection and application.

The hardware technology would be sustained by Mr. Culvert, a part-time employee. Ms. Lazariuk would have executive responsibility over the entire school.

In order to afford hiring the turn-around specialist the Board eliminated the positions of Vice Principal/Technology and Supervisor of Curriculum and Development. The duties of these two positions were consolidated with the duties of the turn-around specialist and the principal, Ms. Lazariuk and Ms. Eckel, respectively. This took place at the Board meeting of August 10, 2015.

The plan changed after ten days as Ms. Eckel decided to retire. The Board then immediately advertised for the position of principal. The Board hired Deirdre Mastandrea as principal after reviewing several applications. Ms. Mastandrea had been supervisor of special education and disciplinarian. Those roles would now be included in the principal position. In effect the Board consolidated four administrative positions into two. This resulted in a reduction of more than $170,000 in administrative salaries.

The school's charter was renewed in February 2016.

Mr. Baldini and Ms. Zappile, the former Supervisor of Curriculum and Instruction, were each paid two months salary at the rate of their abolished positions.

Ms. Mastrandrea was hired based upon the response received and the needs of the school at the time. Interviews for principal were conducted by Ms. Lazariuk. Ms. Mastrandrea was interviewed on August 24, 2015, and hired that day at the Board meeting.

Mr. Baldini's resume was not submitted until the next day. He was not considered for the principal position as Ms. Mastrandrea had already been hired. Ms. Mastrandrea's duties including supervisor of special education, supervisor of curriculum and instruction and discipline. Ms. Mastrandrea continued as supervisor of special education after a part-time special education position was filled.

Noreen Lazariuk testified as follows:

She is Executive Director of SCCST. Her role was to save the school from closing, get its charter re-newed and have the school removed from probation. She immediately did an assessment of the reports and took action to remedy. She reviewed curriculum teachers submitted. She retained experts. She began writing the charter renewal application. She began this process on her first day, August 3, 2015. The renewal application was due October 15, 2015. A renewal visit was also to occur on October 15, 2015.

She informed the Mr. Baldini that his position as Vice Principal/Technology was being eliminated at the next Board meeting. The new administrative team consisted of herself, Ms. Eckel and Deirdre Mastrandrea as Supervisor of Special Educational/Disciplinarian.

Ms. Eckel decided to retire and Ms. Lazariuk immediately posted the job opening. She interviewed four candidates and recommended Deirdre Mastrandrea to the Board for the principal position. The Board hired Ms. Mastrandrea. The principal responsibilities included getting school open and continuing to work on renewal application and preparing for October 15, 2015, renewal visit. Ms. Lazariuk took over technology with the assistance of Ms. Mastrandrea and Mr. Culver. Ms. Mastrandrea also did affirmative action.

Ms. Lazariuk explained "bumping" rights, stating you cannot bump up into a position such as vice principal to principal.

Mr. Baldini was never considered for the principal position. She knew Mr. Baldini had a principal certification. Ms. Lazariuk interviewed four candidates for the principal job. She received Mr. Baldini's application for the principal job within hours of announcing Ms. Mastrandrea had been hired. She did not do anything regarding Mr. Baldini's application as the position had been filled.

The salary savings realized by the school in reducing four administrator positions into two of $172,199 does not include the sixty days of pay given to Mr. Baldini and Ms. Zappile. It also did not include the costs of consultants hired by Ms. Lazariuk. It also does not include the part time hire of a Learning Disabilities Teacher Consultant (LDTC). The annual salary for the LDTC position is about $11,000. The consultants hired were a onetime thing and only one was paid $5,000. The other consultants did not charge.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following:

1. Petitioner was hired by Respondent as Vice Principal/Technology in 2010. He continued in that position until it was abolished by the Board in August 2015.

2. Petitioner had tenure rights to the position of social studies teacher, which he assumed following the abolition of his previous position.

3. On August 3, 2015, Noreen Lazariuk began in the position of turnaround specialist, now executive director, at SCCST. Ms. Lazariuk was hired by the Board in response to the Charter Office of the New Jersey DOE placing SCCST on probation.

4. The Board determined that the only way to afford to pay Ms. Lazariuk would be to consolidate administrative positions.

5. At the time of Ms. Lazariuk's hire there were four administrative positions at SCCST: Administrative Principal held by Jill Eckel; Vice Principal/Technology held by James Baldini; Supervisor Curriculum and Instruction held by Barbara Zappile; and, Special Education Supervisor/Disciplinarian held by Deirdre Mastandrea.

6. At the Board meeting of August 10, 2015, the positions of Vice Principal/Technology and Supervisor of Curriculum and Instruction were abolished. Ms. Eckel was named principal and she, Ms. Lazariuk and Ms. Mastandrea remained as three administrators. Ms. Mastandrea's position was a ten-month position.

7. Within ten days Ms. Eckel retired leaving an opening for the principal position.

8. The principal position opening was immediately posted and four candidates, including Ms. Mastrandrea, were interviewed by Ms. Lazariuk. Ms. Lazariuk thereafter recommended Ms. Mastrandrea to the Board for the position of principal. The Board hired Ms. Mastrandrea at their August 24, 2015, Board meeting.

9. In addition to being principal, Ms. Mastrandrea retained her duties as supervisor of special education and disciplinarian.

10. The total savings in salary by reducing four previous administrative positions into two was $172,199.

11. Both Mr. Baldini and Ms. Zappile were paid two months' pay after the abolition of their respective positions.

12. Sometime after Ms. Mastrandrea was hired a part time position of LDTC was filled at approximately $11,000 per year. Ms. Mastrandrea still retained her role as supervisor of special education after this part time hire.

13. After Ms. Lazariuk was hired she retained the services of several experts to assist her in addressing the issue of SCCST being placed on probation by DOE. One of those experts was paid $5,000. The others did not charge a fee.

LEGAL ANALYSIS AND CONCLUSION

Petitioner asserts two arguments: He is entitled to the position of Principal based upon his tenure in the abolished position of Vice Principal/Technology; and, the RIF was done in bad faith. Accordingly, an analysis of the applicable statutory and case law as to both issues is required.

The tenure of teaching staff is authorized by the Tenure Act, N.J.S.A. 18A:28-1 et seq. A teaching staff member must hold a valid certificate to "teach, administer, direct or supervise the teaching, instruction, or educational guidance of . . . pupils in such public schools and of such other certificate, if any, as may be required by law." N.J.S.A. 18A:26-2. In order to attain tenure, a teaching staff member must hold the appropriate certificate for his or her position. N.J.S.A. 18A:28-4. In addition to certification, the teaching staff member must also be employed by the school district or board for: "(a) [t]hree consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or (b) [t]hree consecutive academic years, together with employment at the beginning of the next succeeding academic year; or (c) [t]he equivalent of more than three academic years within a period of any four consecutive academic years." N.J.S.A. 18A:28-5.

There are three types of educational certificates issued by the Board of Examiners: (1) instructional; (2) administrative and supervisory; and (3) educational services. N.J.A.C. 6:11-2.3. The Board of Examiners may also issue special "endorsements" under the appropriate certificates. Ibid. A teaching staff member must have the appropriate certificate and endorsement for his or her position. For example, an art teacher would be required to hold an instructional certificate with an art endorsement, which "authorizes the holder to teach art in all public schools." N.J.A.C. 6:11-6.2(a)(2). A teaching staff member may possess multiple endorsements under a certificate, qualifying him or her to fill any position covered by the corresponding endorsement. For example, an art teacher holding an instructional certificate with an art endorsement and English as a second language endorsement is

authorized to teach both art and English as a second language in all public schools. N.J.A.C. 6:11-6.2(a)(2), (a)(8).

There are at least four separate endorsements under an administrative and supervisory certificate: (1) school administrator; (2) principal; (3) supervisor; and (4) school business administrator. N.J.A.C. 6:11-9.3. According to the Supreme Court in Dennery v. Board of Education of the Passaic County Regional High School District # 1, 131 N.J. 625, 634 (1993), "[A]n educator with tenure in any endorsement that he or she possesses can, in effect, extend or transfer that tenure to other endorsements that are subsumed under the same certificate." Thus, the art teacher in the foregoing example with tenure under her instructional certificate with an art endorsement may apply that tenure to her English as a second language endorsement, i.e., she is a tenured art teacher as well as a tenured English as a second language teacher. A literal reading of Dennery would appear to compel the conclusion that a supervisor with tenure under her administrative and supervisory certificate with a supervisor endorsement could also apply her tenure to her principal endorsement, which is held under the same administrative and supervisory certificate. However, both the legislature, and the Supreme Court in a subsequent decision, Nelson v. Board of Education of the Township of Old Bridge, 148 N.J. 358 (1997), rev'g, A-6441-94T5 (App. Div. April 29, 1996), rev'g, 95 N.J.A.R.2d (EDU) 257, make it clear that tenure does not apply in the same way for administrative and supervisory personnel as it does for teachers.

In Nelson the petitioner held an administrative and supervisory certificate, with a principal endorsement and a supervisor endorsement, as well as an instructional certificate. He began his employment as a teacher of industrial arts, and was eventually appointed to department chairperson of industrial arts, achieving tenure in that supervisory position in 1985. His duties included assisting in the recruitment, hiring, training and supervising of department personnel, preparing the departmental budget, and evaluating teacher performance. Five years later, the board of education eliminated his position, reassigning him to his former position as a teacher of industrial arts. About three years later, three positions opened up, two as elementary school

principals and one as a middle school vice principal. The petitioner filed a petition of appeal with the Commissioner of Education, asserting that he was entitled by tenure to be appointed to any one of the three positions, even though he had never actually served as a principal or vice principal. Citing to the Supreme Court in Dennery, which held that a tenured educator in any endorsement can transfer that tenure to other endorsements under the same certificate, the ALJ determined that the petitioner was entitled to an appointment to one of the elementary school principal positions.

However, the Commissioner of Education rejected the ALJ's decision, finding that tenure accrued only as a result of actual work experience in the separately tenurable positions specifically enumerated in N.J.S.A. 18A:28-5. Since the petitioner could not transfer his tenure as a supervisor to the position of principal, he was not entitled to the position of elementary school principal. The State Board of Education affirmed the Commissioner's decision. 95 N.J.A.R.2d (EDU) 257.

On appeal, the Appellate Division reversed the State Board of Education, reading the Dennery decision the same way as the ALJ, having earned tenure in the supervisor endorsement under the supervisory and administrative certificate, the petitioner could transfer his tenure to his principal endorsement, even though he never worked as a principal. Dennery, supra, A-6441-94T5.

During pendency of the appeal to the Supreme Court, the Legislature amended N.J.S.A. 18A:28-5 in response to the Appellate Division's decision in Nelson, to clarify that "tenure is acquired in one of the specifically enumerated positions only if the individual has served for the requisite statutorily required period of time in that position." L. 1996, c. 58, §1, eff. June 28, 1996. The statute now reads, in pertinent part: "[T]enure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. Tenure so accrued shall not extend to any other administrative or supervisory position." N.J.S.A. 18A:28-5.

The Supreme Court subsequently reversed the Appellate Division's decision in Nelson, and although it did not expressly overrule the Dennery decision, it noted that Dennery emphasized that the courts "should defer to the State Board in its interpretation of complex tenure laws." Nelson, supra, 148 N.J. at 366 (citing Dennery, supra, 131 N.J. at 637).

The decision in Nelson makes it clear that tenure is not transferable between certificates, or even between endorsements for separately tenurable positions within a single certificate. However, tenure may be transferable within the same endorsement, particularly a supervisor endorsement, which is "generic and authorizes the holder to supervise any subject matter and any grade level." Galbraith v. Lenape Regional High School District, 96 N.J.A.R.2d (EDU) 396, 406, aff'd, 97 N.J.A.R.2d (EDU) 558.

Further, N.J.A.C. 6A:32-5.1(l) makes it clear that principal and vice principal are separate tenurable positions.

To summarize, tenure accrues only as a result of actual work experience in the separately tenurable positions specifically enumerated in N.J.S.A. 18A:28-5, including all positions that require appropriate certificates and endorsements. Tenure accrued in a particular administrative or supervisory position does not extend to any other administrative or supervisory position enumerated in the statute.

The courts have permitted an individual to claim eligibility to a new position based on tenure in another position only when the two positions are "substantially identical." The New Jersey Supreme Court has recognized that, "[w]hen the duties of the position in which a teaching-staff member has acquired tenure are substantially identical to those of the position that the person seeks, a local school board may not sidestep an educator's tenure rights by simply renaming the position or tacking on additional meaningless requirements" and "must extend the teaching-staff member's tenure rights to the newly created position." Dennery v. Passaic County Reg. High School District Bd. of Educ., 131 N.J. 626, 639 (1993); see Viemeister, supra, 5 N.J. Super. at 218 (providing for the reinstatement of a tenured principal on the basis that

his position had not in fact been abolished when the board created the position of "teaching" principal); Vogel v. Ridgefield Bd. of Educ., State Bd. of Educ. (June 5 ,1985), slip op. at 6-8 (holding that the board did not abolish in substance the position of elementary school principal but merely reassigned the duties of that position to a substantially similar position and the board's failure to reinstate petitioner, a tenured principal, to that position violated his tenure and seniority rights).

The Supreme Court in Dennery further explained:

> A mere overlap in duties, however, does not mean that two positions are equivalent for tenure purposes. If a newly-created position is similar to a tenure holder's abolished position but also requires additional duties or different responsibilities, then the newly-created position is not considered to be substantially similar to the former position. Santasiero v. Parsippany-Troy Hills Bd. of Educ., 1984 S.L.D. 854, 879; see also Sandri v. Board of Educ., 1986 S.L.D. 1501 (ruling that duties of abolished position of supervisor of guidance/shop were similar but of greater nature and scope than newly-created position of director of special needs and student services); Rufalo v. Board of Educ., 1 986 S.L.D. 1699 (ruling that despite overlap of duties between post of vice-principal and newly-created supervisor position, positions were "substantially different").
>
> [Dennery, supra, 131 N.J. at 640.]

In the instant matter Petitioner holds a Principal Certificate and served in the position of Assistant Principal/Technology, where he earned tenure in that position. It is undisputed that Petitioner never served in the position of Principal.

Prior to the abolishment of the position of Vice Principal/Technology, SCCST had four administrative positions: Administrative Principal; Vice Principal/Technology; Director of Curriculum and Instruction; and, Special Education Supervisor/Disciplinarian. The Petitioner's previous position of Vice Principal/Technology and the position of Director of Curriculum and Instruction were abolished. The duties of those positions were incorporated into the Principal position the Executive Director (previously the turnaround specialist). That position of Principal

is not substantially identical to the abolished position of Vice Principal/Technology as it encompasses significantly more duties than previously performed by Petitioner as Vice Principal/Technology. Certainly there were some overlap in duties. However, the newly hired Principal was responsible for special education, and discipline. These were not part of Petitioner's duties as Vice Principal/Technology. Further, Petitioner is not qualified to act as supervisor of special education. Accordingly, Petitioner's claim that he has tenure in the position of Principal must fail.

N.J.S.A. 18A:28-9 states:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

A Board has broad discretion to implement RIFs. In Carpenito v. Board of Education of Borough of Rumson, Monmouth County, 322 N.J. Super. 530 (App. Div. 1999) the court states" "If done for proper reasons, such as 'economy' or because of a reduction in the number of pupils enrolled, the effectuation in force is entirely within the authority and discretion of the board."

Here the board reduced the number of administrators from four to two. The express purpose of the reduction was to afford the hiring of a turnaround specialist. The board was faced with a non-renewal of its charter and the closing of the school. The decision to abolish Petitioner's position of Vice Principal/Technology was well within the board's discretion. Further, Petitioner offered no credible evidence whatsoever that the RIF was done in bad faith.

Accordingly, Petitioner's claim that the RIF was done in bad faith must also fail. Based upon the above, I **CONCLUDE** and that the Petitioner does not have tenure

rights to the position of Principal. I further **CONCLUDE** that the RIF was not done in bad faith.

ORDER

It is hereby **ORDERED** that Petitioner's Complaint be **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 12, 2017 — Thomas R. Betancourt

DATE — **THOMAS R. BETANCOURT**, ALJ

Date Received at Agency: September 12, 2017

Date Mailed to Parties: September 12, 2017

db

APPENDIX

List of Witnesses

For Petitioner:

James Baldini, Petitioner

For Respondent:

Edwin Selby, Board President SCCST

Noreen Lazariuk, Executive Director SCCST

List of Exhibits

Joint Submission:

Joint Stipulation of Facts

For Petitioner:

A	Relevant Employment Contracts
B	Baldini C.V. and Qualifications
C	Certificates of Training and Workshops
D	Leave History for James Baldini
F	Evaluations
G	Emails
H	Baldini Application for Principal Position
I	"Rice" Notices and Board Meetings
	SCO 178 was not admitted
	SCO 179 was admitted
	P50-56 was admitted (Board minutes)
J	Job Descriptions
	SCO 462-464 was not admitted
	SCO 554-559 was not admitted
	SCO 628-631 was admitted

SC0 632-637 was admitted

For Respondent:

R-1 Correspondence from the State of NJ Dept. of Education (DOE) placing SCCST on probationary status dated Feb. 16, 2015

R-2 Remedial Plan submitted by SCCST to DOE in March 2015 and revised plan re-submitted in June 2015,

R-3 DOE Probation Summary Report dated June 10, 2015

R-4 Cover letter and job description created by Petitioner

R-5 To-From Reports from appellant dated December 3, 2009

R-12 Respondent's Renewal Application for 2015-2016

R-13 DOE's Probation Site Visit dated Oct. 15, 2015

R-14 DOE's Renewal Site Visit Summary dated Jan. 28, 2016

R-15 Correspondence from DOE renewing SCCST's charter for a period of five years dated Feb. 29, 2016

R-19 August 10, 2015 Board minutes

R-20 August 24, 2015 Board minutes

351-17

AGENCY DKT. NO. 59-3/17

BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
A.B., on behalf of minor child, T.B.,	:	
RESPONDENT.	:	

On June 29, 2017, a final agency decision was rendered in this matter, wherein the Commissioner found that T.B. was not a domiciliary of Red Bank for the 2016-2017 school year and was, therefore, not entitled to a free education in the District's schools during that time. The Commissioner further found that T.B. attended school in the District as an ineligible student for 92 days between September 6, 2016 and January 31, 2017. The Commissioner, therefore, assessed respondent, Alfanette Bronson, $7,099.64 in tuition costs, to be reimbursed to the Red Bank Board of Education for T.B.'s period of ineligible attendance in the District's schools pursuant to *N.J.S.A.* 18A:38-1. The Board subsequently notified the Commissioner that respondent had failed to reimburse petitioner as directed in the final decision, and has requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Respondent offered no reasons why the judgment against her should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Alfanette Bronson is now subject to entry of a judgment by the court in the amount of $7,099.64, which represents the total payment ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 12/08/17
Date of Mailing: 12/08/17

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Commissioner

December 7, 2017

Michelle M. Smith, Clerk
Superior Court of New Jersey
Hughes Justice Complex
25 Market Street, 6th Floor
P.O. Box 971
Trenton, NJ 08625

Re: Request for Docketing of Judgment

Dear Ms. Smith:

In accordance with *N.J.S.A.* 2A:58-10, I am enclosing the Order of the Commissioner of Education finding that Alfanette Bronson is subject to entry of a judgment on the docket of the court due to her failure to pay the tuition assessment ordered in the matter of *Board of Education of the Red Bank Regional High School District, Monmouth County v. A.B., on behalf of minor child, T.B.*[1] By copy of this letter, I am advising Ms. Bronson as well as counsel for the Red Bank Board of Education, of the Commissioner's issuance of the enclosed Order.

If you require anything more, please contact this office at (609) 376-9079.

Very truly yours,

Samantha L. Price, Director
Bureau of Controversies and Disputes

SLP/ATA

Enclosure
c: Alfanette Bronson, *pro se* (with copy of Order)
Anthony P. Sciarillo, Esq. (with copy of Order)
State Law Library (with copy of Order)

[1] Please note that, although the case caption reflects only Ms. Bronson's initials, her full name is included within the body of the Commissioner's Order.

352-17
OAL DKT. NO. EDU 16072-16
AGENCY DKT. NO. 262-9/16

PATRICIA SCHREIBER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY VOCATIONAL TECHNICAL, SCHOOLS, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed. According to the Agreement, the Board will restore two sick days to the petitioner's accumulated sick leave within 30 days after the execution of the Agreement. This date has preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of the settlement payment. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 12/07/17
Date of Mailing: 12/08/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 16072-16

AGENCY DKT. NO. 262-9/16

PATRICIA SCHREIBER,

Petitioner,

v.

BOARD OF EDUCATION OF UNION COUNTY VOCATIONAL TECHNICAL SCHOOLS, UNION COUNTY,

Respondent.

Nicholas Poberezhsky, Esq., for petitioner (Caruso, Smith & Picini, attorneys)

Christina M. DiPalo, Esq., for respondent (LaCorte, Bundy, Varady & Kinsella, attorneys)

Record Closed: October 27, 2017 Decided: October 31, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

Petitioner, Patricia J. Schreiber, seeks to have her sick time restored. The Department of Education transmitted this matter to the Office of Administrative Law, where it was filed on October 21, 2016, for hearing as a contested case. A telephone

prehearing conference was held on November 29, 2016, and the hearing was scheduled April 4, 2017. During a telephone conference held on March 22, 2017, counsel for petitioner requested the matter be resolved by way of summary decision. Thereafter, counsel for the Board advised that the matter had been tentatively settled. Subsequently, counsel for the Board submitted the attached Settlement Agreement and Release, along with the Board resolution, indicating the terms of agreement between the parties.

I have reviewed the record and the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

10/31/17
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency:

11-2-17

Date Mailed to Parties: NOV 2 2017

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

RECEIVED
2017 AUG -7 P 4:47
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SETTLEMENT AGREEMENT & RELEASE

This Settlement Agreement and Release (hereinafter referred to as "Agreement") is made this 8th day of June 2017, by and between the Union County Vocational Technical School District Board of Education and its agents, past and present members, employees, attorneys, successors, heirs and assigns (collectively "the Board"), and Patricia Schreiber and her agents, attorneys, successors, heirs and assigns (collectively "Schreiber"). (Schreiber and the Board will hereinafter be collectively referred to as the "Parties").

WHEREAS, Schreiber is employed with the Board as a tenured art teacher; and

WHEREAS, Schreiber filed a Petition for Relief with the Commissioner of Education to challenge the Board's alleged improper charging of two (2) sick days [OAL Dkt. No.: EDU 16072-2016N; Agency Ref. No.: 262-9/16]; and

WHEREAS, the Board filed an Answer to Ms. Schreiber's Petition for Relief, disputing her entitlement to the restoration of the two (2) sick days; and

WHEREAS, the matter was transferred to the Office of Administrative Law and assigned to the Honorable Michael Antoniewicz, A.L.J., for adjudication; and

WHEREAS, the Parties are desirous to amicably resolve this matter in lieu of proceeding with litigation; and

NOW, THEREFORE, in consideration of the agreements contained herein, the Parties agree as follows:

1. In exchange for the below consideration, Schreiber will immediately dismiss with prejudice the Petition for Relief currently pending against the Board [OAL Dkt. No.: EDU

16072-2016N; Agency Ref. No.: 262-9/16]. Schreiber further agrees not to file a new claim or lawsuit, in any forum, against the Board and its past and present members, officers, administrators, agents, employees, attorneys, successors, heirs and assigns, for any claims or rights, whether known or unknown, arising out of or related to the allegations set forth in the litigation captioned Patricia Schreiber v. Board of Education of Union County Vocational Technical Schools, OAL Dkt. No.: EDU 16072-2016N; Agency Ref. No.: 262-9/16.

2. The Board will restore two (2) sick days to Schreiber's accumulated sick leave within thirty (30) days of the execution of this Agreement.

3. The signatures of the parties below indicate that they have had an opportunity to review this Agreement with their respective Counsel, that they have read and understood the provisions, and that they have executed it voluntarily with full knowledge of the significance of all provisions.

4. This Agreement is executed and all consideration is given in final settlement of disputed claims and shall not be construed as an admission of any allegation or of liability by the Board, and any such liability is expressly denied.

5. This Agreement shall not be modified or amended except by writing duly executed and signed by the parties to this Agreement.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement as of the date first written above.

By: _____
Patricia Schreiber

STATE OF NEW JERSEY:

: ss

COUNTY OF ~~UNION~~ Essex

I certify that on July 20th, 2017, Patricia Schreiber personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in this Agreement, and that he personally signed this document, and signed, sealed, and delivered this document as his act and deed.

MAREK POPLAWSKI
Notary Public
State Of New Jersey
My Commission Expires March 22, 2021
ID# 50034737

_____
Nicholas Poberezhsky, Esq.
Attorney for Petitioner

8/2/17
Dated:

_____
Robert F. Varady, Esq.
Attorney for Union County Vocational Technical School District Board of Education

8/3/17
Dated:

353-17

353-17
OAL DKT. NO. EDU 5917-17
AGENCY DKT. NO. 62-3/17

Z.S., on behalf of minor children, M.M., M.M., and M.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 12/07/17

Date of Mailing: 12/08/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05917-17N
AGENCY DOCKET NO. 62-3/17

Z.S. ON BEHALF OF MINOR CHILDREN,
M.M., M.M. AND M.M.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FAIRLAWN, BERGEN COUNTY,
Respondents.

Jeffrey M. Parella, Esq. appearing on behalf of petitioners (Sekas Law Group, LLC)

Paul Green, Esq., for respondent (Schenck, Price, Smith & King, LLP)

Record Closed: October 31, 2017 Decided: October 31, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on April 28, 2017, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A hearing was scheduled for June 6, 2017 which was adjourned due to the parties negotiating settlement. The matter was rescheduled for July 19 and 25, 2017. Both of the July hearings were cancelled due to the parties reaching a tentative

Settlement Agreement. The matter was rescheduled to October 31, 2017 during which time the parties forwarded the fully executed Stipulation of Settlement and Release, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement meets the requirements of N.J.A.C. 1:1-19.1 and that the stipulation should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 31, 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

Date Mailed to Parties: NOV 2 2017
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for Respondent Fair Lawn
Board of Education

RECEIVED
2017 OCT 31 A 10:50
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Z.S. o/b/o M.M., M.M., and M.M.,

Petitioner,

v.

FAIR LAWN BOARD OF EDUCATION,

Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

OAL Dkt. No. EDU 05917-17
Agency Ref. No. 62-3/17

STIPULATION OF SETTLEMENT AND RELEASE

This Agreement is made by and between Petitioner, Zuzanna Szczech ("Z.S."), and the Respondent, Fair Lawn Board of Education.

RECITALS

WHEREAS, in or about January of 2017, Respondent Fair Lawn Board of Education ("the Board") determined, based on the results of a residency investigation and the evidence produced at a hearing before the Board requested by Z.S., that minor students M.M., M.M., and M.M. were not domiciled in the Fair Lawn School District ("District") and thus not entitled to a free, public education in the District, and the Board therefore passed a resolution ordering the removal of the students from the District; and

WHEREAS, Petitioner thereafter commenced an administrative action to challenge the Board's residency determination with regard to M.M., M.M., and M.M.; and

WHEREAS, this administrative action is captioned Z.S. o/b/o M.M., M.M., and M.M. v. Fair Lawn Board of Education, and is currently pending before the Commissioner of

Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 05917-17, Agency Dkt. No. 62-3/17 ("the Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, in order to avoid the expense, inconvenience, distractions and inherent uncertainties associated with continuation of this dispute, and the fees and expenses that inevitably would result therefrom, the Parties, by this Agreement, herein agree to adopt a full and final settlement of any and all claims, lawsuits, complaints, and/or disputes between Petitioner and Respondent in connection with any and all damages and losses arising from the Litigation; and

WHEREAS, by this Agreement, Petitioner will voluntarily dismiss the Litigation with prejudice, and without costs to any party as against the other;

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. The Parties mutually agree that, during the pendency of the residency investigation, M.M., M.M., and M.M. were found by the Board not to be domiciled in Fair Lawn.
2. Petitioner understands and agrees that M.M., M.M., and M.M. are not eligible for enrollment in the District and that Petitioner must make alternative plans for the education of M.M., M.M., and M.M. for the 2017-2018 school year and subsequent school years.
3. Petitioner agrees that tuition for M.M., M.M., and M.M. for the period of ineligible attendance is due and owing to the Board, for which Petitioner is fully liable. The Board has agreed to not pursue its Counter Claims against Petitioner seeking full tuition for the

period of ineligible attendance, in exchange for the consideration and other terms and conditions specified in this Stipulation.

4. Petitioner and Respondent consent to the assessment by the Commissioner of Education of a fixed money amount against Petitioner in the amount of Twenty-Two Thousand Dollars ($22,000.00). By execution of this Stipulation, Petitioner consents to the Commissioner's issuance of a final order of assessment in such amount, and notification to the Clerk of the Superior Court pursuant to *N.J.A.C.* 6A:3-11.1 that the final order of assessment is subject to recording on the judgment docket of the court pursuant to *N.J.S.A.* 2A:58-10.

5. The Petitioner further shall permit the Board to place a Twenty-Two Thousand Dollar ($22,000.00) (the "Settlement Amount") Mortgage (the "Mortgage") on real estate owned by Petitioner located at 20 Spruce Street, Elmwood Park, New Jersey 07407 (the "Property"). The Board, at the Petitioner's sole expense, shall, within fifteen (15) days of the date hereof, order a title search to confirm the lien position of the Mortgage prior to recordation. Failure by Petitioner to execute any and all documents necessary to perfect the Board's lien against the Property shall be a breach of this Agreement.

6. In the event Petitioner sells or otherwise disposes or transfers ownership of the Property, Petitioner acknowledges and agrees that the Settlement Amount shall become immediately due and owing to the Board. To the extent that the proceeds of the Property sale do not satisfy the full amount due and owing under this Agreement, Petitioner shall remain personally liable for any deficiency.

7. Petitioner, in consideration of this Stipulation of Settlement and Release, and in full, final, and complete settlement of the matter, hereby agrees to a withdrawal and/or dismissal, with prejudice, of the Petition of Appeal in this matter

8. Petitioner further agrees to indemnify Respondent for any and all costs, including court costs and attorneys' fees, associated with any action instituted by Respondent to enforce the terms of this Agreement should Petitioner breach the Agreement and/or fail to adhere to the agreed-upon terms and conditions contained herein.

9. The terms of this Agreement shall in no way constitute acceptance or assent by the Board that M.M., M.M., and M.M., nor any other child of Petitioner, as may be applicable, is automatically entitled to a free public education in the District at any point in the future, and the Parties understand and agree that Respondent reserves the right to investigate M.M., M.M., and M.M.'s and/or Petitioner's residency status in the District at any time should Petitioner attempt to re-enroll any of her children in the District or if it otherwise becomes necessary to do so, in order to determine whether or not Petitioner and/or her child(ren) are domiciled in the District.

10. This Agreement is subject to approval by the Board. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

11. In exchange for the above consideration, Respondent Board agrees to release Petitioner from any and all claims, cross-claims, counterclaims, demands, liabilities, damages, indebtedness, costs, attorneys' fees, actions or obligations of any nature, which solely arise out of or are related in any way to this Litigation, through the date of this Agreement and agrees to the withdrawal/dismissal of any counter-claim for tuition payments, through the date of this Agreement.

12. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

13. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

14. Petitioner hereby represents that she is freely entering into this Agreement, that she was advised of her right to obtain counsel of her choosing and has done so, and that she has read and fully understands the contents and effects of this Agreement.

15. This Settlement is subject to the approval of the Administrative Law Judge assigned to this matter and the Commissioner of Education. The terms of this Agreement shall not be binding until said approvals are received.

16. This Agreement shall be binding upon all parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors, predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, shareholders, members, employees, agents and assigns.

17. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than those set forth herein. This Agreement supersedes all previous arrangements or understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioner and Respondent.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, consisting of six pages, on the dates set forth below.

PETITIONER

Date: 9/27/2017 Z Szczech
Zuzanna Szczech, Petitioner

FOR RESPONDENT,
FAIR LAWN BOARD OF EDUCATION

Date: 10/18/17
Eugene Banta, Board President

STATE OF NEW JERSEY)
ss:
COUNTY OF Bergen)

I CERTIFY that on September 27, 2017, Zuzanna Szczech, Individually and o/b/o her minor children, personally came before me and acknowledged under oath, to my satisfaction, that she:

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as her act and deed.

Attorney or Notary Public

EVDOXIA HATZIOANNOU
Notary Public, State of New Jersey
My Commission Expires
October 09, 2021

354-17

OAL DKT. NO. EDU 06141-17
AGENCY DKT. NO. 74-4/17

P.J., on behalf of minor child, T.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RED BANK, MONMOUTH COUNTY	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 12/11/17

Date of Mailing: 12/11/17

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06141-17
AGENCY DKT. NO. 74-4/17

P.J., ON BEHALF OF MINOR CHILD, T.H.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF RED BANK, MONMOUTH COUNTY,
Respondent.

P.J., on behalf of minor child, **T.H.,** petitioner, pro se

Richard D. McOmber, Esq., for respondent (McOmber & McOmber, P.C., attorneys)

J.P., participant, on behalf of petitioners

Record Closed: October 20, 2017 Decided: October 25, 2017

BEFORE **JACOB S. GERTSMAN,** ALJ:

On April 11, 2017, petitioner P.J., on behalf of minor child, T.H., filed a residency appeal from a determination of the Red Bank Board of Education (Board) that T.H. was not properly residing in the District, and was not entitled to a free public education therein,

pursuant to N.J.S.A. 18A:38-1, N.J.A.C. 6A:3-8.1, and N.J.A.C. 6A:22. This matter was transmitted to the Office of Administrative Law on May 3, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A motion to participate pursuant to N.J.A.C. 1:1-16.6, was filed on August 2, 2017, by J.P., mother of minor child T.H. The motion was granted on August 8, 2017.

The matter was scheduled for an evidentiary hearing on September 18, 2017. Prior to the commencement of the hearing, counsel announced that they had reached an accord which was contingent on the Board's approval. On October 20, 2017, I received a certified copy of an excerpt of the Board's minutes from September 19, 2017, containing a resolution approving same. (J-2.) The settlement agreement indicating the terms thereof, is attached and fully incorporated herein. (J-1.)

I have reviewed the record and terms of settlement and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached document.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time

limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 25, 2017
DATE

JACOB S. GERTSMAN, ALJ

Date Received at Agency: 10/27/17

Date Mailed to Parties: 10/27/17

nd

APPENDIX

EXHIBITS

Jointly Submitted:

J-1 Stipulation of Settlement

J-2 True and Accurate Excerpts From the Minutes of the September 19, 2017, Meeting of the Red Bank Borough Board of Education, from Debra Papagallo, Business Administrator/Board Secretary, Red Bank Borough Schools, dated October 2, 2017

P.J., o/b/o minor child, T.H. v. Borough of Red Bank BOE Monmouth Co.
OAL Docket No.: EDU 06141-2017S

Settlement

P.J. o/b/o minor child T.H. ("Petitioner") and the Board of Education Borough of Red Bank, in the County of Monmouth ("Board") hereby agree to resolve the above captioned matter with the below terms and conditions:

(1) Petitioner agrees to withdraw T.H. from the Red Bank School District on or before January 3, 2018 and enroll T.H. in Tinton Falls School District ("Tinton Falls");

(2) The Board will work with Tinton Falls, the Petitioner and J.P., mother of T.H. ("Intervener") to ensure a smooth transition for T.H. from the Red Bank School District to Tinton Falls;

(3) Parties agree to enter into a mutual release of any and all claims up to the present date, including but not limited to any claim by the Board for fees and costs related to T.H.'s attendance in the Red Bank School District. The Board thus agrees to waive all said fees and costs;

(4) Neither the Board nor Petetioner admit any liability with respect to this settlement;

The settlement is hereby agreed to by the following:

Patricia Jones

Patricia Jones
(Petitioner)

Jamira Patrick
(Intervenor)

R. Armen McOmber
(Board of Education)

This Settlement shall become final upon ratification by the Board at its next regular meeting. Counsel to the Board shall provide notice of said ratification to the Court and all parties.

J-2

Red Bank Borough Schools
Debra Pappagallo, School Business Administrator/Board Secretary
76 Branch Avenue – Red Bank, New Jersey 07701
Telephone: 732.758.1500 x1508 – Fax: 732.758.0140
www.rbb.k12.nj.us

October 2, 2017

The following is an excerpt from the minutes of the September 19, 2017 meeting of the Red Bank Borough Board of Education:

VI. ACTION AGENDA
Ms. Jones motioned, seconded by Ms. Roseman, to approve the following:

BUSINESS – 3000
BE IT RESOLVED by the RED BANK BOROUGH BOARD OF EDUCATION that upon the recommendation of the Superintendent the following FINANCE resolution(s) are approved as indicated:

3144. RESIDENCY
Be it resolved that the Board of Education of the Borough of Red Bank, in the County of Monmouth ("Board") herby ratifies a negotiated agreement between P.J. on behalf of minor child, Student ID #10633, and the Board on this 19th day of September, 2017, as discussed with counsel.

ROLL CALL VOTE:
AYES: Mr. Ballard, Mr. Forest, Ms. Jones, Mr. Labetti, Ms. Lewis, Miss Lowe, Ms. Roseman, Dr. Stone, Ms. Viscomi NAYS: None ABSTENTIONS: None

I certify that the preceding is a true and accurate excerpt from the minutes of the September 19, 2017 meeting of the Red Bank Borough Board of Education.

Respectfully submitted,

Debra Pappagallo
Business Administrator/Board Secretary

2017 OCT 20 P 2:53

357-17

JUAN GRILES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the decision of the Executive Committee of the New Jersey State Interscholastic Athletic Association (NJSIAA), suspending him from coaching at any NJSIAA school for two years and fining him $1000.00 for violation of the Association's Recruitment Rule. Petitioner contended, *inter alia*, that he was not afforded the requisite due process before the NJSIAA, and that both the decision of the Executive Committee and the underlying decision of the Controversies Committee were arbitrary, capricious and unreasonable.

The NJSIAA contended, *inter alia*, that: the petitioner was provided with full and fair due process; the decision of the Executive Committee was not arbitrary and capricious, as there was sufficient evidence in the record that petitioner violated recruitment rules when he used his basketball contacts to help enroll multiple international students at Paterson's Eastside High School who had little or no connection to Paterson, and provided housing and food for those students who were members of Eastside's basketball team; and it is a violation of NJSIAA rules to make "any effort to proselytize, pressure, urge or entice a student to enroll in or transfer to a school for athletic purposes." The NJSIAA emphasized that its decision is entitled to wide deference, and should be affirmed by the Commissioner.

The Commissioner upheld the NJSIAA's decision and dismissed the petition, finding, *inter alia*, that petitioner did not meet his burden so as to entitle him to prevail on appeal. In so deciding, the Commissioner – who may not substitute her judgment for that of the NJSIAA on appeal – noted that the ban on athletic recruitment does not require a showing that the players received an athletic advantage or that they provided an actual athletic advantage to the basketball team, but simply that the players enrolled in the Paterson School District for an athletic reason. There being ample evidence that this was the case herein, the Commissioner found that the Executive Committee's ruling that petitioner violated NJSIAA's Recruitment Rule was not arbitrary, capricious or unreasonable.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 18, 2017

357-17

AGENCY DKT. NO. 231-9/17

JUAN GRILES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

For Petitioner, Juan Griles, Alfred F. Maurice, Esq.

For Respondent, New Jersey State Interscholastic Athletic Association, Michael W. Herbert, Esq.

This case involves an appeal of a decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) Executive Committee, suspending the petitioner – Juan Griles – from coaching at any NJSIAA school and fining him in the amount of $1000.00 for recruiting violations. On appeal, the petitioner argues that he was not afforded the requisite due process before the NJSIAA and that the decisions of both the Controversies Committee and the Executive Committee were arbitrary, capricious and unreasonable.

Athletic competition in New Jersey's public schools is overseen by the NJSIAA, a voluntary, non-profit organization which promulgates the rules and regulations governing high school athletics. *See, B.C. v. Cumberland Reg. Sch. Dist.*, 220 *N.J. Super.* 214, 234 (App. Div. 1987). The NJSIAA member schools have adopted a number of eligibility rules for student athletes that have been approved by the Commissioner of Education pursuant to *N.J.S.A.* 18A:11-3, and are published in the NJSIAA Handbook. One of the eligibility rules is the Recruitment Rule, which prohibits schools – or anyone associated with the school – from engaging in any effort to "proselytize, pressure, urge or entice

a student to enroll in or transfer to a school for athletic purposes." NJSIAA Bylaws, Article V, Section 4.D. Schools accused of recruiting are subjected to a hearing before the Controversies Committee, and face potential penalties including probation, forfeit of games and/or championship rights, suspension of players and/or coaches, and fines of up to $1000.00 per party. NJSIAA Bylaws, Article X, Penalties.

On February 6, 2017, New Jersey Advanced Media published an article regarding multiple international students who were living with the petitioner and playing on the Eastside High School basketball team, which was coached by the petitioner. Further reports also surfaced regarding potential recruitment violations regarding players on the Eastside High School girls basketball team. These allegations led to the Paterson School District's (Paterson) voluntary withdrawal from the 2017 State Championship Tournament, and the suspension and/or termination of many employees. Paterson also retained former New Jersey Supreme Court Justice John Wallace to conduct an internal investigation of the boys and girls basketball programs. Justice Wallace issued a report detailing numerous violations of District policies and NJSIAA rules on the part of various coaches and administrators at Eastside High School.

The NJSIAA reviewed the report and determined that a hearing should be held before the NJSIAA Controversies Committee regarding the potential violation of NJSIAA rules. Following a hearing where testimony was taken, the Controversies Committee found that the petitioner violated NJSIAA's Recruitment Rule.[1] Specifically, the Controversies Committee found that the petitioner, through his basketball contacts, helped to enroll students at Eastside High School who had little to no connection with Paterson, and that the petitioner provided housing and food for those students who were members of the basketball team. As a result, the petitioner engaged in an effort to "proselytize, pressure, urge, or entice a student to enroll in or transfer to a school for athletic purposes." NJSIAA

[1] The Controversies Committee also found that Paterson and Ray Lyde, Jr. – the girls basketball coach – violated NJSIAA rules and imposed penalties on both Paterson and Coach Lyde. Those findings and penalties are not the subject of this appeal.

Bylaws, Article V, Section 4.D. On August 3, 2017, the petitioner appealed the decision of the Controversies Committee to the Executive Committee. Following a hearing on September 13, 2017 before the Executive Committee, during which counsel for the petitioner presented oral argument in support of his appeal, the Executive Committee unanimously affirmed the decision of the Controversies Committee.

On September 28, 2017, the petitioner filed a petition with the Commissioner of Education challenging the decision of the NJSIAA. On appeal, the petitioner maintains that he was not afforded the requisite due process before the NJSIAA. First, the hearing was held before the Controversies Committee on June 13, 2017 and counsel for the petitioner did not receive notice of the hearing until June 7, 2017, less than a week before the hearing date. Additionally, the petitioner argues that he never had the opportunity to review the evidence against him in advance of the hearing before the Controversies Committee; therefore, he had no ability to present a defense or otherwise present evidence on his behalf. The petitioner also contends that the Executive Committee undertook no deliberation prior to rubber stamping the decision of the Controversies Committee.

In addition to the lack of due process, the petitioner argues that the decision of both Committees finding that the petitioner engaged in recruiting was arbitrary, capricious and unreasonable. The residence of all of the students who lived with the petitioner was completely lawful and had nothing to do with their eligibility to play basketball. Furthermore, no athletic advantage was gained by the basketball program based upon the enrollment of the students and in fact their roles on the varsity and junior varsity teams were de minimus. Moreover, the Controversies Committee found that the petitioner engaged in recruiting, despite Justice Wallace finding in his report that the petitioner was not seeking athletic advantage but instead was acting as a humanitarian. Finally, the punishment that the petitioner

received was twice the penalty received by the girls basketball coach for ostensibly the same alleged offense. As a result, the petitioner argues that the NJSIAA's decision should be overturned.

In reply, the NJSIAA maintains that the Executive Committee's decision was not arbitrary, capricious or unreasonable and is entitled is wide deference. The NJSIAA argues that the petitioner was provided with full and fair due process. Prior to the hearing before the Controversies Committee, the petitioner was given the opportunity to submit documentary evidence or sworn statements. The petitioner also could have presented testimony at the hearing but he chose not to appear. Significantly, petitioner did not object to the notice he received for the June 13, 2017 hearing at any time prior to the hearing. Additionally, the petitioner was permitted to appeal the Controversies Committee's decision to the Executive Committee. In that appeal, the petitioner submitted a brief in support of his position, which was provided to all of the members of the Executive Committee prior to the meeting. Counsel for the petitioner presented oral argument to the committee members, which was fully considered by the Executive Committee. Therefore, the NJSIAA provided the petitioner with substantial and fair due process.

The NJSIAA also contends that the decision of the Controversies Committee which was upheld by the Executive Committee was supported by sufficient evidence and should not be overturned by the Commissioner. It is a violation of NJSIAA rules to make "any effort to proselytize, pressure, urge or entice a student to enroll in or transfer to a school for athletic purposes." NJSIAA Bylaws, Article V, Section 4.D. This includes providing any form of monetary assistance to a student to enable that student to enroll at school for athletic purposes. In this case, the petitioner had multiple students living in his home who also became members of the basketball team that he coached. Many of the students had no connection to Paterson, and came there solely for the purposes of enrolling at Eastside High School. The evidence also showed that all of the students' journeys to Paterson were

facilitated through contacts the petitioner made in the basketball world. Moreover, none of the students who joined the basketball team for the 2016-2017 school year had transfer forms completed until after the media reports were released.

The Controversies Committee noted that it was unconvinced by the conclusion of Justice Wallace regarding athletic recruitment because Justice Wallace erroneously focused on whether the petitioner was attempting to gain an athletic advantage by enrolling the students. The proper inquiry for purposes of the Recruitment Rule is whether the petitioner engaged "any effort to proselytize, pressure, urge or entice a student to enroll in or transfer to a school for athletic purposes." NJSIAA Bylaws, Article V, Section 4.D. Providing housing for students who became members of his basketball team clearly meets the definition of recruitment. Finally, as a coach for a NJSIAA member school who violated NJSIAA's rules, the petitioner was subject to the penalties enumerated in Article X, which specifically include suspension and the imposition of fines. Therefore, the Commissioner should affirm the decision of the Executive Committee and dismiss the petition in its entirety.

It is well-established that the Commissioner's scope of review in matters involving NJSIAA decisions, including determinations made by the Executive Committee, is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. A petitioner seeking to overturn a decision of the NJSIAA bears the burden of proof. *Id.* As such, the Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious or unreasonable manner.[2] See *N.J.A.C.* 6A:3-7.5(a)(2); *see also B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Moreover, "where there is room for two opinions, action is

[2] Arbitrary and capricious means "willful and unreasoning action, without consideration and in disregard of circumstances." *Bayshore Sew. Co. v. Dep't of Envt. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974) (citations omitted).

not arbitrary or capricious when exercised honestly and upon due consideration." Bayshore, supra, at 199-200. Therefore, the Commissioner may not substitute her own judgment for that of the NJSIAA, where due process has been provided and where there is sufficient credible evidence in the record to serve as a basis for the decision reached by the NJSIAA. *N.J.A.C.* 6A:3-7.5(a)(1); *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259.

Upon consideration of the record and in light of the prescribed standard of review, the Commissioner finds that the petitioner has not met his burden on appeal. As a threshold matter, the petitioner was afforded adequate due process before the NJSIAA. The petitioner was provided notice of the hearing through his counsel, and he was given the opportunity to testify and present evidence at the hearing before the Controversies Committee. The petitioner opted instead not to attend the hearing, and did not even submit evidence or sworn statements for the Committee's consideration. Petitioner did exercise his right to appeal the decision of the Controversies Committee to the Executive Committee and was he provided with due process before the Executive Committee. Counsel for the petitioner submitted a position paper to the Executive Committee and provided oral argument before that Committee, all of which were considered by its members before a decision on the appeal was rendered.

Further, the Commissioner cannot find that the NJSIAA applied its rules in a patently arbitrary or unreasonable manner when it found that the petitioner violated the Recruitment Rule. It is undisputed that the petitioner had multiple students living in his home who also became members of the basketball team that he coached. Many of the students had no connection to Paterson; their arrival in Paterson was facilitated through contacts the petitioner made in the basketball world; and they came to Paterson solely for the purpose of enrolling at Eastside High School. Moreover, none of the students who joined the basketball team for the 2016-2017 school year had transfer forms completed until after

the media reports regarding the circumstances of their living situation were released.[3] Importantly, the ban on athletic recruitment does not require a showing that the players received an athletic advantage or that they provided an actual athletic advantage to the basketball team, but simply that the players enrolled in the Paterson School District for an athletic reason. There is ample evidence in the record to demonstrate that the decision of the Executive Committee – finding that the petitioner violated the Recruitment Rule – was not arbitrary, capricious or unreasonable. Likewise, the penalty imposed on the petitioner for violation of the NJSIAA's rules was not arbitrary, capricious or unreasonable.

Accordingly, the NJSIAA's decision is upheld and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

Kimberly Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 12/18/17

Date of Mailing: 12/18/17

[3] The petitioner concedes that he is not intimate with the NJSIAA rules and relied on the administration to make eligibility determinations.

[4] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1). Commissioner decisions are appealable to the Superior Court, Appellate Division.

358-17

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the decision of the Executive Committee of the New Jersey State Interscholastic Athletic Association (NJSIAA), disqualifying the Paterson School District's boys and girls basketball teams from participating in state tournaments for two years as one of several penalties imposed upon the District for egregious violations of NJSIAA rules and regulations. Petitioner contended, *inter alia*, that both the decision of the NJSIAA Executive Committee and the underlying decision of the Controversies Committee were arbitrary, capricious and unreasonable because the penalty imposed would have a "disproportionate impact" on students, parents, and fans of the basketball teams; the petitioner further claimed that "it shocks the conscience that NJSIAA, presumably charged with instilling the values of fair play and sportsmanship, would penalize children for the acts of adults."

The NJSIAA contended, *inter alia*, that: the petitioner was provided with full and fair due process; petitioner misstated the applicable standard of review herein, as the Commissioner's review is appellate in nature and the arbitrary, capricious or unreasonable standard is applicable in this case; the decision of the Executive Committee was not arbitrary and capricious, as it is supported by sufficient credible evidence in the record showing that petitioner violated several NJSIAA rules and regulations; and NJSIAA acted within its authority when it disqualified the petitioner's basketball teams from playing in the state tournament for two years based on violation of NJSIAA rules. The NJSIAA urged the Commissioner to affirm the decision of the NJSIAA Executive Committee.

The Commissioner upheld the NJSIAA's decision and dismissed the petition, finding, *inter alia*, that petitioner did not meet its burden so as to entitle the District to prevail on appeal. In so deciding, the Commissioner – who may not substitute her judgment for that of the NJSIAA on appeal – noted that petitioner's contentions that the "values associated with interscholastic athletics include fair play, integrity, and good faith sportsmanship" and the goals of interscholastic athletics to prepare "student athlete participants for life by instilling within them overriding notions of teamwork, fair play and discipline," are well aligned with the NJSIAA's decision to disqualify Paterson's basketball teams from participating in tournament play as a consequence of egregious violations of NJSIAA rules and regulations.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 18, 2017

358-17
AGENCY DKT. NO. 233-10/17

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	

For Petitioner, Frances E. Barto, Esq. (Barto & Barto, LLC)

For Respondent, Kayleen Egan, Esq. (Parker McCay, P.A.)

In this matter, petitioner seeks review of the decision of the Executive Committee of the New Jersey State Interscholastic Athletic Association (NJSIAA) affirming the penalty imposed on the District by its Controversies Committee. The Controversies Committee found that petitioner violated several rules of the NJSIAA and imposed – among other penalties – a two-year disqualification of the boys and girls basketball teams from participating in the state tournament for 2017 and 2018, which is the subject matter of this appeal.

On appeal, petitioner maintains that the NJSIAA's decision was arbitrary, capricious and unreasonable because the penalty imposed on petitioner has a "disproportionate impact," and should be reversed. Petitioner argues that the penalty ultimately punishes the students, the parents, and the community for the conduct of the adults who were in charge of the basketball program. Petitioner states that the District's students are generally poor and living in an urban environment where the student athletes depend on sports in numerous ways, including college scholarships and opportunities to play at a more competitive level. Petitioner also argues

that the standard of review in this matter should be whether the penalty is disproportionate to the offense alleged because the District is not challenging the findings but rather the penalty that "disproportionately impacts" the students, the parents, and the fans of the teams. Petitioner claims that "it shocks the conscience that NJSIAA, presumably charged with instilling the values of fair play and sportsmanship, would penalize children for the acts of adults." Petitioner's Brief at 12-13.

The NJSIAA maintains that petitioner was provided adequate due process and that the Executive Committee's decision was not arbitrary or capricious, as it was supported by sufficient credible evidence. Respondent argues that petitioner has misstated the applicable standard of review, as the Commissioner's review is appellate in nature and the arbitrary, capricious, or unreasonable standard should be applied. Respondent contends that the NJSIAA acted within its authority when it restricted the District's eligibility for the tournaments for violation of NJSIAA rules, and notes that it considered petitioner's voluntary withdrawal from the 2017 tournament as "time served" in rendering a proper penalty. Respondent further contends that the fact that individual players were not involved in the violation of NJSIAA rules is immaterial to the penalty imposed because the penalty is imposed on the District and not the students. The NJSIAA notes that students have no right to participate in extra-curricular athletics, and applying its rules differently to urban districts – as petitioner proposes – would be arbitrary and capricious. Respondent submits that the NJSIAA, therefore, did not apply its rules in an arbitrary, capricious or unreasonable manner with respect to the petitioner, and as such, the Commissioner should affirm its decision.

Petitioner filed a sur-reply on November 17, 2017, in violation of *N.J.A.C.* 6A:3-7.3(c), arguing that the NJSIAA's decision was arbitrary, capricious and unreasonable under the circumstances because the NJSIAA rendered a different decision in a separate matter involving recruitment of student athletes. On November 22, 2017, respondent

submitted a letter requesting that the Commissioner decline to consider petitioner's submission. The Commissioner has considered petitioner's sur-reply – despite the submission having been filed without permission – as well as respondent's correspondence thereof, and finds that the arguments set forth in the sur-reply have no bearing on the facts and the penalties imposed in this matter

The NJSIAA is an independent, voluntary association of public, non-public, and independent high schools in New Jersey, responsible for the promulgation of rules and regulations in connection with orderly administration of athletic programs. The member schools are bound by the NJSIAA rules and regulations – as set forth in its Constitution, Bylaws, Rules and Regulations – including eligibility requirements, athletic recruitment and transfer procedures, and administrative responsibilities of member schools. The NJSIAA is charged with enforcing its rules and regulations, and decisions made by the NJSIAA relating to any member public school district may be appealed to the Commissioner pursuant to *N.J.S.A.* 18A:11-3. However, it is well-established that the Commissioner's scope of review in matters involving NJSIAA decisions, including determinations made by the Executive Committee, is appellate in nature. *See Bd. of Educ. of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182 (Feb. 10, 1992). A petitioner seeking to overturn a decision of the NJSIAA bears the burden of proof. *Id.* As such, the Commissioner may not overturn an action by the NJSIAA absent a demonstration by petitioner that the NJSIAA applied its rules in a patently arbitrary, capricious or unreasonable manner.[1] *See N.J.A.C.* 6A:3-7.5(a)(2); *see also B.C. v. Cumberland Reg'l Sch. Dist.*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Moreover, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration."

[1] Arbitrary and capricious means "willful and unreasoning action, without consideration and in disregard of circumstances." *Bayshore Sew. Co. v. Dep't of Envt. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

Bayshore, *supra,* at 199-200. Therefore, the Commissioner may not substitute her own judgment for that of the NJSIAA where due process has been afforded and where exists sufficient credible evidence in the record to serve as a basis for the decision rendered by the NJSIAA. *See N.J.A.C.* 6A:3-7.5(a)(1); *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259.

Upon careful review and consideration, the Commissioner upholds the decision of the NJSIAA. The Commissioner finds that petitioner has not met its burden to prevail on appeal, as the petitioner's due process rights were not violated; further, the evidence in the record supports the Commissioner's finding that the NJSIAA decision in this matter was not arbitrary, capricious or unreasonable.[2] As noted above, petitioner disagrees with the penalty imposed, specifically, the District's two-year disqualification from the state tournament for 2017 and 2018.[3] Petitioner's basis for seeking reversal of the penalty is the alleged "disproportionate impact" the penalty has on the students, including "the potentially far reaching consequences of depriving student athletes of life changing opportunities." Petitioner's Brief at 20. The Commissioner is unpersuaded by petitioner's arguments.

As a preliminary matter, the standard of review is not whether the "punishment is so disproportionate to the offense" that it is "shocking to one's sense of fairness[,]" *Id.*. at 12; rather, the Commissioner will uphold a penalty so long as it is reasonable and proper based on the record. In this matter, petitioner was found – as amply supported by the evidence in the record – to have violated several rules of the NJSIAA. Such violations – *without exception* – result in the consequences outlined in the Bylaws, including forfeiture of games, probation, and/or disqualification from tournaments. *See NJSIAA Bylaws*, Article V. The Controversies

[2] Although petitioner does not allege violation of its due process rights, Commissioner's scrutiny of same is to reiterate her full consideration of the matter and her limited scope of review of NJSIAA appeals.

[3] Petitioner has argued that the District "voluntarily" withdrew from the 2017 tournament; however, such *voluntary* withdrawal is irrelevant for the purposes of this appeal as forfeiture of games and subsequent disqualification from the 2017 tournament was inevitable and mandatory – *without a right of appeal* – pursuant to *NJSIAA Bylaws*, Article X and Article V.

Committee may also impose additional penalties on the offending school district. *See id.* at Article X. The Controversies Committee was, therefore, within its authority to deem the District's basketball teams ineligible for the 2018 tournament as a result of petitioner's violations.

With regard to petitioner's arguments as to the purported impact on the student athletes and the greater school community, the District has not provided tangible support for such assertions.[4] Specifically, the Commissioner is not convinced that the student athletes of the basketball teams would lose the opportunity to go to college or be deprived of scholarships because of the teams' disqualification from a tournament; particularly when the teams are not barred for playing basketball against other schools during its regular season, which allows the District's student athletes to participate and compete in the sport, and showcase their skills and abilities as they otherwise would. Therefore, petitioner's arguments are speculative, at best. Petitioner also fails to acknowledge that the NJSIAA rules clearly set forth the range of penalties that may be imposed on a school district and an *entire team*. Notably, when a team has been unjustly enriched via a rule violation, such as participation in games by ineligible players, the resulting penalty will affect the entire team. Consequently, the penalty imposed on the District in this matter is certainly not unique, nor is it contrary to the rules. Of note is petitioner's contention that the "values associated with interscholastic athletics include fair play, integrity, and good faith sportsmanship" and the goals of interscholastic athletics is to "prepare its student athlete participants for life, by instilling within them overriding notions of teamwork, fair play and discipline." Petitioner's Brief at 15. The Commissioner finds that the NJSIAA's decision to disqualify the District from participating in the 2018 tournament for egregious violations of NJSIAA rules and regulations is aligned with those goals and values.

[4] The Commissioner notes that the District represents its interests in this matter, not the students; therefore, arguments on behalf of the students, in support of petitioner's appeal, lack candor.

Accordingly – the Commissioner having found that a two-year ineligibility from the state tournament is not arbitrary, capricious or unreasonable – the NJSIAA's ruling is upheld and the petition of appeal dismissed.

IT IS SO ORDERED.[5]

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 12/18/17
Date of Mailing: 12/19/17

[5] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

359-17SEC

AGENCY DKT. NO. 262-11/17

IN THE MATTER OF DAVID EICHENHOLTZ,	:	
EAST NEWARK BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
HUDSON COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission, finding that respondent violated the School Ethics Act for failure to timely file his Personal/Relative and Financial Disclosure Statements (hereinafter jointly referred to as "disclosure statements") in accordance with *N.J.S.A.* 18A:12-25 and 26. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately filed disclosure statements after the issuance of its August 22, 2017 Order to Show Cause, but prior to the Commission's September 26, 2017 meeting and it, therefore, recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon school board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 12/18/17

Date of Mailing: 12/19/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF DAVID EICHENHOLTZ	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	
	:	**DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS**
***EAST NEWARK BOARD OF EDUCATION*, HUDSON COUNTY**	:	
	:	
	:	**DOCKET NO.: D02-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on August 22, 2017, and mailed on August 23, 2017, through regular and electronic mail,, directing Respondent, a "school official" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find him in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

The OTSC issued by the Commission provided notification to Respondent that he had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. Annually, on or before April 30th of each year, all school officials, as defined in N.J.S.A. 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. N.J.A.C. 6A:28-3.1(a). In addition, after the April 30th filing date, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. N.J.A.C. 6A:28-3.1(c), (d), (e) and (f).

Respondent is a returning school official and, therefore, was required to file his Disclosure Statements by April 30, 2017. Respondent failed to file his Disclosure Statements within the statutorily required timeframe.

Consequently, by letter dated August 8, 2017, the Commission informed Respondent that failure to file his Disclosure Statements by August 18, 2017, would result in the Commission

voting to issue an OTSC. The Commission further advised that, if an OTSC issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file his Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by August 18, 2017, an OTSC was issued by the Commission at its meeting on August 22, 2017. After having been served with the OTSC, Respondent filed his completed Disclosure Statements on August 30, 2017. Respondent also filed a response to the OTSC, and alleged that he "did not receive any original emails with this request."

DECISION/PENALTY RECOMMENDATION

Based on the record as set forth above, at its meeting on September 26, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1. Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. The Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4-1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: November 1, 2017

IN THE MATTER OF DAVID EICHENHOLTZ	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS**
***EAST NEWARK BOARD OF EDUCATION*, HUDSON COUNTY**	:	
	:	**DOCKET NO.: D02-17**

WHEREAS, Respondent is a "school official," as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), at East Newark Board of Education; and

WHEREAS, as a returning school official, Respondent was required to file his Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2017; and

WHEREAS, Respondent failed to file his Disclosure Statements within the statutorily required timeframe; and

WHEREAS, at its meeting on August 22, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why he failed to file his Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1; and

WHEREAS, Respondent filed his Disclosure Statements on August 30, 2017, although they were required to be filed no later than April 30, 2017; and

WHEREAS, Respondent filed a response to the OTSC, and denied that he received "any original emails" with this matter; and

WHEREAS, at its meeting on September 26, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by failing to timely file his Disclosure Statements; and

WHEREAS, at its meeting on September 26, 2017, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on October 31, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on October 31, 2017.

Kathryn A. Whalen, Director

360-17SEC

AGENCY DKT. NO. 261-11/17

IN THE MATTER OF BARBARA VILLARI-PETERS, BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (Commission) finding that respondent violated the School Ethics Act (SEA) for failure to timely file her Personal/Relative and Financial Disclosure Statements (disclosure statements) in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The Commission advises that the respondent failed to file her disclosure statements despite the issuance of its August 22, 2017 Order to Show Cause. The Commission recommended that respondent receive a suspension of 30 days effective immediately upon the Commissioner's adoption of the penalty. The Commission further recommends that respondent be removed from her position on the 31st day if she fails to file her disclosure statements within the period of 30 days following the Commissioner's final decision in this matter. Respondent has neither filed exceptions to the recommended penalty nor has she instituted an appeal of the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's failure to honor an obligation placed upon school board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby suspended for from her position as a school official for 30 days from the date of this decision, and is hereby ordered to submit the requisite Disclosure Statements within 30 days. If respondent fails to submit the disclosure statements within 30 days from the date of this decision, she shall be removed from her position as a school official found to have violated the SEA.

IT IS SO ORDERED.[1]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 12/18/17

Date of Mailing: 12/19/17

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF BARBARA VILLARI-PETERS	:	BEFORE THE SCHOOL ETHICS COMMISSION
PINE HILL BOARD OF EDUCATION, CAMDEN COUNTY	:	DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS
	:	DOCKET NO.: D01-17

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on August 22, 2017, and mailed on August 23, 2017, through regular and electronic mail, directing Respondent, a "school official" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

The OTSC issued by the Commission provided notification to Respondent that she had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. Annually, on or before April 30th of each year, all school officials, as defined in N.J.S.A. 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. N.J.A.C. 6A:28-3.1(a). In addition, after the April 30th filing date, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. N.J.A.C. 6A:28-3.1(c), (d), (e) and (f).

Respondent is a returning school official and, therefore, was required to file her Disclosure Statements by April 30, 2017. Respondent failed to file her Disclosure Statements within the statutorily required timeframe.

Consequently, by letter dated August 8, 2017, the Commission informed Respondent that failure to file her Disclosure Statements by August 18, 2017, would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file her Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by August 18, 2017, an OTSC was issued by the Commission at its meeting on August 22, 2017. After having been served with the OTSC, Respondent still failed to file her completed Disclosure Statements, or to otherwise respond to the OTSC.

DECISION/PENALTY RECOMMENDATION

Based on the record as set forth above, at its meeting on September 26, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1. Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. The Commission recommends that the Commissioner of Education impose a penalty of **suspension for thirty (30) days**, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education. If Respondent fails to file her Disclosure Statements within the period of her thirty (30) day suspension, the Commission recommends that Respondent be **removed from office on the thirty-first (31st) day**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4-1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been

filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: November 1, 2017

	:	**BEFORE THE SCHOOL**
IN THE MATTER OF	:	**ETHICS COMMISSION**
BARBARA VILLARI-PETERS	:	
	:	**RESOLUTION ADOPTING**
	:	**DECISION FOR FAILURE TO**
PINE HILL BOARD OF	:	**FILE PERSONAL/RELATIVE**
EDUCATION,	:	**AND FINANCIAL DISCLOSURE**
CAMDEN COUNTY	:	**STATEMENTS**
	:	
	:	**DOCKET NO.: D01-17**

WHEREAS, Respondent is a "school official," as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), at Pine Hill Board of Education; and

WHEREAS, as a returning school official, Respondent was required to file her Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2017; and

WHEREAS, Respondent failed to file her Disclosure Statements within the statutorily required timeframe; and

WHEREAS, at its meeting on August 22, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file her Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1; and

WHEREAS, Respondent failed to file her Disclosure Statements following issuance of the OTSC; and

WHEREAS, Respondent failed to otherwise file a response to the OTSC; and

WHEREAS, at its meeting on September 26, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by failing to file her Disclosure Statements; and

WHEREAS, at its meeting on September 26, 2017, the Commission recommended that the Commissioner of Education impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education; and

WHEREAS, if at the conclusion of the thirty (30) day suspension, Respondent still has not filed her Disclosure Statements, the Commission recommends that she be removed from office on the thirty-first (31st) day; and

WHEREAS, at its meeting on October 31, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on October 31, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

360-17

360-17SEC+

AGENCY DKT. NO. 261-11/17

AMENDED DECISION

IN THE MATTER OF BARBARA VILLARI-PETERS, BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

On December 18, 2017, the Commissioner rendered a decision concurring with the October 31, 2017 recommendation of the School Ethics Commission (SEC) that respondent be suspended for 30 days – effective upon the Commissioner's adoption of the penalty – for failure to timely file her Personal/Relative and Financial Disclosure Statements (Disclosure Statements) in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, in violation of the School Ethics Act (SEA).

Subsequently, by letter dated January 25, 2018, the Executive Director of the SEC advised respondent and the Commissioner that the SEC had voted on January 23, 2018 to rescind its prior decision and adopt a revised decision recommending that the Commissioner impose a penalty of reprimand. The SEC further advised that it received correspondence from the Board Attorney that respondent had in fact filed her Disclosure Statements, *albeit* untimely. Respondent has neither filed exceptions to the revised recommended penalty nor has she instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, in light of respondent's filing of the necessary Disclosure Statements prior to the issuance of the Commissioner's decision in this matter, the Commissioner adopts the SEC's recommended penalty of reprimand. Additionally, respondent is admonished for her delay in filing the requisite Disclosure Statements and causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the SEA.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/08/18

Date of Mailing: 3/08/18

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF BARBARA VILLARI-PETERS	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS**
***PINE HILL BOARD OF EDUCATION*, CAMDEN COUNTY**	:	
	:	**DOCKET NO.: D01-17**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on August 22, 2017, and mailed on August 23, 2017, through regular and electronic mail, directing Respondent, a "school official" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

The OTSC issued by the Commission provided notification to Respondent that she had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. Annually, on or before April 30th of each year, all school officials, as defined in N.J.S.A. 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. N.J.A.C. 6A:28-3.1(a). In addition, after the April 30th filing date, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. N.J.A.C. 6A:28-3.1(c), (d), (e) and (f).

Respondent is a returning school official and, therefore, was required to file her Disclosure Statements by April 30, 2017. Respondent failed to file her Disclosure Statements within the statutorily required timeframe.

Consequently, by letter dated August 8, 2017, the Commission informed Respondent that failure to file her Disclosure Statements by August 18, 2017, would result in the Commission voting to issue an OTSC. The Commission further advised that, if an OTSC issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file her Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by August 18, 2017, an OTSC was issued by the Commission at its meeting on August 22, 2017. After having been served with the OTSC, Respondent still failed to file her completed Disclosure Statements, or to otherwise respond to the OTSC.

The OTSC directed Respondent to show cause, in writing and under oath, within twenty (20) days, why a penalty up to and including removal should not be imposed. The twenty (20) day deadline for Respondent to submit a written response to the OTSC was September 13, 2017. At its meeting on September 26, 2017, and because Respondent had not yet filed her Disclosure Statements or otherwise responded to the OTSC, the Commission discussed recommending that the Commissioner of Education (Commissioner) impose a penalty of suspension for thirty (30) days, with such suspension to become effective immediately upon adoption of the Commission's recommended penalty by the Commissioner of Education. The Commission further discussed that if Respondent failed to file her Disclosure Statements within the period of her thirty (30) day suspension, Respondent should be removed from office on the thirty-first (31st) day.

A decision memorializing the Commission's discussion from its meeting on September 26, 2017, was adopted by the Commission at its meeting on October 31, 2017, and mailed to Respondent, with a copy to the Pine Hill Board of Education's (Board) Business Administrator, on November 1, 2017. On November 2, 2017, the Board's Business Administrator advised the Commission that Respondent filed her Disclosure Statements on October 20, 2017, which was after the Commission had discussed a recommended penalty on September 26, 2017, but before the Commission adopted its decision on October 31, 2017. At its meeting on January 23, 2018, the Commission voted to rescind the previously issued decision, and to adopt the within decision recommending a penalty of reprimand.

DECISION/PENALTY RECOMMENDATION

Based on the record as set forth above, at its meeting on January 23, 2018, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1. Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. The Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of

a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4-1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: January 24, 2018

361-17

AGENCY DKT. NO. 263-11/17

IN THE MATTER OF JOHANNA LOPEZ,	:	
EAST NEWARK BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
HUDSON COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission, finding that respondent violated the School Ethics Act for failure to timely file her Personal/Relative and Financial Disclosure statements in accordance with *N.J.S.A.* 18A:12-25 and 26. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately filed disclosure statements after the issuance of its August 22, 2017 Order to Show Cause, but prior to the Commission's September 26, 2017 meeting and it, therefore, recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon school board members by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 12/18/17
Date of Mailing: 12/20/17

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

IN THE MATTER OF JOHANNA LOPEZ	:	BEFORE THE SCHOOL ETHICS COMMISSION
EAST NEWARK BOARD OF EDUCATION, HUDSON COUNTY	:	DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS
	:	DOCKET NO.: D03-17

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued by the School Ethics Commission (Commission) at its meeting on August 22, 2017, and mailed on August 23, 2017, through regular and electronic mail, directing Respondent, a "school official" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1.

The OTSC issued by the Commission provided notification to Respondent that she had twenty (20) days to respond to the OTSC, and that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was further notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with N.J.A.C. 6A:28-1.6(c), which so permits when material facts are not in dispute.

ANALYSIS

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. Annually, on or before April 30th of each year, all school officials, as defined in N.J.S.A. 18A:12-23, must file Disclosure Statements with their local board secretaries or charter school designees. N.J.A.C. 6A:28-3.1(a). In addition, after the April 30th filing date, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. N.J.A.C. 6A:28-3.1(c), (d), (e) and (f).

Respondent is a returning school official and, therefore, was required to file her Disclosure Statements by April 30, 2017. Respondent failed to file her Disclosure Statements within the statutorily required timeframe.

Consequently, by letter dated August 8, 2017, the Commission informed Respondent that failure to file her Disclosure Statements by August 18, 2017, would result in the Commission

voting to issue an OTSC. The Commission further advised that, if an OTSC issued, Respondent would be assessed a penalty, up to and including removal.

When Respondent failed to file her Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by August 18, 2017, an OTSC was issued by the Commission at its meeting on August 22, 2017. After having been served with the OTSC, Respondent filed her completed Disclosure Statements on September 7, 2017. Respondent also filed a response to the OTSC, and indicated that she "had just returned from a trip due" to a family emergency.

DECISION/PENALTY RECOMMENDATION

Based on the record as set forth above, at its meeting on September 26, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1. Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. The Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at N.J.A.C. 6A:4-1 et seq. within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: November 1, 2017

IN THE MATTER OF JOHANNA LOPEZ	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	
	:	**RESOLUTION ADOPTING DECISION FOR FAILURE TO FILE PERSONAL/RELATIVE AND FINANCIAL DISCLOSURE STATEMENTS**
***EAST NEWARK BOARD OF EDUCATION*, HUDSON COUNTY**	:	
	:	
	:	**DOCKET NO.: D03-17**

WHEREAS, Respondent is a "school official," as defined in N.J.S.A. 18A:12-23 of the School Ethics Act (Act), at East Newark Board of Education; and

WHEREAS, as a returning school official, Respondent was required to file her Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2017; and

WHEREAS, Respondent failed to file her Disclosure Statements within the statutorily required timeframe; and

WHEREAS, at its meeting on August 22, 2017, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file her Disclosure Statements as required by N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1; and

WHEREAS, Respondent filed her Disclosure Statements on September 7, 2017, although they were required to be filed no later than April 30, 2017; and

WHEREAS, Respondent filed a response to the OTSC, and indicated that she "had just returned from a trip due" to a family emergency; and

WHEREAS, at its meeting on September 26, 2017, the Commission found that Respondent violated N.J.S.A. 18A:12-25, N.J.S.A. 18A:12-26, and N.J.A.C. 6A:28-3.1 by failing to timely file her Disclosure Statements; and

WHEREAS, at its meeting on September 26, 2017, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

WHEREAS, at its meeting on October 31, 2017, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

NOW THEREFORE BE IT RESOLVED, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on October 31, 2017.

Kathryn A. Whalen

Kathryn A. Whalen, Director

364-17

THOMAS FERRARI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

This matter is an ancillary claim for a stipend payment in a companion case in which petitioner challenged his termination from employment as a Certificated Teacher of Military Science in respondent's school district without the benefit of a tenure hearing. Herein, the petitioner claimed entitlement to a stipend that had been included in the collective bargaining agreement between the respondent Board and the Brick Township Education Association (Association). The parties submitted cross motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue, and the matter is ripe for summary decision; the petitioner's position in the JROTC program was created pursuant to an "Agreement for the Establishment of an Air Force Junior Reserve Officer Training Corps Unit"; the Agreement included a statement that petitioner's position as the instructor of senior rank in the school's JROTC program was equivalent to a department head position; the Board had entered into a collectively negotiated agreement (CNA) with the Association which governed the terms and conditions of employment for all certified personnel; petitioner was a member of the Association; the CNAs between the Board and the Association provided for "Department Heads" to receive a stipend annually; petitioner was never paid a stipend by the Board as a "Department Head"; however, it is well settled that the Commissioner lacks jurisdiction to decide contractual claims unless those claims implicate the agency's expertise. The ALJ concluded that the Commissioner does not have jurisdiction over this contractual dispute as it does not arise under the school laws. Accordingly, the ALJ ordered that the petition be dismissed for lack of jurisdiction.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed with prejudice for lack of jurisdiction.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 21, 2017

OAL DKT. NO. EDU 03464-17
AGENCY DKT. NO. 47-3/17

THOMAS FERRARI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	DECISION
RESPONDENT.[1]	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions – submitted in accordance with *N.J.A.C.* 1:1-18.4 – were also considered by the Commissioner.[2] The Administrative Law Judge (ALJ) dismissed the matter, concluding that the Commissioner does not have jurisdiction to hear contractual disputes. The ALJ found that the underlying issue in the matter relates to interpretation of the agreements entered into between the Board and Air Force, and the collective negotiations agreement (CNA) between the Board and Education Association, and therefore, do not implicate the agency's special expertise.

Respondent takes exception to the ALJ's finding that the Commissioner lacks jurisdiction in this matter and seeks reversal of the Initial Decision. The Board argues that petitioner's claim for payment of stipends is a dispute that arises under the school laws. Specifically, respondent submits: "petitioner seeks the benefit of the enforcement of a collective

[1] The Commissioner notes that the companion case – *Ferrari v. Bd. of Educ. of Twp. of Brick, Ocean County*, OAL Dkt. No. 19971-15, Agency Dkt. No. 326-10/15 – will be determined as a separate matter, as the two cases were not consolidated.

[2] Petitioner did not file a reply to respondent's exceptions.

bargaining agreement negotiated between the District and the Education Association. The very benefits he seeks were only [allegedly] due him as a benefit of his employment with the District." The Board further argues that whether petitioner is entitled to the stipends set forth in the CNA is "a question of interpretation best left to the Commissioner" because petitioner's "claim for stipends [ ] is linked to his employ with the District, as negotiated for him by the bargaining unit of the Education Association." While reflecting the Board's obvious disagreement with the findings and conclusions contained within the Initial Decision, respondent's exceptions are unpersuasive, and substantially recast and reiterate the arguments made below. Upon a comprehensive review of the record, the Commissioner is in accord with the ALJ's determinations.

It is evident that respondent has failed to understand the scope of the Commissioner's jurisdiction. The Board's contention that the interpretation of the subject agreements should be "best left to the Commissioner" by virtue of petitioner's (former) employment in the District, is materially flawed. *See Bd. of Educ. of the Twp. of E. Brunswick v. Twp. Council of the Twp. of E. Brunswick, et al.*, 48 *N.J.* 94, 102 (1966) (holding "[w]here the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel"). It is well-settled that contractual disputes are typically beyond the purview of the Commissioner's jurisdictional mandate *unless* they implicate the agency's expertise. *Dolan v. Centuolo*, 2012 *N.J. Super. Unpub.* LEXIS 1627 (App. Div. 2009). As such, where the interpretation of a contract or a contractual provision is the primary issue, the Commissioner lacks jurisdiction. *See Bd. of Educ. of the Twp. of Middletown v. Witmer*, 2009 *N.J. Super. Unpub. LEXIS* 2260 (App. Div. 2009). There is no dispute that the claim for stipends in this matter arise from contractual language and assertion of petitioner's rights pursuant to the terms of the respective agreements. Petitioner avers that the agreement entered

into between the Board and the Air Force provides that his position was to be deemed equivalent to that of a department head; and that petitioner was entitled to the negotiated stipend for "Department Heads" as set forth in the CNA between the Board and the Education Association. Such determination requires interpretation of the agreements and review of their intent. The Commissioner, therefore, lacks jurisdiction to determine whether petitioner is entitled to the stipend for "Department Head" as set forth in the CNA.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed with prejudice for lack of jurisdiction.

IT IS SO ORDERED.[3]

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 12/21/17
Date of Mailing: 12/21/17

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSING
PETITION FOR LACK OF JURISDICTION
OAL DKT. NO. EDU 03464-17
AGENCY DKT. NO. 47-3/17

THOMAS FERRARI,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF BRICK, OCEAN COUNTY,
Respondent.

Edward A. Cridge, Esq., for petitioner (Mellk O'Neill, attorneys)

Sebastian F. Ferrantell, Esq., for respondent (Montenegro Thompson Montenegro & Genz, attorneys)

Record Closed: August 10, 2017 Decided: September 21, 2017

BEFORE **JOSEPH A. ASCIONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter is a secondary matter to the matter, Ferrari v. the Board of Education of the Township of Brick, Ocean County, OAL Docket # 19971-2015, Initial Decision, September 12, 2017, Agency Docket # 326-10/51, wherein petitioner challenged his removal as a military science teacher without the granting of a tenure hearing by the

respondent the Board of Education of the Township of Brick, Ocean County ("Board," "Brick," or "District"). The removal was a result of the loss of petitioner's status as an instructor of the United States Air Force, Junior Reserve Officer Training Corps (JROTC).

The respondent disputed any obligation to provide a tenure hearing as the certification by the State of New Jersey Department of Education as a military science teacher is not independent of the Armed Forces certification as a military science teacher. The latter's determination qualifies one for certification as a New Jersey military science teacher. The loss of that certification from the Armed Forces results in a failure of the teacher to maintain the New Jersey certification as a military science teacher. The Air Force provided an appeal process for petitioner to address the potential de-certification, accordingly, his due process rights were addressed by the Air Force and the decertification of petitioner resulted. Respondent successfully maintained that it had no obligation to conduct a tenure hearing.

On or about December 11, 2015, petitioner, Major Thomas Ferrari, filed a complaint in the Monmouth County Superior Court, which was subsequently transferred to Ocean County. The complaint, filed in the Law Division, alleges a breach of contract for failure to pay stipends negotiated on his behalf between the Brick Township Education Association ("the Association") and respondent, the Brick Township Board of Education.

The parties filed motions and cross-motions for summary judgment before the Hon. Arnold B. Goldman, J.S.C. Respondent took the position that the dispute arose under the school laws, and should have been brought before the Commissioner. On December 2, 2016, Judge Goldman issued an order dismissing the complaint without prejudice, and directing that the matter be consolidated with the case pending in the Office of Administrative Law (OAL), Docket No. EDU 19971-15.

Prior to issuance of an initial decision in the EDU 19971-15 matter, the parties requested that the tribunal await the outcome of a New Jersey Superior Court decision directing the consolidation of an ancillary claim for a stipend payment with the within

action. The OAL advised the parties that the J.S.C. did not have the authority to either assign or consolidate the matter and that the OAL jurisdiction depended on a transmittal from the Department of Education. The parties sought that transmittal. That matter was transmitted to the OAL occurred on March 13, 2017. Motions and cross-motions for summary judgement filed in the New Jersey Superior Court, Law Division, Ocean County under Docket # L-2340-16 were filed with the OAL by the parties.

The OAL scheduled oral argument for August 10, 2017. That oral argument was recorded on that date under the OAL docket number EDU 19971-16. The record closed on August 10, 2017. No order of consolidation was issued in the two matters, accordingly, separate Initial Decisions are being issued on the initial application for a tenure hearing and the subsequent application for the interpretation of the contract between the Board and the United States Air Force JROTC as it applies to the petitioner. The separate initial decision reflects that counsel representing the respondent in the subsequent matter differs from counsel representing the respondent herein.

FACTS

The parties submitted their motion and cross motion for summary judgment filed in the New Jersey Superior Court. There is no discrepancy between each's factual presentations. Accordingly, I **FIND AS FACT** the following:

1. In September 2006, petitioner became an employee of respondent, working as an instructor for the AFJROTC program at Brick Memorial High School. Petitioner's Statement of Undisputed Facts ("Petitioner's Facts"), ¶9; Respondent's Statement of Unrefuted Facts ("Respondent's Facts"), ¶1.

2. Respondent is a party to collectively negotiated agreements ("CNAs") with the Association. Petitioner's Facts, ¶2. Via these CNAs, respondent recognizes the Association "as the exclusive and sole-representative of collective negotiations concerning the terms and conditions of employment for all certified personnel . . ." Respondent's Exh. B, p. 3. It is undisputed that petitioner was a member of the Association, and his employment with respondent was subject to the terms and

conditions set forth in the CNAs executed between the Association and respondent. Petitioner's Facts, ¶9; Respondent's Facts, ¶2.

3. On or about July 1, 2006, respondent and the Association entered into a CNA, which provided that "Department Heads" would receive a stipend for the 2006-2009 school years. See Petitioner's Exh. A. On or about July 1, 2009, respondent entered into a successor CNA with the Association, which provided that "Department Heads" would receive stipends for the 2009-2012 school years. See Petitioner's Exh. B. Finally, on or about July 1, 2012, another CNA provided that "Department Heads" would receive stipends for the 2012-2015 school years. See Petitioner's Exh. C. The dollar amount of each stipend is explicitly provided for in the CNAs. See Petitioner's Exhs. A-C.

4. Concurrently, in November 2006, respondent entered into an agreement with the United States Air Force, entitled "Agreement for the Establishment of an Air Force Junior Reserve Officer Training Corps Unit." See Petitioner's Exh. D. The agreement provided, at Section 3(a)(iii), that:

> The institution principal (or equivalent) is the on-site person in charge of the supervision of the AFJROTC Program. The Senior Aerospace Science Instructor ensures the program operates satisfactorily and is appointed to a [sic] institution position equivalent to that of a department head. [Id. at p. 6.]

5. Respondent entered into successor agreements with the Air Force in April 2012 and December 2014, both of which contained the identical provision. See Petitioner's Exhs. E-F.

6. The AFJROTC Operations publication, Instruction 36-2001, defines the Senior Aerospace Science Instructor ("SASI") as:

> The AFJROTC instructor of senior rank at the host school responsible for day-to-day unit operations. The SASI reports to the principal (or equivalent) and ensures applicable instructions are complied with and the unit is operated in an efficient, military manner. The SASI will be designated as a department head (or equivalent) at the host

> school. The SASI acts as the unit commander providing overall direction to the ASI and cadet programs/activities. [See Petitioner's Exh. I.]

Petitioner asserts that for the entirety of his employment, he was the instructor of senior rank employed by respondent. Certification of Thomas Ferrari, ¶4.

6. Each year, petitioner signed a "Tenure Teacher Contract Salary Notice," which indicated Petitioner's salary, including any stipends that he would be paid. Certification of Megan Osborn ("Osborn Cert."), Exh. D.

7. Each year, petitioner signed a form accepting these conditions.

8. Respondent never paid a stipend to petitioner as a "Department Head."

9. Petitioner held his position with respondent until May 2015. Osborn Cert., ¶2.

LEGAL DISCUSSION

"To exercise jurisdiction over a dispute, an administrative agency must have specific legislative authority." Dolan v. Centuolo, Nos. A-2470-10T4, A-2710-10T4, at *11 (App. Div. July 9, 2012), <http://njlaw.rutgers.edu/collections/courts/> (citing Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 426 (App. Div. 2002)). Pursuant to N.J.S.A. 18A:6-9, the Commissioner of Education

> shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner . . . [N.J.S.A. 18A:6-9 (emphasis added).]

"Our courts have long recognized the sweep of the Commissioner's reviewing powers . . . ". Bd. of Educ. of E. Brunswick v. Twp. Council of E. Brunswick, 48 N.J. 94, 101 (1966). However, "the sweep of the Department's interest and the Commissioner's jurisdiction does not extend to all matters involving boards of education." Archway, 352 N.J. Super. at 424-25. "Where the controversy does not arise under the school laws, it

is outside the Commissioner's jurisdiction even though it may pertain to school personnel." E. Brunswick, 48 N.J. at 102.

Generally, "contractual disputes do not fall within the Commissioner's jurisdictional mandate unless they implicate the agency's special expertise." Dolan, at *12. While the Commissioner may have jurisdiction over "contractual claims which are incidental to his obligation to resolve education claims that are the subject of litigation," B.P. v. Bd. of Educ. of Lenape Reg'l High Sch. Dist., EDU 2782-02, Initial Decision (August 16, 2002), adopted, Comm'r (October 7, 2002), <https://njlaw.rutgers.edu/collections/oal/>, the Commissioner will not rule on the enforceability of a contract where "the interpretation of the contract is the primary issue at hand and not merely implicated in a question of the school laws." Bd. of Educ. of Middletown, No. A-5128-07T3, at *23 (App. Div. August 17, 2009), <http://njlaw.rutgers.edu/collections/courts/>. This is because "contract claims against boards do not arise under the school laws but rather from statutory and common law." Archway, 352 N.J. Super. at 425. Therefore, such claims are "typically and appropriately adjudicated in the courts." Ibid.

The Commissioner lacks jurisdiction to decide the contractual claim currently before the OAL. Although the matter involves a board of education, the dispute does not arise under the school laws. Rather, the primary issue is the interpretation of the contractual language contained in the Air Force and Association agreements. Interpretation of these contracts is not "incidental" to the Commissioner's obligation to decide petitioner's pending tenure claim, as the two claims are distinct and separate.

Respondent argues that the Commissioner has jurisdiction over the matter because "[t]he within dispute is a case in controversy arising under the school laws, (N.J.S.A. 18A:6-9 et seq.)." Respondent's Reply Brief, p. 3. However, respondent fails to explain how the contractual claim is connected to any specific statute under Title 18A. Because the interpretation of the contractual language at issue does not implicate the Department of Education's special expertise, the matter should be decided in Superior Court, where it was originally filed.

CONCLUSION

I CONCLUDE the Commissioner does not have jurisdiction to hear this contractual dispute. Although the matter involves a board of education, the controversy does not arise under the school laws. Rather, the primary issue is the interpretation of two series of contracts. Because these contracts do not implicate the Department of Education's special expertise, the matter should be dismissed so that it may be decided in a more appropriate forum.

This tribunal recognizes that this is not the efficient use of judicial resources, however, the Commissioner and the OAL, is without jurisdiction to determine whether petitioner is entitled to any stipend payments.

ORDER

Based upon the foregoing, it is **ORDERED** that the petition be **DISMISSED** for lack of jurisdiction.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 21, 2017
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 9/21/17

Date Mailed to Parties: 9/22/17

/tat

APPENDIX

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

None

LIST OF EXHIBITS

For Petitioner:

P-1 Superior Court filed Summary Judgment Motion and attachments

For Respondent:

R-1 Superior Court filed Cross Motion for Summary Judgment and Opposition to Summary Judgment

365-17

365-17

THOMAS FERRARI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged his termination from employment as a Certificated Teacher of Military Science in respondent's school district without the benefit of a tenure hearing. Petitioner began employment as a United States Air Force JROTC instructor at Brick Memorial High School in 2006, and acquired tenure pursuant to *N.J.S.A.* 18A:28-5 in 2009. Petitioner was terminated by the Board in 2015 after the Air Force decertified him for performance reasons. Petitioner claimed entitlement to a tenure hearing. The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue, and the matter is ripe for summary decision; the petitioner's position in the JROTC program was created pursuant to an "Agreement for the Establishment of an Air Force Junior Reserve Officer Training Corps Unit" (Agreement); the Agreement made clear that the school district was the employing agency and, as such, the respondent Board had the right to terminate the employment of certified instructors in accordance with applicable rules and regulations; the JROTC unit and the petitioner were placed on probation in December 2014 after the unit received a "Does Not Meet Standards" rating; petitioner subsequently received an overall evaluation of "unsatisfactory" on his AFJROTC Instructor Evaluation Report; following an unsuccessful appeal of this report, petitioner was decertified by the Air Force in August 2015, and then terminated by the Board "due to loss of his certification to teach Military Science by the United State Air Force". The ALJ concluded that: respondent was required to terminate petitioner upon notification that he was decertified by the Air Force; petitioner no longer held the necessary credentials to maintain his certification endorsement; once petitioner's teaching certificate was no longer in full force and effect, he was not entitled to tenure protections. Accordingly, the ALJ granted summary decision in favor of the Board, and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed with prejudice.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 21, 2017

365-17
OAL DKT. NO. EDU 19971-15
AGENCY DKT. NO. 326-10/15

THOMAS FERRARI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	DECISION
RESPONDENT.[1]	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and respondent's reply thereto – submitted in accordance with *N.J.A.C.* 1:1-18.4 – were also considered by the Commissioner. The Administrative Law Judge (ALJ) found that petitioner was not entitled to tenure protections when the Board terminated petitioner from his employment as a military science teacher in the District. The ALJ reasoned that as a result of petitioner's decertification from the Air Force, he no longer possessed the necessary credentials to maintain a New Jersey military science certification endorsement and serve as an instructor in the District, and as such, petitioner was ineligible for tenure protections and his termination was proper. Upon comprehensive review, the Commissioner is in accord with the ALJ's determinations for the reasons thoroughly expressed therein.

Petitioner's exceptions substantially reiterate the substance of his submissions at the OAL, recasting the arguments therein to support his contention that the ALJ erroneously concluded that petitioner's due process rights were not violated when he was terminated from his tenured teaching position in the District. Specifically, petitioner argues that he had acquired tenure in his position and

[1] The Commissioner notes that the companion case – *Ferrari v. Bd. of Educ. of Twp. of Brick, Ocean County*, OAL Dkt. No. 03464-17, Agency Dkt. No. 47-3/17 – will be determined as a separate matter, as the two cases were not consolidated.

his certificate had not been suspended or revoked by the State Board of Examiners; therefore, his "protectable interest in his employment [ ] could not be extinguished without procedural due process" pursuant to *N.J.S.A.* 18A:6-10.

In reply, respondent also restates its position advanced in the Board's submissions at the OAL. Respondent contends that petitioner's right to due process was met through the Air Force procedures prior to his decertification. Respondent argues that the ALJ properly concluded that in order to be employed in the District, petitioner needed to maintain a valid certification and, once petitioner was decertified, the Board was required to remove petitioner from his position.

It is well-settled that in order for teaching staff members to be employed in a public school district, they must hold a valid teaching certificate and any other such certificate as required by law. *See N.J.S.A.* 18A:26-2; *see also N.J.A.C.* 6A:9B-5.1(b) ("the certificate holder shall obtain any license, certificate, or authorization required by State or Federal law, a licensing board, or *N.J.A.C.* 6A:9B-4.1 and 4.2 for the individual to serve in a position"). A military science instructor is required to "[h]old valid certification authorizing employment as a military science instructor from the branch of service in which the candidate served." *N.J.A.C.* 6A:9B-11.8(a)(2). Furthermore, in order to retain a military science endorsement, the instructor must maintain the military employment authorization. *Id.* at (b). Therefore, in order for petitioner to continue employment in the District, he must possess a valid certification from the Air Force authorizing his employment as a military science teacher.

When a teaching staff member fails to maintain "the mandated license, certificate, or authorization," the employing board shall remove the instructor from the position. *See N.J.A.C.* 6A:9B-5.1(c). It is undisputed that the Air Force revoked petitioner's authorization for employment as a military science teacher when it notified petitioner of his imminent decertification and subsequently decertified him following an internal appeal process. Once petitioner's authorization was revoked and he was decertified, petitioner was no longer eligible for employment in the District. Moreover,

petitioner was not protected by the tenure statute once he was decertified by the Air Force, as retention of his endorsement and entitlement to employment were contingent upon authorization for employment as a military science teacher by the Air Force, and tenure protection does not extend to individuals whose certificates are not in full force and effect. *See N.J.S.A.* 18A:28-5; *see also Hunsicker v. Bd. of Educ. of the High Point Reg'l High Sch. Dist.*, 2016 *N.J. Super. Unpub.* LEXIS 1147 (App. Div. 2016) (affirming the Commissioner's decision that a teaching staff member must be removed for failure to maintain a required license, notwithstanding tenure status or personal circumstances; and holding that "appellant's lack of an athletic trainer license effectively rendered his educational services certificate and endorsement invalid, thus making him ineligible for employment as a school athletic trainer, ineligible for tenure protections, and subject to mandatory removal").

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.[2]

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 12/21/17

Date of Mailing: 12/21/17

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING RESPONDENT'S APPLICATION FOR SUMMARY DECISION AND DENYING PETITIONER'S APPLICATION FOR SUMMARY DECISION

OAL DKT. NO. EDU 19971-15

AGENCY DKT. NO. 326-10/51

THOMAS FERRARI,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,

Respondent.

Edward A. Cridge, Esq., for petitioner (Mellk O'Neill, attorneys)

Patricia M. Reilly, Esq., for respondent (Wolff, Helies Spaeth & Lucas, attorneys)

Record Closed: August 10, 2017 Decided: September 21, 2017

BEFORE **JOSEPH A. ASCIONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner, Thomas Ferrari (Ferrari), challenges his removal as a

military science teacher without the granting of a tenure hearing by the respondent the Board of Education of the Township of Brick, Ocean County ("Board," "Brick," or "District"). The removal, a result of the loss of petitioner's status as an instructor of the United States Air Force, Junior Reserve Officer Training Corps (JROTC).

The respondent disputes any obligation to provide a tenure hearing as the certification by the State of New Jersey Department of Education as a military science teacher is not independent of the Armed Forces certification as a military science teacher. The latter's determination qualifies one for certification as a New Jersey military science teacher. The loss of that certification from the Armed Forces results in a failure of the teacher to maintain the New Jersey certification as a military science teacher. The Air Forces provided an appeal process for petitioner to address the potential de-certification. Accordingly, his due process rights were addressed by the Air Force and petitioner became de-certified. Respondent maintains that as a result of the Air Force de-certification, no tenure hearing is required.

On December 10, 2015, the New Jersey State Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-8.2. On July 22, 2016, the petitioner moved for summary decision, seeking to reverse the Board's determination and removal of petitioner. On July 26, 2016, respondent opposed said motion and filed a cross-motion for summary decision. Prior to issuance of an initial decision on the summary disposition motion and cross-motion, the parties requested that the tribunal await the outcome of a New Jersey Superior Court decision directing the consolidation of an ancillary claim for a stipend payment with the within action. That matter was transmitted to the OAL on March 13, 2017, and assigned docket number EDU 03464-17. Motions and Cross-Motions for Summary Judgement were filed by the parties in the New Jersey Superior Court, Law Division, Ocean County under Docket # L-2340-16. The OAL scheduled oral argument for August 10, 2017. The voice transcript of that oral argument is recorded on that date under the EDU 19971-16 docket number. The record closed on August 10, 2017. No order of consolidation was issued in the two matters, and accordingly, separate Initial Decisions are being issued on the initial application for a tenure hearing and the subsequent application for the interpretation of the contract between the Board

and the United States Air Force JROTC as it applies to the petitioner. The separate Initial Decision reflects that counsel representing the respondent in the subsequent matter differs from counsel representing the respondent herein.

FACTS

The parties submitted a motion and cross-motion for summary disposition. There is no discrepancy between the factual presentations. Accordingly, the matter is ripe for a summary disposition application. I **FIND AS FACT** the following:

1. On or about September 1, 2006, petitioner, Major Thomas Ferrari, commenced employment as a Certificated Teacher of Military Science with respondent, the Brick Township School District Board of Education (District). Verified Petition, ¶1. Petitioner worked as a JROTC instructor at Brick Memorial High School. Respondent's Brief, p. 1. On or about September 1, 2009, petitioner acquired tenure pursuant to N.J.S.A. 18A:28-5. Verified Petition, ¶2; Answer, ¶2.

2. Brick Memorial's JROTC unit was created pursuant to a document entitled "Agreement for the Establishment of an Air Force Junior Reserve Officer Training Corps Unit." See Exhibit A of Certification of Retired Colonel Scott E. Lewis ("Col. Lewis' Certification")(attached to respondent's moving papers). Under the agreement, ROTC instructors must be "qualified retired Air Force commissioned officers/non-commissioned officers (NCO) and otherwise meet the acceptance standards of AFJROTC instructors prescribed by Public Law and applicable DoD and Air Force Instructions." Id. at Section 1(1)(B)(iii). Additionally, "[i]ndividuals employed as AFJROTC instructors will not perform duties or teach any classes in any discipline other than Aerospace Science." Id. at Section 2(1)(D)(iv)(c).

3. Under the agreement, the school is required to conduct annual instructor evaluations and submit them to the Air Force and to advise AFJROTC of any changes in the employment status of personnel employed in the unit. Id. at Section 1(1)(D)(ii)-(iii). "The Air Force shall have the right to withdraw certification of AFJROTC instructors for breach of standards and the institution

will remove decertified personnel from the AFJROTC program." Id. at Section 3(1)(B)(ii). However, the agreement makes clear that the district is the employing agency of the instructor. Id. at Section 2(1)(D)(iv). As such, the school has the right to terminate the employment of certified instructors in accordance with institutional rules and regulations. Id. at Section 3(1)(C)(1).

4. By letter dated December 16, 2014, Colonel Bobby C. Woods, Jr., Director, HQ Air Force JROTC, advised the principal at Brick Memorial that the unit received a "Does Not Meet Standards" rating and that the unit was being placed on probation. Exhibit E, ¶12; Exhibit C of Col. Lewis' Certification. Additionally, the letter advised that petitioner was being placed on probation for neglect of program requirements and lack of preparation for the Unit Evaluation and, if certain discrepancies were not corrected, petitioner would be considered for decertification. Ibid. By letter dated February 27, 2015, Colonel Woods informed the principal that the unit and petitioner were being placed on a second probation for failure to maintain minimum enrollment requirements. Exhibit E, ¶13; Exhibit D of Col. Lewis' Certification. Petitioner acknowledged that he and the unit were placed on a second probation. Ibid.

5. On March 20, 2015, petitioner received an overall evaluation of "unsatisfactory" on his AFJROTC Instructor Evaluation Report, known as a Form 98, signed by Dr. Walter Uszenski, Superintendent; Jennifer Joseph, Principal; Ryan Blessing, Assistant Principal; and petitioner. Exhibit E, ¶14; Exhibit F of Col. Lewis' Certification. By letter dated May 14, 2015, the Interim Superintendent advised petitioner that he was denying petitioner's appeal of his Special Instructor Evaluation Report Form 98. Exhibit E, ¶15; Exhibit G of Col. Lewis' Certification. The letter further advised petitioner that he could appeal to the Holm Center[1] within fifteen days for a final appeal opportunity before his decertification would become effective. Ibid. Petitioner was also advised of his right to appeal the Unsatisfactory Form 98 evaluation by Colonel Scott E. Lewis (retired) Air Force, Chief, Instructor Management via e-mail dated April 16, 2015. Exhibit E, ¶16;

[1] The Holm Center is the part of the Air Force responsible for directing the JROTC program.

Exhibit H to Col. Lewis' Certification. Petitioner acknowledged receipt of that e-mail. Ibid.

6. Petitioner appealed his Unsatisfactory Form 98 to the Air Force. Exhibit E, ¶17; Exhibit I of Col. Lewis' Certification. By letter dated August 27, 2015, Colonel Patricia D. Hoffman, USAF, Vice Commander, Holm Center denied the appeal and provided the reasons for her denial of the appeal. Ibid.

7. On or about August 21, 2015, petitioner was decertified by the Air Force. Exhibit D. On or about August 27, 2015, respondent terminated petitioner's employment. Verified Petition, ¶3. The District's stated reason for petitioner's termination was "due to his loss of certification to teach Military Science by the United States Air Force." Answer, ¶5.

8. Respondent terminated petitioner's employment without filing tenure charges pursuant to N.J.S.A. 18A:6-10 et. seq. Petitioner's Brief, p. 2.

9. The Board of Examiners has taken no action to suspend or revoke petitioner's Teacher of Military Science Certificate. Ibid.

10. Petitioner filed a Verified Petition with the State of New Jersey, Department of Education, claiming that his employment with respondent was terminated in derogation of his tenure and seniority rights. An Answer was filed on behalf of respondent stating that termination of petitioner's employment was mandated due to the loss of his certification to teach Military Science by the United States Air Force.

LEGAL DISCUSSION

Upon notification that petitioner no longer held the appropriate certification from the military, respondent was compelled to remove petitioner from his position and report his name to the Board of Examiners.

N.J.S.A. 18A:26-2 provides, "No teaching staff member shall be employed in the public school by any board of education unless he is the holder of a valid certificate

to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools and of such other certificate."

N.J.A.C. 6A:9B-5.1 provides:

> a. "Pursuant to N.J.S.A. 18A:26-2, any person employed as a teaching staff member by a district board of education shall hold a valid and appropriate certificate.
>
> b. In addition to the requirements set forth in this subchapter, the certificate holder shall obtain any license, certificate, or authorization required by State or Federal law, a licensing board, or N.J.A.C. 6A:9B-4.1 and 4.2 for the individual to serve in a position. The district board of education that is considering employing the individual shall ensure the candidate holds all necessary licenses, certificates, or authorizations.
>
> c. **The employing school district shall remove from the position any teaching staff member who fails to maintain the mandated license, certificate, or authorization as set forth in (b) above.** Pursuant to N.J.A.C. 6A:9B-4.3(a), the school district also shall report to the Board of Examiners the teaching staff member's name.
>
> d. The Board of Examiners may consider revocation or suspension of the certificate of any individual who fails to maintain the license, certificate, or authorization required in (b) above."
>
> [N.J.A.C. 6A:9B-5.1 (emphasis added).]

To hold a military science endorsement from the State of New Jersey, an individual must have a valid certification authorizing employment as a military science instructor from the branch of service in which the candidate served. N.J.A.C. 6A:9B-11.8(a)(2).

Here, respondent was informed that, as of August 21, 2015, petitioner no longer held the proper authorizations from the Air Force. Therefore, he failed to maintain a certification required by State law to hold a position as an instructor of military science. Pursuant to N.J.A.C. 6A:9B-5.1(c), respondent was required to remove petitioner from his position and was correct in taking this course of action.

Although N.J.A.C. 6A:9B-5.1(c) clearly requires petitioner's termination, this provision does not address the necessity for a hearing on tenure charges. Tenure of teaching staff is outlined in N.J.S.A. 18A:28-5. The statute states in pertinent part:

> a. "The services of all teaching staff members employed prior to the effective date of P.L.2012, c.26 (C.18A:6-117 et al.) in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services, school athletic trainer and such other employees as are in positions **which require them to hold appropriate certificates issued by the board of examiners**, serving in any school district or under any board of education, **excepting those who are not the holders of proper certificates in full force and effect** and school business administrators shared by two or more school districts, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by sub-article B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:
>
> (1) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (2) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (3) The equivalent of more than three academic years within a period of any four consecutive academic years."

[N.J.S.A. 18A:28-5 (emphasis added).]

Notably, the statute excludes from tenure protection "those who are not the holders of proper certificates in full force and effect," referring to previously granted "certificates issued by the board of examiners." N.J.S.A. 18A:28-5. Thus, if a teaching staff member does not hold an appropriate certificate "in full force and effect" from the State Board of Examiners, he is not entitled to tenure protections.

The Board of Examiners is the sole entity charged with the authority to revoke or suspend teaching certificates. N.J.A.C. 6A:9B-3.2(b). However, a teaching certificate may be effectively invalidated by a holder's failure to meet other requirements associated with his or her position. See Hunsicker v. Bd. of Educ. of the High Point Reg'l High Sch., No. A-3314-14T22016, 2016 LEXIS 1147, at *9-10 (N.J. Super. Ct. App. Div. May 18, 2016).

In Hunsicker, a school athletic trainer was terminated because he failed to renew his athletic trainer license from the State Board of Medical Examiners, a requirement necessary for practicing athletic training in the State of New Jersey. Id. at *5. Despite this deficiency, the Board of Examiners never formally revoked or suspended the trainer's educational services certificate and school athletic trainer endorsement. Id. at *9. The trainer filed a petition with the Commissioner of Education, arguing that, notwithstanding his lack of an athletic trainer license, since he maintained a valid educational services certificate, he had tenure protections, including the right to formal charges and a hearing. Id. at *6. The Commissioner transmitted the case to the OAL, and the Administrative Law Judge (ALJ) found that N.J.A.C. 6A:9-5.1(c) mandated the trainer's removal and that there was no exemption for a tenured individual. Ibid. The Commissioner adopted the ALJ's decision and dismissed the petition. Id. at *7. Upon review, the Appellate Division concluded that there was sufficient credible evidence in the record to support the Commissioner's decision. Id. at *8-9. Importantly, the Appellate Division noted, "Appellant's lack of an athletic trainer license effectively rendered his educational services certificate and endorsement invalid, thus making him ineligible for employment as a school athletic trainer, ineligible for tenure protections, and subject to mandatory removal." Id. at *10. Thus, the Commissioner's decision was affirmed. Ibid.

Here, petitioner is likewise ineligible for tenure protections and subject to mandatory removal. In Hunsicker, supra, he was required to hold a license from the State Board of Medical Examiners. Here, petitioner was required to hold a certificate from the Air Force to keep current his certificate as an instructor of military science. Even though the Board of Examiners did not take formal action to revoke or suspend

petitioner's teaching certificate, his decertification from the military effectively invalidated this certificate because he could not work as a JROTC instructor without it. Since tenure protections only apply to holders of certificates "in full force and effect," petitioner, like the trainer in Hunsicker, is ineligible for these protections.

Petitioner's denial of his appeal from the decertification by the Air Force as a military science teacher, effectively and instantly resulted in the New Jersey State military science teacher certification being in full force and effect. Respondent was required to terminate petitioner upon notification that he was decertified by the Air Force because he no longer held the authorizations necessary to serve as a JROTC instructor. Petitioner is ineligible for tenure protections because his teaching certificate, issued by the Board of Examiners, was effectively invalidated when he was decertified by the military. As the decertification effectively invalidated the teaching certificate issued to petitioner by the Board of Examiners, respondent is entitled to summary decision as a matter of law.

CONCLUSION

I **CONCLUDE** under N.J.A.C. 6A:9B-5.1(c), that respondent was required to terminate petitioner upon notification that he was decertified by the Air Force as a JROTC military science teacher. I **CONCLUDE** once this decertification occurred, petitioner no longer held the necessary credentials to maintain a New Jersey military science certification endorsement and serve as a JROTC instructor. The Board of Examiners never took formal action to revoke or suspend petitioner's teaching certificate. I **CONCLUDE** the Board of Examiners had no obligation to proceed to revoke petitioner's military science certificate, as the decertification by the Air Force effectively invalidated petitioner's military science certificate. I **CONCLUDE** his New Jersey State military science teaching certificate was not "in full force and effect," as required by N.J.S.A. 18A:28-5, accordingly, petitioner is not entitled to tenure protections.

ORDER

Base on the foregoing, it is **ORDERED** that the petitioner's motion for summary disposition is **DENIED**; and the respondent's motion for summary disposition is **GRANTED,** and the petition is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/21/17
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 9/21/17

Date Mailed to Parties: 9/22/17

/lam

APPENDIX

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

None

LIST OF EXHIBITS

For Petitioner:

P-1 Summary Decision Motion and attachments

For Respondent:

R-1 Cross-Motion for Summary Decision and Opposition to Summary Decision

366-17

JOSEPH EHRHARD AND ROBERT EHRHARD,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro se petitioners filed an appeal with the Commissioner of Education in November 2013, challenging the determination of the respondent Board that Robert Ehrhard (Ehrhard) was not the victim of harassment, intimidation or bullying (HIB) under the provisions of the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 to -32.1 (the Act). Petitioners alleged that Ehrhard – who was a player on the high school baseball team from ninth through twelfth grade – was the victim of HIB at the hands of the head and assistant baseball coaches for the Hunterdon Central Regional High School team during the period from 2009-2013. Petitioners contended, *inter alia*, that Ehrhard and others on the team were the target of HIB by the coaches because they were students, healthy, white male student-athletes, and were perceived to be weak or meek members of the team. The Board asserted that it conducted a comprehensive HIB investigation, including interviews with coaches and 23 students, and that the determination of no HIB was not arbitrary, capricious or unreasonable. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: the Act applies to any gesture, or any written, verbal or physical act, or any electronic communication that is reasonably perceived as being motivated either by an actual or perceived characteristic, such as, *inter alia*: race, color, religion, national origin, gender, sexual orientation, or any other distinguishing characteristic; in this case, the alleged conduct fails to meet the statutory definition of HIB; there are no facts to support that the alleged bullying was motivated by a "distinguishing characteristic" of Ehrhard; status as a student does not qualify as a distinguishing characteristic, as the HIB statute only applies to misconduct against students; and – while being "meek or weak" could qualify as a distinguishing characteristic, petitioners failed to set forth any facts to support this theory. Accordingly, the ALJ granted the Board's motion for summary decision, denied petitioner's cross motion, and dismissed the petition.

Upon comprehensive review, the Commissioner concurred with the ALJ that the Board did not act in an arbitrary, capricious or unreasonable manner in rendering its HIB determination, as the alleged conduct fails to meet the statutory definition of HIB. Further, there is no evidence in the record that the alleged actions were motivated by a distinguishing characteristic of Ehrhard, as required by *N.J.S.A.* 18A:37-14. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 21, 2017

366-17

OAL DKT. NO. EDU 00188-14
AGENCY DKT. NO. 298-11/13

JOSEPH EHRHARD AND ROBERT EHRHARD,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioners and the Board's reply thereto.

In their exceptions, petitioners argue that they have been prejudiced by the three year delay between the time the Board filed its motion to dismiss for untimeliness and the time it was decided. Petitioners argue that they were harmed by the delay because they were forced to wait for a decision, rather than proceeding with discovery, which would have enabled them to show further cause for a finding of HIB. Petitioners further contend that the Administrative Law Judge (ALJ) mischaracterized their argument that all students are protected by the Harassment, Intimidation and Bullying (HIB) law. Petitioners maintain that their argument throughout has been that "healthy white heterosexual male student athletes (who by the Respondent's definition of a protected class are effectively excluded by the HIB law's coverage), are clearly covered by the HIB law if they were singled out for HIB by coaches who perceived them to be weak, meek and or timid; intelligent; and/or anxiety prone." (Petitioners' Exceptions at 11) The ALJ indicated

that petitioners were asserting that Robert Ehrhard's (Ehrhard) distinguishing characteristic was that he was a white, healthy, male student athlete, while petitioners were intending to convey that students without any explicitly enumerated distinguishing characteristics – like Ehrhard – are still protected under the HIB Act.

Petitioners argue that the ALJ further erred in finding that they failed to set forth facts to link the alleged bullying to Ehrhard being a weak or meek member of the team. Petitioners maintain that they made clear in their submissions that Ehrhard was targeted because he was the smallest team member and has always been "quiet, mild mannered and respectful." (Petitioners' Exceptions at 13) Petitioners also contend that the Board failed to consider that there had been a pattern of similar misconduct for ten years prior to the time of their complaint. In the HIB investigation, petitioners assert that the anti-bullying specialist was excluded from the investigation and there were conflicts of interest, which demonstrates that the Board selectively enforces its policies and that the HIB determination was therefore arbitrary, capricious and unreasonable.

Petitioners also contend that the ALJ erroneously stated that petitioners failed to assert that the alleged conduct physically or emotionally harmed Ehrhard, insulted or demeaned Ehrhard, or created a hostile environment. Instead, petitioners maintain that the effects of the HIB on Ehrhard had been discussed in previous submissions to the OAL and included heightened anxiety, mood lability, and a loss of confidence in his abilities, which resulted in him leaving baseball despite opportunities to play at the college level. When considering a test of reasonability, petitioners contend that a reasonable adult would agree that name calling, cursing, berating, public humiliation and threats of demotion would result in physical or emotional harm. As such,

petitioners argue that they meet the statutory definition of HIB and the Initial Decision should be rejected.

In reply, the Board argues that the ALJ properly found that the alleged actions do not meet the definition of HIB. The Board contends that petitioners are mischaracterizing the Board's position, creating new facts, and introducing additional allegations that are not supported by the record. The Board maintains that the only issue before the Commissioner is whether the Board's determination that no HIB was committed was arbitrary, capricious, or unreasonable, and that petitioners' discussion of other matters, including their attempt to advocate for other individuals who are not parties in this litigation, are irrelevant. Although petitioners argue that summary decision should not have been granted because further discovery was required, the Board notes that they have provided the complete investigatory file, and, thus, additional discovery is unnecessary. Additionally, the Board points out that petitioners propounded their discovery requests at the same time that they filed their summary decision motion, after the discovery period had ended. With respect to any procedural deficiencies, the Board notes that it conducted a comprehensive HIB investigation, including interviews with coaches and 23 students.

The Board agrees with the ALJ that the alleged behaviors were not motivated by a distinguishing characteristic and can therefore not meet the definition of HIB. Even if Ehrhard does have a distinguishing characteristic, the Board maintains that the alleged actions – i.e., unfair playing time, favoritism, profanity, and being too hard on the players – were not *motivated* by a distinguishing characteristic. Specifically, the Board notes that the ALJ properly found that Ehrhard's status as a student, a power imbalance, or being a healthy white male student athlete are not distinguishing characteristics. Further, the Board contends that the ALJ was correct in finding that there is no link between the alleged bullying and Ehrhard's status as meek or weak. As such,

the Board urges the Commissioner to adopt the Initial Decision and find that the Board's HIB determination was not arbitrary, capricious, or unreasonable.

Upon a comprehensive review of the record, the Commissioner agrees with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination because the alleged conduct fails to meet the statutory definition of HIB. The Commissioner is further in accord with the ALJ that there is no evidence in the record that the alleged actions were motivated by a distinguishing characteristic of Ehrhard. Although petitioners argue that Ehrhard's distinguishing characteristic is that he is a weak or meek member of the team, there is no link between the alleged conduct and the distinguishing characteristic to demonstrate that the alleged actions were *motivated* by said characteristic, as required by *N.J.S.A.* 18A:37-14. As petitioners fail to succeed on the distinguishing characteristic element, the Commissioner need not reach the remaining elements of the HIB definition, such as whether the alleged conduct physically or emotionally harmed Ehrhard, insulted or demeaned Ehrhard, or created a hostile environment.

The Commissioner does not find petitioners' exceptions to be persuasive. At the outset, petitioners were not prejudiced by the length of time of these proceedings. It appears that petitioners failed to propound discovery until the time that they served their summary decision motion and are in possession of the entire investigatory file. Further, any perceived mischaracterization of their arguments by the ALJ are of no moment. The ALJ viewed petitioners' arguments broadly and conducted analysis on whether Ehrhard could demonstrate a distinguishing characteristic under any of the proposed scenarios – as a student, a healthy white heterosexual male student athlete, or as a weak or meek member of the team – and found that the alleged conduct was not motivated by any of these characteristics. Although petitioners argue that they made clear

in submissions that Ehrhard was targeted because he was the smallest team member, quiet, and mild mannered, there is no link in the record to connect this distinguishing characteristic with the alleged conduct. There is simply no evidence that the alleged actions were motivated by Ehrhard's distinguishing characteristic. Finally, petitioners' concerns regarding the investigatory process are not convincing. The Board conducted a comprehensive investigation into the HIB complaint, including interviewing 23 student baseball players and several coaches.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.*

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 12/21/17

Date of Mailing: 12/22/17

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 188-14
AGENCY DKT. NO. 298-11/13

J.E. AND R.E.,
Petitioners,
v.
HUNTERDON CENTRAL REGIONAL BOARD OF EDUCATION,
Respondent.

J.E., appearing for petitioners, pro se

Brandon Croker, Esq., appearing for respondent (Comegno Law Group, attorneys)

Record Closed: September 25, 2017 Decided: September 28, 2017

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

The petitioners, J.E. and R.E., J.E.'s son, appeal the determination of respondent, the Board of Education of the Hunterdon Central Regional School District ("Board"), that head baseball coach Mike Raymond ("Coach Raymond") and assistant

baseball coach John Augusta ("Coach Augusta") did not commit acts of "harassment, intimidation or bullying" ("HIB") as defined under the Anti-Bullying Bill of Rights Act ("ABRA"), N.J.S.A. 18A:37-13, et seq., against petitioner R.E., who was a player on the high-school baseball team during the relevant time period.

PROCEDURAL HISTORY

On November 29, 2013, the petitioners filed a Petition of Appeal and Petition for Declaratory Ruling with the Commissioner of Education ("Commissioner"). On December 23, 2013, respondent filed a motion to dismiss, arguing that the petition was filed outside of the required ninety-day period. The matter was transmitted to the Office of Administrative Law ("OAL") on January 7, 2014, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On October 6, 2016, Administrative Law Judge Masin issued an Order denying respondent's motion to dismiss, finding that the petition was timely filed.

On June 16, 2017, petitioners filed a "Motion for Declaratory Ruling on Definition of Protected Class," seeking a ruling that 1) the HIB statute protects all students from acts of HIB, and 2) the students who filed complaints in the instant matter fell within a protected class. On June 19, 2017, respondent moved for summary decision, arguing that any alleged misconduct was not motivated by a "distinguishing characteristic," and, therefore, did not meet the statutory definition of HIB. Petitioners filed a letter on July 14, 2017, which may reasonably be construed as an opposition to respondent's motion, arguing, for the first time, that R.E. and others were targeted because they were perceived as "meek or weak" members of the baseball team. The petitioners filed additional letter briefs on September 20 and 22, 2017. Following a telephone conference on September 25, 2017, the record closed.

FACTUAL DISCUSSION

Petitioner R.E. played baseball for Hunterdon Central Regional High School from his freshman year to his senior year (2009–2013).[1] (Certification of Brandon R. Croker, Esq., ("Croker Cert."), Exh. 1.) Coaches Raymond and Augusta served as members of the coaching staff during this time. (Ibid.)

On June 13, 2013, petitioner J.E. sent an email to Hunterdon Central's anti-bullying coordinator Barbara Manfredi ("ABC Manfredi") requesting a meeting to discuss Coach Raymond's and Coach Augusta's treatment of R.E. (Croker Cert., Exh. 2.) The email included allegations that: 1) Coaches Raymond and Augusta tossed baseballs into a pond, laughed at R.E., and requested that he go into the pond to retrieve the balls; 2) Coach Raymond hassled R.E. over the manner in which he threw a baseball with an injured wrist; 3) Coach Raymond threatened to demote R.E. to the junior-varsity team; 4) Coaches Raymond and Augusta berated R.E. for informing them that he would miss baseball practice due to a family vacation and then guilted him into coming to

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[1] Petitioner R.E. graduated from Hunterdon Central in 2013 and is believed to have graduated from college in 2017. Respondent argues that the case is moot because R.E. is no longer a student in the school district. While this issue need not be reached, the limited case law suggests that such an action can continue even after the alleged perpetrator is out of contact with the alleged victim.

One case that addresses the mootness issue in the HIB context is J.M. v. Board of Education of Tinton Falls, EDU 7871-13, Initial Decision (December 12, 2013), rejected, Comm'r (March 17, 2014), <http://njlaw.rutgers.edu/collections/oal/>. In that case, the administrative law judge (ALJ) concluded that an HIB action was moot because the alleged bully, a cheerleading coach, was relieved of her coaching duties during the pendency of the appeal proceedings. However, because the former coach was still employed by the respondent district, the Commissioner found that resolution of the petitioner's challenge was necessary for the sake of all parties. The Commissioner concluded that, if the ALJ's fact findings supported the petitioner's allegations, a finding of HIB should be entered into the former coach's personnel file and reported to the Department of Education. Additionally, if there was a substantiated finding of HIB, corrective measures would need to be taken so that other students were not exposed to further inappropriate behavior by the former coach.

In M.D.G. ex rel. C.J. v. Board of Education of Atlantic City, EDU 6450-04, Initial Decision (April 27, 2005), adopted, Comm'r (May 26, 2005), <http://njlaw.rutgers.edu/collections/oal/>, a school board was found to have violated the HIB statute by failing to properly investigate an incident of bullying. During the appeal, the student was withdrawn from the school and enrolled in another school within the respondent's district. While the ALJ noted that "there is no immediate remedy readily available to [the bullied student]," he ordered the board to comply with the Act by "conducting staff in-service programs with respect to the requirements of the statute in order to assure that all pupils under the Board's supervision and control will be protected from harassment, intimidation or bullying in the future." The Commissioner adopted the ALJ's decision.

These cases suggest that the HIB appeal is not moot, even though there is no immediate personal remedy available to R.E.

the allegations of misconduct were being reviewed as a personnel matter. (Ibid.) The parents were informed of their right to request a hearing before the Board of Education. (Ibid.) Principal Cooley also sent letters to coaches Raymond and Augusta advising them of the results of the investigation. (Croker Cert., Exh. 13.)

On July 1, 2013, Principal Cooley and Superintendent Steffner met with R.E.'s parents to explain the results of the investigation. (Croker Cert., Exh. 14.) On July 8, 2013, J.E. sent an email to Principal Cooley, notifying her that he would be appealing the finding before the Board. (Ibid.) On the same date, Superintendent Steffner responded to the email, advising R.E.'s parents of the time and date of the Board's next meeting. (Ibid.)

On July 15, 2013, a hearing was held during the executive session of the Board meeting. (Croker Cert., Exh. 15.) On July 16, 2013, J.E. sent an email to Principal Cooley reiterating his purpose for filing the HIB complaint and including HIB resource material for the Board to consider prior to its vote. (Croker Cert., Exh. 16.) On August 19, 2013, during the regular session of the Board meeting, the Board voted to approve the administration's findings that there was insufficient evidence to confirm that R.E. had been the victim of HIB. (Croker Cert., Exh. 17.) By letter dated August 26, 2013, Superintendent Steffner informed R.E.'s parents that the Board had not found evidence to support the HIB allegations. (Croker Cert., Exh. 18.)

On September 3, 2013, Principal Cooley prepared a document entitled "HIB Summary Report—Baseball," which included the status of five HIB complaints against coaches Raymond and Augusta, including the complaint filed by R.E. (Croker Cert., Exh. 19.) The report indicated that a total of twenty-five baseball players and five coaches were interviewed during the course of the investigation. (Id. at 1.) The report also outlined the questions asked during the interviews and summarized the responses to these questions. (Id. at 1–6.) Four players indicated that they were the direct recipients of intimidation and/or abuse. (Id. at 3.) The first said that he experienced "in-your-face" confrontations by Coach Augusta, which affected his performance. (Ibid.) The second indicated that he was placed in "timeout" for what the coaches perceived as a lack of hustle. (Ibid.) The third felt that he was ridiculed for attending to an injury.

(Ibid.) The last believed that he was led on by continuously being told that he was one play away from becoming a starter and was told to bring his catcher's equipment despite being moved to a pitching position. (Ibid.) However, the report noted that the allegations documented in J.E.'s initial complaint to the school were "not verified." (Id. at 2.) For example, it was "not verified" that the coaches targeted players based on personalities or that they preyed on those with anxiety, those who were intelligent, or those who were mild-mannered. (Ibid.)

LEGAL ANALYSIS AND CONCLUSION

Standards for Summary Decision

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, which govern the conduct of contested cases before the OAL, a party may file a motion for summary decision on substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion "shall be served with briefs and with or without supporting affidavits." N.J.A.C. 1:1-12.5(b).

Under this regulation, which is akin to the judiciary's motion for summary judgment, see R. 4:46-1, "the determination [of] whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995). In making this determination, the analysis is "'whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986). Summary decision is also proper when the opposing party "points only to disputed issues of fact that are 'of an insubstantial nature.'" Id. at 529.

The issues presented are whether the HIB statute applies to teachers, coaches, and other school staff members, and whether the alleged conduct meets the statutory definition of HIB.

I. The HIB statute applies to teachers, coaches, and other school staff members.

The text of the HIB statute does not explicitly address the applicability of the law to teachers, coaches, and other school staff members. However, guidance issued by the Department of Education has made clear that teachers and other adults can be offenders under the HIB statute. The guidance document notes, "The [ABRA] addresses HIB committed only against students; it does not address HIB committed against adults . . . . While the [ABRA] only addresses HIB committed against students, it includes any person who commits an act of HIB against a student." (New Jersey Dep't of Educ.'s Guidance for Schs. in Implementing the Anti-Bullying Bill of Rights Act (P.L. 2010, c. 122).[2]) Thus, the statute covers HIB committed against a student by a teacher, coach, or school staff member.

The HIB statute has been interpreted to give staff members the same procedural rights as an alleged student offender, including the ability to defend themselves at a board hearing. Gibble v. Bd. of Educ. of the Hunterdon Cent. Reg'l Sch. Dist., EDU 02767-15, Initial Decision (April 12, 2016), modified Comm'r (July 13, 2016), <http://njlaw.rutgers.edu/collections/oal/>. "While the law provides that 'parents or guardians of the students who are parties to the investigation' may request a hearing before the board, this requirement must be held to extend to staff members whose conduct is implicated by a bullying allegation." Ibid. Therefore, the procedural rights afforded under the HIB statute are equally applicable to accused teachers, coaches, and staff members.

[2] Found at <http://www.state.nj.us/education/students/safety/behavior/hib/guidance.pdf>.

II. Does the alleged conduct meet the statutory definition of HIB?

The ABRA is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises." N.J.S.A. 18A:37-13.1(f).

Each school district must adopt an HIB policy that meets minimum statutory requirements, but generally has "control over the content of the policy." N.J.S.A. 18A:37-15(a) and (b). The statutory requirements for an HIB policy include "a procedure for prompt investigation of reports of violations and complaints." N.J.S.A. 18A:37-15(b)(6).

Under this procedure, "the investigation shall be initiated by the principal or the principal's designee within one school day of the report of the incident and shall be conducted by a school anti-bullying specialist," and "[t]he investigation shall be completed as soon as possible, but not later than 10 school days from the date of the written report of the incident of [HIB]." N.J.S.A. 18A:37-15(b)(6)(a). The results of the investigation shall then be quickly reported to the superintendent who, in turn, shall report the results to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." N.J.S.A. 18A:37-15(b)(6)(b) and (c).

Within five days of the board's receipt of the report, the parents of the students involved in any alleged HIB incident are entitled to receive information about the nature and result of the investigation. N.J.S.A. 18A:37-15(b)(6)(d). Upon receipt of this information, the parents may request a hearing before the board, and the hearing must be held within ten days of the request. Ibid. The board must issue a decision at the first meeting after its receipt of the investigation report. N.J.S.A. 18A:37-15(b)(6)(e). The board may affirm, reject, or modify the superintendent's decision. Ibid. The board's decision may be appealed to the Commissioner. Ibid.

An action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Thus, in order to prevail, those challenging an HIB decision made by a board of education "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014), (citation omitted), adopted, Comm'r (April 10, 2014), <www.njlaw.rutgers.edu/collections/oal/>. Also, a board's decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, Comm'r (April 25, 2013), <http://njlaw.rutgers.edu/collections/oal/>.

Under the ABRA, "harassment, intimidation or bullying" (HIB) is defined as:

> any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or

> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14 (emphasis added).]

As such, an incident must satisfy four separate elements in order to meet the definition of HIB under the ABRA.

A. Petitioners have failed to assert facts to support that the alleged bullying was motivated by a "distinguishing characteristic."

First, to satisfy the statutory definition of HIB, the conduct must be "reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic." N.J.S.A. 18A:37-14 (emphasis added). "The statute has not limited 'distinguishing characteristic' to those specifically enumerated, but it has consistently required such a perceived motivation." K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 351 (App. Div. 2011). "The Legislature in the Anti-Bullying Act intentionally included a very open-ended phrase, 'any other distinguishing characteristic,' to signal that the Act would apply to a broad, unlimited range of distinguishing characteristics, so long as the distinguishing characteristic motivated the bully to harass the targeted student." L.P. and H.P. ex rel. L.P., EDU 04462-16, Initial Decision (June 10, 2016), adopted, Comm'r (July 25, 2016), <http://njlaw.rutgers.edu/collections/oal/>.

The category "any other distinguishing characteristic" has been interpreted to include a variety of traits. For example, both being a vegetarian and having head lice have been found to be "distinguishing characteristics" under the HIB statute. G.C. v. Bd. of Educ. of Montgomery, EDU 12103-15, Initial Decision (March 7, 2016), adopted, Comm'r (April 22, 2016), <http://njlaw.rutgers.edu/collections/oal/> (concluding that being a vegetarian constitutes "any other distinguishing characteristic" so as to support

a finding of HIB); W.C.L. v. Bd. of Educ. of Tenafly, EDU 3223-12, Initial Decision (November 26, 2012), adopted, Comm'r (January 10, 2013), <http://njlaw.rutgers.edu/collections/oal/> (finding that a ten-year-old boy's statement to another student that a classmate had head lice constituted HIB).

In R.G.B. v. Village of Ridgewood Board of Education, EDU 14213-12, Initial Decision (May 15, 2013), adopted, Comm'r (June 24, 2013), <http://njlaw.rutgers.edu/collections/oal/>, a student calling another student a "horse" and a "fat-ass" was reasonably perceived as motivated by the "distinguishing characteristic" of appearance or body-type and was found to constitute HIB. Similarly, in C.C. ex rel. S.C. v. Board of Education of Jefferson, EDU 10872-14, Initial Decision (April 6, 2015), <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (May 12, 2015), <http://www.nj.gov/education/legal/>, a student's comments that another student was "short" and "sucks at basketball" were found to constitute HIB, as the comments were reasonably perceived as motivated by the "distinguishing characteristic[s]" of height and sports proficiency.

However, the Appellate Division has made clear that "harmful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation, does not come within the statutory definition of bullying." K.L. v. Evesham, supra, 423 N.J. Super. at 351. For example, in L.B.T. v. Freehold Regional School District Board of Education, EDU 7894-12, Initial Decision (January 24, 2013), adopted, Comm'r (March 7, 2013), <http://njlaw.rutgers.edu/collections/oal/>, the Commissioner found that comments made by a high-school swimmer about her teammate's commitment to the team merely reflected a dispute about their respective roles on the team and did not constitute HIB. Likewise, in L.P. and H.P v. West Morris Regional High School District, EDU 04462-16, Initial Decision (June 10, 2016), adopted, Comm'r (July 25, 2016), <http://njlaw.rutgers.edu/collections/oal/>, there was no HIB where there was a clear conflict between two members of a high-school fencing team, but no evidence that the alleged bullying was based on a particular characteristic. Finally, in B.A. v. Board of Education of Hamilton, EDU 10485-15, Initial Decision (May 12, 2016), adopted, Comm'r (June 22, 2016), <http://njlaw.rutgers.edu/collections/oal/>, there was no finding

of HIB as the result of a relationship breakdown between middle-school girls after one girl attended a party to which the other girls were not invited.

A "distinguishing characteristic" must be the motivation for the alleged bullying, even when the alleged bully is a teacher, coach, or staff member. In M.R. ex rel. M.R. v. Board of Education of the Ramapo Indian Hills Regional School District, EDU 05308-16, Initial Decision (November 7, 2016) modified in part, Comm'r (December 21, 2016), <http://njlaw.rutgers.edu/collections/oal/>, a parent filed an HIB report alleging that his daughter and three other cheerleaders were bullied by their cheerleading coach. The report stemmed from an incident in which the cheerleader sent a text message to her coach stating that she would be unable to attend the night's basketball game due to other plans. The report claimed that the coach responded with a "strong bullying tone" and informed her that she and any other cheerleader who missed the game would be off the team. The HIB investigation concluded that the coach did not engage in HIB, and the school board affirmed the findings. Importantly, there was no evidence in the record that the cheerleading coach's alleged actions were motivated by a distinguishing characteristic of the cheerleader.

It is unclear from the instant petition and subsequent motion papers what "distinguishing characteristic" of R.E. made him the target of the alleged bullying behavior. Approximately three theories can be gleaned from the pleadings. According to petitioners, R.E. and the other victims of the alleged bullying may have been targeted because of their status as: 1) students; 2) "white, healthy male student athletes"; or 3) perceived "meek or weak" members of the team. As set forth in greater detail below, these theories must fail, as there is no evidence to suggest that the alleged conduct was motivated by any of these characteristics.

1. *Status as a student is not a sufficient "distinguishing characteristic" to substantiate a finding of HIB against a staff member.*

In the Petition of Appeal, petitioners argue that "a clear distinguishing characteristic is Student vs. Staff." (Petition of Appeal at 1.) According to petitioners, "[o]ne of the defining characteristics of HIB is an imbalance of power. An adult teacher

and coach is obviously in this position of power against a minor child, regardless of their race, creed or sexual orientation." (Petitioners' Brief at 2.) In other words, petitioners argue that R.E.'s status as a student, alone, qualifies as a "distinguishing characteristic" under the HIB statute.

This reasoning must be rejected. The Department of Education has made clear that the HIB statute only applies to HIB committed against students; it is not meant to address HIB committed against adults. If status as a student, alone, was sufficient to substantiate an HIB finding there would be no reason to include an additional requirement that the misconduct be motivated by a "distinguishing characteristic." Clearly, something more is needed.

2. *There is no evidence that R.E. and others were bullied due to their status as "white, healthy male student athletes."*

Petitioners take issue with ABC Manfredi's explanation that, in order for the HIB statute to apply, the victim must be a member of a protected class based on race, gender, ethnicity, etc. (Petition of Appeal at 1.) Petitioners are correct in asserting that the phrase "any other distinguishing characteristic" expands the coverage of the HIB statute to cover traits that are not contemplated in traditional anti-discrimination laws.

The problem with petitioners' claim, however, is that there is no evidence that R.E. was the victim of the alleged HIB because he was a "white, healthy male student athlete[]." In order for the HIB statute to apply, the alleged misconduct must be "reasonably perceived as being motivated either by any actual or perceived characteristic." N.J.S.A. 18A:37-14. Since there is no support that R.E. and the other players were targeted because of their status as "white, healthy male student athletes," this argument must be rejected.

3. *While a claim of HIB may be based on the "distinguishing characteristic" of being "meek or weak," the alleged bullying of R.E. cannot reasonably be perceived as being motivated by this trait.*

In his initial email report to Principal Cooley, J.E. alleges that coaches Raymond and Augusta "prey[] on kids with anxiety, those who are intelligent, those who are mild mannered." (Croker Cert., Exh. 1, at 3.[3]) In petitioners' letter brief, petitioner J.E. again argues that, "The boys who filed complaints, including my son [R.], are all intelligent, soft spoken, mild mannered kids. This would be perceived by bullies like these two and others as meek or weak." (Petitioners' Brief at 2.) J.E. also mentions that R.E. was "under five feet tall and 112 pounds" when he started high school and had a "slight build." Ibid.

Being perceived as "meek or weak" could qualify as a "distinguishing characteristic" under the HIB statute. Characteristics such as height, intelligence, and sports proficiency have been found to satisfy the "distinguishing characteristic" requirement in previous cases. See C.C. ex rel. S.C., supra, EDU 10872-14, Initial Decision (April 6, 2015), <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (May 12, 2015), <http://www.nj.gov/education/legal/>. Appearance and body type have also been considered "distinguishing characteristics" under the HIB statute. See R.G.B., supra, EDU 14213-12, Initial Decision (May 15, 2013), adopted, Comm'r (June 24, 2013), <http://njlaw.rutgers.edu/collections/oal/>.

However, petitioners have failed to set forth facts to link the alleged bullying with R.E.'s status as a perceived "meek or weak" member of the team. Contrast, for example, the facts in R.G.B., where calling another student "horse" or "fat-ass" was clearly linked to the victim's body type or appearance. Similarly, as in C.C., telling someone that they are "short" and "suck[] at basketball" can reasonably be perceived as being motivated by the victim's height and sports proficiency.

Here, petitioners have not alleged that coaches Raymond and Augusta ever made comments about R.E.'s demeanor or physical stature. Rather, the reported

[3] This allegation was considered during the investigation and is noted in the HIB Summary Report as "not verified." (Croker Cert., Exh. 19, at 2.)

conduct involves such incidents as instructing R.E. to retrieve balls that had been thrown into a pond, guilting R.E. to miss a family vacation to attend baseball practice, and forcing R.E. to carry his catchers' gear with no intention of letting him play. Without more, these incidents cannot reasonably be perceived as being motivated solely by the perception that R.E. was "meek or weak." In fact, according to J.E., Coach Raymond exhibited bullying conduct to everyone from assistant coaches to members of the grounds crew. (Croker Cert., Exh. 2, at 3.) These actions are more akin to what the Appellate Division called "aggressive conduct without identifiable motivation," conduct that, while inappropriate and undesirable, is not covered by the HIB statute.[4] See K.L. v. Evesham, supra, 423 N.J. Super. at 351.

B. The conduct took place on school property.

Second, in order to satisfy the statutory definition of HIB, the conduct must take place "on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3)." N.J.S.A. 18A:37-14. There is no dispute that the conduct at issue took place on school baseball fields or at school-sponsored baseball games and practices.

C. The conduct may have interfered with the rights of R.E.

Third, in order to satisfy the statutory definition of HIB, the conduct must substantially disrupt or interfere with the orderly operation of the school or the rights of other students. This provision of the law appears to address free-speech concerns. T.R. and T.R. ex rel. E.R. v. Bridgewater-Raritan Reg'l Bd. of Educ., EDU 10208-13, Initial Decision (September 25, 2014), <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (November 10, 2014), <http://www.nj.gov/education/legal/>. In Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513, 89 S. Ct. 733, 740, 21 L. Ed. 2d 731, 741 (1969), the United States Supreme Court explained that "conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."

[4] Presumably, the Board can take whatever other personnel action is appropriate to address such behavior.

According to the Court, a school may circumscribe speech that results in the "interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." Id., 393 U.S. at 508, 89 S. Ct. 737, 740, 21 L. Ed. 2d at 738. Certainly, "schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct." Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683, 106 S. Ct. 3159, 3164, 92 L. Ed. 2d 549, 558 (1986).

Neither petitioners nor respondent have addressed this element of the HIB claim. Arguably, the alleged conduct interfered with R.E.'s right "to be secure and to be let alone." Then again, the extent of this right is unclear given R.E.'s voluntary participation in the baseball program. Nevertheless, because there is no evidence that the alleged conduct was motivated by a "distinguishing characteristic," the HIB definition cannot be satisfied and further analysis of this element is unnecessary.

D. Petitioners have failed to clearly assert that the alleged conduct physically or emotionally harmed R.E., insulted or demeaned R.E., or created a hostile environment.

Fourth, to qualify as HIB, the conduct must be such that:

> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14 (emphasis added).]

The petitioners have not addressed this element of the HIB definition. J.E.'s initial complaint to the school alleges that coaches Raymond and Augusta were involved in "[n]ame calling and intimidation, degrading students," as well as "[p]hysically intimidating players." (Croker Cert., Exh. 2.) Indeed, it is alleged that the coaches exhibited such inappropriate behavior to numerous students, as well as adults. However, nowhere in the pleadings is it made clear that R.E. suffered physical or emotional harm or felt insulted or demeaned by the actions of his coaches. The coaches may have been "bullies," but their conduct did not fall within the statutory definition of bullying with its particular requirements.

CONCLUSION

Although the HIB statute does not explicitly address HIB perpetrated by an adult, guidance issued by the Department of Education has clarified that the law applies to any person who commits an act of HIB against a student. Several cases have applied the statute to teachers, coaches, and staff members. These individuals are granted the same procedural rights under the law as an alleged student-perpetrator.

Here, the alleged conduct fails to meet the statutory definition of HIB. There are no facts to support that the alleged bullying was motivated by a "distinguishing characteristic" of R.E. Petitioners suggest that the alleged conduct may have been motivated by R.E.'s status as 1) a student; 2) a "white, healthy male student athlete[ ]"; or 3) a perceived "meek or weak" member of the baseball team. Status as a "student" does not qualify as a distinguishing characteristic, as the HIB statute only applies to misconduct against students—the "distinguishing characteristic" must be more specific than this. Additionally, there is no support for the argument that R.E. was targeted because he was a "white, healthy male student athlete[]." Finally, while being "meek or weak" could qualify as a "distinguishing characteristic," petitioners have not set forth any facts to support this theory.

Furthermore, it is uncertain that the alleged conduct would meet the other elements of the HIB definition. Specifically, the pleadings do not make clear that the alleged conduct physically or emotionally harmed R.E., insulted or demeaned R.E., or

created a hostile environment. For these reasons, respondent's motion for summary decision must be granted.

ORDER

I hereby **ORDER** that the respondent's motion for summary decision is **GRANTED**. The petition is **DISMISSED**. The petitioner's motion is **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 28, 2017
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: September 28, 2017

Date Mailed to Parties: September 28, 2017

SMS/cb

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

Brief and letter briefs

For respondent:

Brief and letter briefs

368-17

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

KIMBERLEY HARRINGTON
Commissioner

December 20, 2017

B[redacted], *pro se*
[redacted]
Newark, New Jersey 07104

Arsen Zartarian, Esq.
The Newark Public Schools
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102-3091

Re: *B.J., on behalf of minor child, T.J. v. Board of Education of the State-Operated School District of the City of Newark, Essex County, et al.*, OAL Dkt. No. EDU 8133-16, Agency Dkt. No. 134-5/16.

Dear Parties,

I have considered the papers filed in connection with the petitioner's request for interlocutory review of the November 29, 2017 Order of Administrative Law Judge Richard McGill in the above-captioned matter. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, the petitioner's request for interlocutory review is hereby denied.[1]

Sincerely,

Kimberley Harrington

Kimberley Harrington
Commissioner

c: Honorable Richard McGill
County Superintendent
State Law Library

KH/SLP/JKH
Via Facsimile and Regular Delivery

[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

369-17

AGENCY DKT. NO. 220-9/17

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM CROWELL,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF	:	DECISION
THE CITY OF NEWARK, ESSEX COUNTY.	:	
	:	

The record of this matter, along with the parties' proposed Settlement Agreement, have been reviewed. Upon review, the Commissioner finds that the proposed Settlement Agreement – one term of which is respondent's resignation from employment in petitioner's district – is consistent with the established standards governing settlement of tenure matters contained within *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, and as incorporated in *N.J.A.C.* 6A:3-5.6.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Kimberley Harrington

COMMISSIONER OF EDUCATION

Date of Decision: 12/22/17
Date of Mailing: 12/22/17

RIKER DANZIG SCHERER HYLAND
& PERRETTI LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
Attorneys for State-Operated School District of the City of Newark

In the Matter of	:	
WILLIAM CROWELL,	:	**Agency Docket Number 226-9/17**
	:	**SETTLEMENT AGREEMENT**
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, IN THE COUNTY OF ESSEX	:	

This Settlement Agreement ("Agreement") is made by and between, on the one hand, the State-operated School District of the City of Newark ("School District"), with an address at 2 Cedar Street, Newark, New Jersey 07102, and its successors, assigns, officers, employees, agents and representatives ("School District"), and, on the other hand, William Crowell, residing at 35 Grand Ave. Newark, NJ 07106 ("Crowell") (collectively, the "Parties").

WHEREAS Crowell is a tenured teaching staff member employed by the School District; and

WHEREAS, on or about September 22, 2017, the School District certified tenure charges of inefficiency against Crowell and a copy of the Notice of Tenure Charges of Inefficiency is attached to this Settlement Agreement (the "Settlement Agreement") as Exhibit A; and

WHEREAS the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with litigation; and

WHEREAS the settlement set forth herein is in the best interest of the Parties and the public because it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, the Parties hereby agree as follows:

1. Crowell hereby agrees to resign from his tenured position, effective December 31, 2017. Attached is a copy of Crowell's signed Letter of Resignation (Exhibit B). Crowell's separation from employment will be deemed a voluntary resignation in good standing. Upon inquiry from any third parties, the School District will only confirm Crowell's employment, position, title, salary and dates of employment.

2. Crowell also agrees to withdraw with prejudice any and all claims or suits that he may have previously filed against the School District that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the School District and Crowell. Should Crowell fail to submit letters of withdrawal and/or stipulations of dismissal for any such pending claims or suits, this Settlement Agreement will serve as Crowell's formal written notice of withdrawal of those pending claims or suits, except for workers compensation claims.

3. In exchange, Crowell will be placed on administrative leave with pay commencing on the date his suspension without pay took effect and will remain in such status until the effective date of his resignation, December 31, 2017. Other than the salary that he receives until the effective date of his resignation, Crowell will not receive any further monies from the School District in exchange for this Settlement Agreement. If applied for, the School District will not oppose Crowell's application for unemployment.

4. The School District also agrees not to pursue any disciplinary action, including termination of Crowell's employment so long as this Settlement Agreement remains in effect and is not voided by any court or administrative agency of competent jurisdiction. However, if the Settlement Agreement is voided, the School District retains the right to pursue disciplinary action against Crowell including termination from the School District.

5. As of the effective date of his resignation, all of Crowell's employment rights, including but not limited to salary, insurance coverage, tenure and seniority, will permanently end, except for any benefits to which he may lawfully be entitled under the Workers' Compensation Act or the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA").

6. Crowell agrees that he will not apply for reemployment with the School District at any time. Specifically, Crowell will be considered to have permanently resigned from his tenured position as a result of this Settlement Agreement. If Crowell does apply for reemployment with the School District and is approved for employment, the terms of this Settlement Agreement shall control and be grounds for immediate termination of Crowell's employment.

7. This Settlement shall not constitute a precedent in any matters involving other employees.

8. Except as noted above, Crowell waives all claims of any nature against the School District with regard to his employment with and/or his separation from the School District including fees or other monetary relief, with the exception of workers' compensation claims.

9. By entering into this Settlement Agreement, and in exchange for good consideration as set forth in Paragraph 3 and 4 above, the sufficiency of which is hereby acknowledged, Crowell hereby releases and discharges the School District, its Board of Education and its members, the State District Superintendent, and any and all other School District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that he has or may have against the Board of Education of the School District regarding his employment with the School District. This includes without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Crowell's employment with the School District and separation from the School District. It specifically includes, without limitation, all claims which Crowell may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the

New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract or collective bargaining/ contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on his employment by and the termination of his employment with the School District, including, but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys fees, costs, and/or future wage loss, except for workers compensation claims and for health insurance continuation coverage under and pursuant to ("COBRA"). Crowell agrees to save, hold harmless and indemnify the Released Parties for any legal costs and attorneys fees associated with the enforcement of the terms of this Settlement Agreement should enforcement become necessary.

10. Notwithstanding Paragraph 9 of this Settlement Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the Released Parties, or any of them, based upon any of the

above-released claims in Paragraph 9, Crowell agrees not to seek or accept any resulting relief whatsoever.

11. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Crowell of the legal requirements of that Act, and fully incorporates the legal requirements by reference into this Settlement Agreement. Accordingly, by executing this Settlement Agreement, Crowell acknowledges that he: (i) fully understands the terms and conditions of this Settlement Agreement; (ii) has consulted with an attorney to review the Settlement Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given twenty-one (21) days within which to consider this Settlement Agreement; and (v) has seven (7) days from the date of the execution of this Settlement Agreement to revoke it. Crowell understands that he may rescind this Settlement Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the School District either by hand or by certified mail within the seven-day period.

12. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

13. This Settlement Agreement constitutes the full agreement between the parties, and shall be construed and enforced in accordance with New Jersey law.

14. If any provision or portion of a provision of this Settlement Agreement is held by a court of competent jurisdiction, or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or remaining portions of a provision will continue and remain in full force and effect.

15. This Settlement Agreement is subject to final approval by the State District Superintendant of the State-operated School District of the City of Newark and will only become effective upon the approval of the Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

Dated: 10/30/17

WILLIAM CROWELL

Dated: 10/30/17

STEVEN ZAKHARYAYEV
Attorney for William Crowell

Dated: 11/20/17

CHRISTOPHER CERF
State District Superintendent

Dated: 11/7/17

BRENDA C. LISS, ESQ.
Attorney for State-Operated School District
of the city of Newark

CERTIFICATION

I, WILLIAM CROWELL, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that I have been advised of the Commissioner of Education's duty to refer tenure determinations resulting in a loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 10/30/17

WILLIAM CROWELL

EXHIBIT A

RIKER DANZIG SCHERER HYLAND
& PERRETTI LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
Attorneys for State-operated School District of the City of Newark

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In the Matter of	:	
	:	
William Crowell,	:	**NOTICE OF TENURE CHARGE OF INEFFICIENCY**
	:	
	:	
	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, IN THE COUNTY OF ESSEX	:	

TO: WILLIAM CROWELL

PLEASE TAKE NOTICE that Angela Mincy, Principal of Barringer Academy of S.T.E.A.M., hereby files a charge of inefficiency against William Crowell ("Respondent"), a tenured teacher employed by the State-operated School District of the City of Newark ("School District"), pursuant to N.J.S.A. 18A:6-17.3.

TENURE CHARGE: INEFFICIENCY

Respondent has been rated ineffective in two consecutive annual summative evaluations, as follows:

1. Respondent was rated ineffective in his 2015-16 annual summative evaluation.

2. Respondent was rated ineffective in his 2016-17 annual summative evaluation.

3. Respondent has failed to effectively perform the duties of a teacher.

4. Respondent has failed to effectively use individual standard-aligned lessons to build on previous lessons and on students' prior knowledge.

5. Respondent has failed to effectively use standard-aligned lesson components to move students toward mastery of an objective that is aligned to objective that is aligned to standards.

6. Respondent has failed to clearly and accurately communicate content and instructions effectively.

7. Respondent has failed to effectively use standards-based, grade-level appropriate lesson plans that reflect work towards annual student achievement goals.

8. Respondent has failed to effectively use lesson objectives that fit into a larger coherent sequence that leads to student mastery of the appropriate standards.

9. Respondent has failed to effectively tailor instruction to move all students toward mastery.

10. Respondent has failed to effectively use questions and tasks to ensure student comprehension and ask for application, analysis, and/or synthesis.

11. Respondent has failed to effectively anticipate and respond to student reactions and misunderstandings by adjusting instructional strategies.

12. Respondent has failed to effectively require precision and evidence in tasks and responses from students.

13. Respondent has failed to effectively demonstrate that student work includes revisions based on teacher and peer feedback, especially revised explanations and justifications to demonstrate student movement toward mastery.

14. Respondent has failed to effectively demonstrate that lesson objectives, tasks and materials require students to demonstrate recall and reproduction, basic application of concepts, strategic thinking, and extended thinking.

15. Respondent has failed to effectively demonstrate that students express satisfaction in solving problems and mastering new material.

16. Respondent has failed to effectively demonstrate that students show persistence in confronting demanding concepts and tasks.

17. Respondent has failed to effectively demonstrate that classroom norms promote positive and productive teacher-student and student-student relationships.

18. Respondent has failed to effectively demonstrate that he fosters a classroom culture that is consistently one of high expectations and hard work.

19. Respondent has failed to effectively demonstrate that students hold themselves and their peers accountable for learning and supporting the culture of the classroom.

20. Respondent has failed to consistently check for understanding effectively.

21. Respondent has failed to effectively demonstrate that he and his students give and receive timely, specific, and constructive feedback.

22. Respondent has failed to effectively demonstrate students know more at the end of the lesson than they did at the start.

23. Respondent has failed to effectively track assessment data to understand each student's progress toward mastery and use results to guide planning and instruction.

24. Respondent has failed to effectively articulate specifically (and with evidence) whether or not each student has internalized grade-level standards and, if not, what s/he still needs to learn.

25. Respondent has failed to effectively demonstrate that data reflects that students are mastering the objectives of the focus areas, leading toward mastery of grade-level standards.

26. Respondent has failed to effectively demonstrate that he accurately self-assesses strengths and substantive growth areas, seeks and incorporates feedback from others, and pursues his own growth and development.

27. Respondent has failed to effectively contribute ideas and expertise to further colleagues' and the school's growth and incorporate productive insights into his own instruction.

28. Respondent has failed to effectively communicate student progress clearly and consistently to students, families, and school leaders.

29. Respondent has failed to demonstrate consistent and prompt attendance that reflects his focus on student learning as a priority.

WHEREFORE, the undersigned hereby requests the following relief:

a. Dismissal of Respondent from the position in which he has tenure in the School District;

b. Suspension of Respondent, without pay, pending review and consideration of this Tenure Charge of Inefficiency; and

c. Such further relief as may be authorized by law and deemed equitable by the State District Superintendent, the Commissioner of Education, and any assigned arbitrator.

This charge is supported by the Statement of Evidence annexed hereto.

Dated: August 11, 2017

ANGELA MINCY

Sworn to and subscribed before
me on this 11th day of August, 2017

Fiona E. Cousland
Attorney at Law of the State of New Jersey

EXHIBIT B

Christopher Cerf
Superintendent
Newark Public Schools
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102

RE: WILLIAM CROWELL
NOTICE OF RESIGNATION- DECEMBER 31, 2017

Dear Superintendent Cerf:

I wish to inform you that I will be resigning from employment with the Newark Public Schools effective December 31, 2017.

Dated: 10/30/17

WILLIAM CROWELL

371-17

OAL DKT. NO. EDU 16381-16
AGENCY DKT. NO. 87-3/16

A.B., on behalf of minor child, T.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	ORDER
RESPONDENT.	:	

On March 2, 2017, a final agency decision was rendered in this matter, wherein the Commissioner found A.B. liable for tuition in the amount of Eighteen Thousand-Four Hundred and Thirty Three Dollars and Sixty Cents ($18,433.60), representing tuition for a period of ineligible attendance by her child, T.B., in the Board's school district during the 2014-2015 and 2015-2016 school years. The Board subsequently notified the Commissioner that A.B. had failed to comply with the decision, and requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. A.B., in response to the Board's request, offered no reasons that have not been fully and fairly adjudicated as to why the judgment against her should not be so docketed.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Alfanette Brunson is now subject to entry of a judgment by the court in the amount of $18,433.60, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 12/27/17
Date of Mailing: 12/27/17

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

KIMBERLEY HARRINGTON
Commissioner

December 28, 2017

Michelle M. Smith, Clerk
Superior Court of New Jersey
Hughes Justice Complex
25 W. Market Street
6th Floor, North Wing
P.O. Box 971
Trenton, New Jersey 08625

Re: Request for Docketing of Judgment

Dear Ms. Smith:

In accordance with *N.J.S.A.* 2A:58-10, I am enclosing the December 27, 2017 Order of the Commissioner of Education finding that Alfanette Brunson is subject to entry of a judgment on the docket of the court due to their failure to pay the tuition assessment ordered in the matter of *A.B., on behalf of minor child, T.B v. Board of Education of the Red Bank Regional High School District, Monmouth County.*[1] By copy of this letter, I am advising Ms. Brunson, as well as counsel for the Red Bank Regional Board of Education, of the Commissioner's issuance of the enclosed Order.

If you require anything more, please contact this office at (609) 376-9079.

Very truly yours,

Samantha L. Price, Director
Bureau of Controversies and Disputes

SLP/JKH
Enclosure

c: Alfanette Brunson
Anthony P. Sciarrillo, Esq.
State Law Library

[1] Please note that, although the case caption reflects only Ms. Brunson's initials, her full name is included within the body of the Commissioner's Order.

370-17

PATRICIA ASCOLESE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY; GEORGE SOLTER, SUPERINTENDENT; AND STEVEN SOMICK, BUSINESS ADMINISTRATOR,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner filed the within appeal in January 2017, claiming entitlement to additional reimbursement for unused vacation and sick time of her deceased husband, a former teacher and Assistant Superintendent for the respondent Board. Mr. Ascolese retired from the Board's employ in January 2012, and was thereafter reimbursed by the Board for his accumulated leave time based on a mutually agreed upon number of days and the terms of Mr. Ascolese's last employment contract with the school district, the gross amount of which totaled $74,553.92 – paid out in two checks, one in 2012 and the other in 2013. Mr. Ascolese died in December 2014, sixteen months after the last reimbursement check was cashed. Petitioner subsequently filed her appeal on January 25, 2017. The Board filed a motion to dismiss, contending that the appeal was filed beyond the 90-day time limitation set forth in *N.J.A.C.* 6A:3-1.3. Petitioner opposed the motion.

The ALJ found, *inter alia,* that: the petitioner's appeal was filed in January 2017, significantly beyond 90 days from any of the three dates that should have triggered notice of the Board's final determination regarding Mr. Ascolese's retirement benefits; the Board asserted that the petitioner should have taken action to appeal the Board's determination of retirement benefits within 90 days of cashing the second reimbursement check in 2014, yet failed to file the instant petition for another three years; the veracity of petitioner's assertion that Mr. Ascolese never consented to the leave time calculation that the Board memorialized in a memorandum bearing Mr. Ascolese's signature – and her denial that the signature was actually her husband's – cannot be entertained because the petition was filed far too late to be viable; there is no merit in the petitioner's claim that a Board memorandum dated December 26, 2016 is the appropriate triggering event, as this communication was merely a responsive letter to the petitioner providing her with requested documentation; and the relaxation of the 90 day rule is not warranted in this matter. The ALJ concluded that the petition must be dismissed as untimely pursuant to *N.J.A.C.* 6A:3-1.3.

Upon review, the Commissioner agreed with the findings and conclusion of the ALJ, and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

DECEMBER 27, 2017

370-17

OAL DKT. NO. EDU 2353-17
AGENCY DKT. NO. 19-1/17

PATRICIA ASCOLESE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY; GEORGE SOLTER, SUPERINTENDENT; AND STEVEN SOMICK, BUSINESS ADMINISTRATOR,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Patricia Ascolese, and the North Bergen Board of Education's (Board) reply thereto.

This matter involves a claim by the petitioner that she is entitled to additional reimbursement for the unused vacation and sick time of her deceased husband, Vincent Ascolese, a former teacher and Assistant Superintendent for the Board. The Administrative Law Judge (ALJ) found that the petition of appeal was untimely under *N.J.A.C.* 6A:3-1.3(i) because it was filed well beyond 90 days from several dates that triggered notice of the Board's final determination regarding Mr. Ascolese's retirement benefits. The ALJ also found that relaxation of the 90-day rule is not warranted in this matter.

In her exceptions, the petitioner argues that the ALJ incorrectly applied the 90-day rule because in fact, none of the trigger dates identified by the ALJ were final Board action. The petitioner asserts that the Board never adopted a board resolution that authorized the Board to expend funds to compensate Mr. Ascolese for his accrued time after he retired in January of 2012. In addition to no formal resolution, the trigger dates utilized by the ALJ were also inconsistent

with the notice requirement outlined in the 90-day rule. To that end, the ALJ erred in finding that the cashing of the checks that Mr. Ascolese received in 2012 ($10,000.00 gross amount) and 2013 ($64,553.92 gross amount) triggered notice of a claim under the 90-day rule because there was no explanation that the payments represented an accounting of the unused accumulated leave sum. Even assuming – as the ALJ did – that the petitioner knew the checks were for reimbursement of leave time, there was no indication that they were payment in full.

The petitioner also argues that the ALJ incorrectly concluded that the letter received by Mr. Ascolese on August 13, 2014, detailing the Board's continued effort to calculate Mr. Ascolese's contractual entitlement, was a trigger for the 90-day rule. The letter unambiguously indicates that the Board had yet to determine the total amount that was due to Mr. Ascolese for his unused time. Finally, the petitioner claims that the ALJ incorrectly concluded that the Board's decision to give the petitioner Mr. Ascolese's personnel file on April 5, 2015 – which included correspondence concerning his accumulated leave time – was the third triggering event of the 90-day rule. Nothing in the file contained a final determination of unused sick and vacation leave time. Therefore, the petitioner contends that the petition of appeal is not untimely.

The petitioner also maintains that the ALJ incorrectly applied the standard for summary decision because she failed to consider facts in the light most favorable to the petitioner. The ALJ also wrongfully granted summary decision before allowing additional discovery to determine if the 90-day rule was implicated and, if it was, whether the rule should be relaxed. In her exceptions, the petitioner discusses several examples of factual findings made by the ALJ that she argues are arbitrary, capricious or unreasonable.

In reply, the Board contends that the ALJ properly dismissed the petition in accordance with the 90-day rule. First, the Board states that a formal board resolution is not necessary to trigger the 90-day rule because a resolution is not required in order for a board of

education to reimburse a retired employee for unused leave time. Moreover, despite the petitioner's claims to the contrary, the ALJ identified the factual findings that were not in dispute to properly determine whether the petition was barred by the 90-day rule.

The Board also indicates that at the OAL it argued that the last possible date for triggering the 90-day rule was the acceptance by Mr. Ascolose of the second check for the payout of his unused leave time in July, 2013. Yet the ALJ took a much more expansive approach and set three different possible trigger dates, the last of which was April 5, 2015 – when the Board turned over Mr. Ascolese's personnel file to his family. Giving the petitioner the benefit of every doubt, the ALJ still found that the petition was filed after the running of the last conceivable trigger date. The Board stresses that the petition was filed five years after Mr. Ascolese retired; three and a half years after the final payment was made for his unused leave time; over two years after Mr. Ascolese died; and almost two years after the latest possible trigger found by the ALJ. Additionally, notwithstanding Mr. Ascolese's illness, the ALJ properly found that there was no compelling constitutional concern of fundamental public interest that existed which would compel the ALJ to relax the 90-day rule.

Upon review of the record in this matter, the Commissioner concurs with the ALJ's determination – for the reasons stated in the Initial Decision – that the petition of appeal was time barred under *N.J.A.C.* 6A:3-1.3(i). The Commissioner likewise concurs that petitioner has failed to set forth any compelling reason to relax the timely filing requirement.

Pursuant to *N.J.A.C.* 6A:3-1.3(i), a petition must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party or agency, which is the subject of the requested contested case hearing." As stated by the Board in its exceptions, the ALJ gave the petitioner the benefit of the doubt with respect to the latest possible date triggering the notice of the Board's final decision

concerning Mr. Ascolese's remaining unused leave time. The Board made the last payment to Mr. Ascolese for his unused leave time in July, 2013,[1] and the Board provided the family with Mr. Ascolese's personnel file in April, 2015. Certainly the petitioner was on notice at that juncture that the Board had made a final determination related to Mr. Ascolese's accrued leave time. Yet the petition of appeal seeking additional unreimbursed leave funds was not filed by the petitioner until January 27, 2017. The Commissioner is not persuaded that the exceptions submitted by the petitioner dictate a different result. The objections identified in the exceptions essentially raise arguments that the ALJ took into account in determining that the petition should be dismissed as untimely.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[2]

Kimberley Harrington
COMMISSIONER OF EDUCATION

Date of Decision: 12/27/17
Date of Mailing: 12/27/17

[1] Subsequent to his retirement on August 30, 2012, the Board issued two checks totaling a gross amount of $74,553.92 in reimbursement for Mr. Ascolese's unused leave at the time of his retirement. During the 2009-2012 school years, Mr. Ascolese was also paid for unused vacation days that accrued during those respective years. Mr. Ascolese's salary for the 2011-2012 school year was $240,325.00. The details of the various payments made to Mr. Ascolese are outlined in the Certification of Steven Somick, the Board's Business Administrator.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02353-17
AGENCY DKT. NO. 19-1/17

PATRICIA ASCOLESE,

Petitioner,

v.

NORTH BERGEN BOARD OF EDUCATION,

Respondent.

Gary M. Lachman, Esq., for petitioner

Kevin Hanly, Esq, for respondent, North Bergen Board of Education

Record Closed: August 9, 2017 Decided: September 27, 2017

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Patricia Ascolese, filed a petition on January 27, 2017, with the State Board of Education seeking to determine the retirement benefits of her deceased husband, Vincent Ascolese, a former teacher and Assistant Superintendent for the North Bergen Board of Education. The petition sought additional reimbursement for alleged "unused vacation and sick leave" time. An answer to the petition was filed by the respondent on February 14, 2017. The respondents to this matter are the North

Bergen Board of Education (NBBOE, the Board, or the District), George Solter and Steven Somick (collectively the respondents).

On February 1, 2017, the matter was transmitted to the Office of Administrative Law for a fair hearing as a contested case. The matter was assigned to ALJ Leslie Celentano and Joan Bedrin-Murray. Subsequently the case was reassigned to the undersigned.

On March 15, 2017, the respondents moved to discuss this matter on the basis that the petition was filed outside of **the** ninety-day rule. On or about April 23, 2017, petitioner filed letter brief in opposition to the Motion

FACTS

I **FIND** the following **FACTS** to be undisputed, thus they are adopted as the **FACTS** herein:

1. Vincent Ascolese (Ascolese) was employed by the District from 1973 until his retirement on January 6, 2012.
2. Ascolese was initially hired as a teacher. He subsequently became an Assistant Superintendent for Business. During this tenure Ascolese was also the football coach.
3. As an Assistant Superintendent, Ascolese was not required to "punch in" using a time clock, but was allowed to keep his own attendance record that were later recorded by the attendance office.
4. The Board's leave policy provided for ten sick days and five personal days, annually. Unused personal days could be accumulated and converted into "sick" time. Vacation days were based on the position held and subject to a longevity adjustment.

5. Prior to the 1995-1996 school year, District employees were given the option of accumulating unused vacation or being paid for the time at the end of the fiscal year. (Certification of Steven Somick.)

6. Beginning in 1995-1996, the vacation policy changed to require that unused vacation days were to be paid at the end of each fiscal year. Thus, in 1996 Acolese was paid for his unused vacation days and this practice continued until he retired. (Certification of Steven Somick.)

7. In 2007 the law changed and capped unused sick time to maximum payout of $15,000. Current employees were grandfathered in and allowed to retain prior accumulated unused sick leave time. The effective date of the new law June 8, 2007. (Certification of Steven Somick.)

8. An employee could receive the greater of the two: accumulated sick days or $15,000. (Certification of Steven Somick.)

9. As of June 8, 2007, Ascolese had 465 unused sick, personal, and vacation days.

10. Also at that time, Ascolese's employment contract ran from July 1, 2006, to June 30, 2009. If the contract dates were to be used to determine accumulated sick leave, Ascolese had 495 sick days. (Certification of Steven Somick.)

11. Prior to the commencement of the 2009-2010 school year, Ascolese was diagnosed with cancer and was unable to perform his duties as Assistant Superintendent. Ascolese continued to perform his duties as a football coach, thus he remained employed with the District by using unused sick, personal, and vacation days until his retirement in early 2010. (Cortication of Steven Somick.)

12. Before his retirement, Ascolese met with the District's general counsel periodically to discuss his leave time. This meeting occurred after his diagnosis. On March 25, 2010, the general counsel sent Ascolese a memorandum that he had 495 days of accumulated leave time. The memorandum further confirmed that Ascolese planned to take 76 sick days commencing on March 8, 2010, school year or June 30, 2010.

13. Subsequently, Ascolese confirmed in writing that he agreed with the accumulated leave time and that he would take seventy-six sick days. Further,

he noted that he would use vacation time for the rest of the 2010 calendar year. (Exhibit 1, Certification of Steven Somick.)

14. Ascolese did not return to school on January 1, 2011, but instead he used sick time for January 1, 2011, to July 31, 2011. As of July 30, 2011, Ascolese had 184 days left and notified the Board that he would retire on January 6, 2012. (Exhibit 3 Certification of Steven Somick.)

15. Prior to reimbursing Ascolese for his accumulated leave time, the District Business Administrator (BA) met with him and advised him that he would be paid $74,553.92 for his leave time. Ascolese agreed to the number of days and that his contract would be used to determine the amount of the payout. (Certification of Steven Somick.)

16. On August 30, 2012, the District sent Ascolese a net check for $8,564.62. The check was cashed on the same day. (Certification of Steven Somick.)

17. On July 11, 2013, the District sent Ascolese a net check for $48,127.35 which cleared the bank on July 22, 2013. (Certification of Steven Somick.)

18. Ascolese died on December 3, 2014, sixteen months after the last reimbursement check was cashed. At no time prior to January 30, 2017, did Mrs. Ascolese contest the amount of his reimbursement. (Certification of Steven Somick.)

19. On June 8, 2007, Ascolese's salary was $208,900.

20. Patricia Ascolese is the wife of the decedent and the petitioner herein. She avers that her husband worked for the District for thirty-nine years and never missed a day of work, even after his diagnosis of prostate cancer. Indeed, he would report to work after his treatments at Holy Name Hospital in Hackensack, N.J. (Certification of Patricia Ascolese.)

21. Petitioner denies that the signature on Exhibit 2 is her husband's signature.

22. Petitioner received a letter from Kevin Hanley, Esq. dated August 13, 2014, regarding the calculation of her husband's sick days. (Certification of Patricia Ascolese.)

23. Petitioner filed this petition on January 25, 2017.

DISCUSSION, FINDINGS AND CONCLUSIONS

Petitioner seeks supplemental reimbursement for alleged unused sick and vacation leave time. Respondent counters that a petitioner failed to comply with the ninety-day limitation period as set forth in N.J.A.C. 6A:3-1.3(i) and therefore this appeal much be dismissed. N.J.A.C. 6A:3-1.3(i) provides:

> [t]he petitioner shall file a petition no later that the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

Thus, Title 6A provides that a petitioner may challenge the action of a board of education by filling a petition conforming to the requirements of N.J.A.C. 6A:3-1.4. The Code further provides for a limitation of action with respect to the initiation of a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws.

Generally speaking, a limitation of action serve two salutary purposes which our Supreme Court discussed in Ochs v. Federal Insurance Company, 90 N.J. 108, 112 (1982). It noted therein, that the initial purpose is "to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims." Second, is to "penalize dilatoriness and serve as a measure of repose." Id. at 112 (quoting Farrell v. Votator Div. of Chetron Corp., 62 N.J. 111, 115 (1975)).

Subsequently, in Kaprow v. Berkeley Township Board of Education, 131 N.J. 572, 588 (1993). the Court affirmed the validity of the ninety-day rule as applied to school law cases (then codified as N.J.A.C. 6:24-1.2(c)) There, the Court held that N.J.A.C. 6:24-1.2(c) represents a fair and reasonable-necessary requirement for the proper and efficient resolution of disputes under the school laws. The Court concluded that even an unofficial, informal note from respondent's secretary to the petitioner

stating that two positions had been created and filled was sufficient to trigger the start of the ninety-day period. The Court stated that the time limitation, while arguably short, provides a "measure of repose, an essential element in the proper and efficient administration of the school laws." Id. at 582. In addition, the limitation period gives school districts the security of knowing that the administrative decisions regarding the operation of the school cannot be challenged after ninety days. Ibid.

In the instant matter, respondent asserts that the triggering action of petitioner occurred when petitioner cashed his second reimbursement check in 2014, three years before the instant petition was filed.

Petitioner rebuts by contending that the District has taken five and one-half years to state its position regarding petitioner's retirement benefits. Notably, petitioner's answer to said motion is silent on the checks that were received and cashed by her before her husband's demise and some three years before this petition was filed.

In her certification, petitioner vehemently denies that her husband took any sick leave or that he consented to leave time as specified in the memorandum setting forth his accumulated sick and leave time. Indeed, petitioner denies that it is her husband's signature on the memorandum or that he prepared same.

However, I **FIND** that the veracity of these contentions can't be entertained unless the petition is viable. Initially, it must be emphasized that not only did petitioner fail to file a timely claim after cashing the checks in 2012 and 2013, which I **FIND** to be the first trigger, she also failed to file a claim even after the respondent's counsel sent her a letter dated August 13, 2014, that referenced her husband accumulated sick and vacation leave time. I **FIND** that letter to be the second trigger.

I **FIND** that the third trigger occurred on April 5, 2015, when the Board delivered the decedent's personnel file, which included memorandum and correspondence concerning his accumulated sick and vacation leave time.

In each of the aforementioned instances, petitioner failed to file a petition within 90 days of the triggering action. I **FIND** no merit to the petitioner's claim that the Board memorandum of December 26, 2016, which provided copies of the "termination" checks of August 31, 2012, and June 30, 2013, as well as a copy of his June 8, 2017, employee contract is a triggering event. Rather, the memorandum is simply a responsive letter to the petitioner providing the requested documentation.

The ninety-day requirement is to be strictly construed and is mandatory. Wise v. Bd. of Educ. of the City of Trenton, EDU 160-00, Comm'r (September 11, 2000), aff'd, State Board of Educ. (January 3, 2011), http://njlaw.rutgers.edu/collections/oal/. A petitioner must file a petition within ninety-days from a notice of adverse action. Adequate notice is notice that is sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. Ibid. In Amiparo Bishop v. Piscataway Board of Education, OAL Dkt. No. EDU 13897-10, the ALJ concluded that an Order approving a workers' compensation settlement constituted sufficient notice so that the ninety-day limitation began to run. There, the petitioner did not file a claim until three and half years later. Here, the decedent and the petitioner received vacation sick leave checks in 2012, 2013. Given the largess of the checks, it is inexplicable that they were not aware that it was for reimbursement of his leave time.

I am mindful that Vincent Ascolese was ill; however, I **FIND** that this reason standing alone does not constitute sufficient cause for relaxation of the ninety-day rule. Put simply it is not a compelling constitutional concern or fundamental public interest issue.

Accordingly, I **CONCLUDE** that the petition herein should be dismissed for failure to comply with the ninety-day rule as set forth in N.J.A.C. 6A:3-1.3(a).

ORDER

Therefore, for the aforementioned reasons, the respondent's Motion to Dismiss is hereby **GRANTED** and this matter is **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/27/17
DATE

Irene Jones
IRENE JONES, ALJ

Date Received at Agency: 9/27/17

Date Mailed to Parties: SEP 29 2017

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

375-17

IN THE MATTER OF THE TENURE CHARGES REGARDING

DREW PACKARD

AND

THE SCHOOL DISTRICT OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY NEW JERSEY

DOCKET NO. 197-8/17

BEFORE JACQUELIN F. DRUCKER, ESQ. ARBITRATOR

AWARD APPROVING SETTLEMENT AGREEMENT

FOR THE DISTRICT:

ARLENE Q. PEREZ, ESQ.
DECOTIIS, FITZPATRICK, COLE & GIBLINE, LLP
GREENPOINTE CENTRE WEST
500 FRANK W. BURR BOULEVARD
TEANECK, NJ 07666

FOR MR. PACKARD:

CAROL R. SMELTZER, ESQ.
NEW JERSEY PRINCIPALS AND SUPERVISORS ASSOCIATION
12 CENTRE DRIVE
MONROE TOWNSHIP, NJ 08831

The School District of the Borough of Carteret, Middlesex County ("District" or "Employer") initiated, and the State District Superintendent certified to the Commissioner of Education, tenure charges seeking the termination of employment of Drew Packard ("Respondent" or "Mr. Packard"), who is tenured in the District in various capacities including in his current positon as Supervisor of Buildings and Grounds. The Commissioner of Education referred the charges to this Arbitrator pursuant to N.J.S.A. 18A:5-16 as amended by P.L. 2012, c. 26 and P.L. 2015, c. 109. Preliminary conferences were conducted with counsel, and a pre-hearing schedule and an initial hearing date of November 9, 2017, were established. Prior to the date set for the hearing, however, counsel jointly requested, and the Arbitrator approved, a postponement of the hearing in light of the development of proposed settlement terms that were accepted by both parties. As settlement discussions had not produced a resolution, counsel and the Arbitrator set the matter for hearing, which was convened on November 29, 2017, at the Carteret Public Library. Prior to commencing the testimony of witnesses, extensive discussions were undertaken to explore possible agreed resolution of the charges. Following these discussions, the parties reached a

mutually acceptable resolution of the tenure charges. Thereafter, a Settlement Agreement and Release, bearing an effective date of December 8, 2017, executed by Mr. Packard and James P. Hart III, Vice President of the Board of Education, was conveyed to the Arbitrator.

Through the referenced proceedings, the Arbitrator has become familiar, in some detail, with the claims, issues, evidence, and arguments posed in this case. She has carefully reviewed the proposed terms of the parties' jointly submitted Settlement Agreement & Release. She finds same to be fair, appropriate, and proper; further, it is in compliance with the terms of N.J. A. C. 6A:3-5.6 and is in the public interest. The Arbitrator therefore approves same and incorporates it herein as her Award in this matter.

Dated: December 26, 2017

Jacquelin F. Drucker, Esq.
Arbitrator

Attachment, Incorporated by Reference: Settlement Agreement & Release dated and effective December 26, 2017

State of New York)
) SS:
County of New York)

On this 26th day of December 2017, before me personally came and appeared Jacquelin F. Drucker, Esq., to me known and known to me to be the individual described herein, and who executed the foregoing instrument and acknowledged to me that she executed same.

Notary Public

JOSEPH DRUCKER
Notary Public, State of New York
No. [illegible]
Qualified in New York County
Commission Expires February 1, 2019

Carol R. Smeltzer, Esq. - ID #020571997
New Jersey Principals and Supervisors Association
12 Centre Drive
Monroe Township, New Jersey 08831
(609) 860-1200
Attorney for Respondent Drew Packard

IN THE MATTER OF THE TENURE HEARING OF DREW PACKARD, SCHOOL DISTRICT OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY	BEFORE THE COMMISSIONER OF EDUCATION Agency Dkt. No.: 197-8/17 **SETTLEMENT AGREEMENT AND RELEASE**

RECITALS

WHEREAS, Petitioner School District of the Borough of Carteret ("Petitioner" or "District") has employed Respondent Drew Packard ("Respondent") in the District since 1974; and

WHEREAS, Respondent is tenured in the District in various capacities including in his current position as Supervisor of Buildings and Grounds; and

WHEREAS, on or about August 30, 2017, Petitioner certified tenure charges to the Commissioner of Education charging Respondent with unbecoming conduct and insubordination; and

WHEREAS, the Commissioner assigned Arbitrator Jacquelin Drucker, Esq. to conduct the tenure dismissal hearing in this matter; and

WHEREAS, it was determined that the tenure dismissal hearing in this case would be a considerably long and costly proceeding with the potential for dozens of witnesses being called over a period of many days; and

WHEREAS, prior to either party calling any witnesses to testify, the parties came to a mutually satisfactory resolution of the tenure charges; and

WHEREAS, the settlement of the tenure charges complies with the requirements of N.J.A.C. 6A:3-5.6 and is in the public interest since settlement avoids what would otherwise be a considerably lengthy and costly proceeding with no guarantee of a favorable outcome for the District; and

WHEREAS, the charged party is entering into this agreement with a full understanding of his rights;

NOW, IN CONSIDERATION of the payment to Respondent, as provided for herein, and other good and valuable consideration, and the promises and covenants contained herein, the receipt and sufficiency of which is acknowledged, the parties do hereby agree as follows:

1. **Non-Admission**. This Agreement is not, and shall not in any way be considered or construed as, an admission of liability by either party of discrimination, retaliation, tortious conduct, or of any violation of any law, common law, or federal, state or local statute or regulation, or of any education policy, practice, contract or agreement, or of any alleged duty owed, or of any unlawful or wrongful acts whatsoever by either party. Both parties specifically deny any wrongdoing of any kind.

2. **Consideration**. The parties agree to the following good and valuable consideration:
    (a) Petitioner shall immediately withdraw the tenure charges against Respondent with prejudice; and
    (b) Petitioner shall pay Respondent the amount of one hundred and fifty thousand dollars ($150,000) as full and final settlement of

any and all claims he has or may have had against Petitioner; and

(c) Said payment shall be issued in two equal installments as follows: (1) payment of seventy five thousand dollars ($75,000) shall be paid on December 15, 2017, and (2) payment of seventy five thousand dollars shall be paid on January 15, 2018; and

(d) Respondent shall be solely responsible for payment of any and all taxes due on these settlement proceeds; and

(e) Petitioner shall not deduct any taxes or pension contributions from these settlement proceeds.

3. **Covenant Not to Sue**. In exchange for the consideration set forth in paragraph 2, Respondent agrees that neither he, nor any person, organization, agency, or other entity acting on his behalf, will file, charge, claim or sue, or cause to be filed, charged, claimed or sued, any other lawsuit, legal proceeding, action, grievance, or claim of any nature with any court, agency, or tribunal (including any action for damages, attorneys' fees, injunction, declaratory, monetary, equitable or other relief) against the Petitioner, based on any matter, fact or event occurring prior to the effective date of this Agreement, whether now known or unknown, or involving any continuing effects of any acts or practices which may have arisen or occurred prior to the effective date of this Agreement, whether now known or unknown.

4. **Written Resignation and Waiver of Tenure Rights**. In exchange for the consideration set forth in paragraph 2, Respondent agrees to submit an irrevocable letter of resignation for the purpose of retirement to be effective immediately upon the execution of this settlement agreement by both parties, and ratification by the Board of Education, which is anticipated to occur on or about December 7, 2017; Respondent further agrees to forfeit

any and all tenure and/or seniority rights he has accrued while working under Petitioner's employ as to any position in the District.

5. **Agreement Not to Apply for Reemployment.** As part of the consideration for entering into this Agreement, Respondent expressly agrees not to apply for reemployment with Petitioner in any capacity.

6. **Retrieval of Personal Property.** Petitioner hereby agrees to permit Respondent entry into his office at the Administration Building for up to two (2) full days during the month of December 2017 for the purpose of retrieving his personal belongings. Petitioner and Respondent shall schedule this for such dates and at such times as to minimize disruption to the orderly operations of the building.

7. **Confidentiality.** Respondent agrees that the terms, conditions, fact of payment, amount of payment, and underlying facts of the settlement stated in this Agreement shall be held strictly confidential by him, his spouse, and any necessary disclosure to an attorney, accountant, and financial adviser. Respondent further agrees that he shall not describe, characterize or disclose any such information in any manner whatsoever, directly or indirectly, orally or in writing to anyone not a party to this Agreement, except to the extent required by law or to say, "the matter has been resolved", if asked, and except that Respondent may disclose the terms of this Agreement to his spouse, accountant, or financial advisor and attorney, or when legally obligated by law to do so. Similarly, Petitioner agrees to keep all terms and conditions of this Settlement Agreement strictly confidential and to not disclose same unless required to do so by law.

8. **Non-Disparagement.** The parties, their agents, representatives, servants, and employees understand and agree that they will not engage in any

activity or make any statement that may disparage or reflect negatively on each other, its employees, officials, officers, directors, employees, or related entities and related individuals.

9. **Neutral Job Reference.** In the event that Petitioner is contacted by any person or entity seeking a professional, personal, or character reference related to Respondent, all parties agree that Petitioner shall advise such person or entity that it is the policy of Petitioner to solely provide information verifying employment, dates, and title, and that Petitioner shall provide no further information.

10. **Certification of Service and Final Salary.** Petitioner agrees to promptly submit to the Public Employees' Retirement System a Certification of Service and Final Salary as required in order for Respondent to obtain retirement benefits.

11. **General Release and Waiver of all Claims**. In exchange for the consideration set forth in paragraph 2, Respondent fully releases and forever discharges Petitioner of and from any and all claims, actions, causes of action, back pay, front pay, contracts, agreements, promises, charges, judgments, grievances, obligations, rights, demands, debts, physical injury, pain, suffering, emotional distress, compensatory damages, punitive damages, attorneys' fees, expenses, costs, losses, liabilities, damages, or accountings of whatever nature, whether known or unknown, disclosed or undisclosed, asserted or unasserted, in law or equity, contract or tort or otherwise (herein collectively designated "Claims"), through the effective date of this Agreement, including, but not limited to, any and all Claims of harassment, discrimination, retaliation, and any and all tort Claims or contract Claims for general damages, and any and all Claims arising under, made, regarding, or involving: any federal, state, or local laws or under the common law; violations of any

federal, state, or educational practices or civil rights laws or ordinances; Claims for personal injury, failure to reinstate, wrongful conduct, or discrimination; New Jersey Department of Education regulations and related statutes; the Civil Rights Acts of 1866 and 1871, as amended, 42 U.S.C. §1981; the Civil Rights Act of 1964, as amended, including Title VII; the Age Discrimination in Employment Act, as amended; the New Jersey Law Against Discrimination; the Employee Retirement Income Security Act; the Fair Labor Standards Act; the National Labor Relations Act, as amended; the American's with Disabilities Act; Fair Housing Act; Section 504 of the Rehabilitation Act; any and all state wage payment and collection laws; the Petitioner's policies, practices, collective bargaining agreements, contracts, benefits, or understandings; any Claims arising out of any relationship, including employer/employee relationship, between or among Respondent and Petitioner predating the effective date of this Agreement; and any and all grievances or demands for mediation or arbitration, or Claims or demands under Petitioner's policies and procedures; and any and all Claims asserted, or which could have been asserted, including any Claims against any current or former agents or employees of Petitioner.

Respondent hereby specifically waives, releases, and gives up all Claims and rights, as described in the preceding paragraph, whether now known or unknown, which he has or may have against Petitioner, based on any fact, act, event, or omission, whether now known or unknown, occurring before the Effective Date of this Agreement. Respondent understands that he is waiving, releasing, and giving up all Claims and rights that he knows about and all Claims and rights that he may not know about.

Similarly, Petitioner hereby specifically waives, releases, and gives up all Claims and rights, as described in the preceding paragraph, whether now known or unknown, which it has or may have against Respondent, based

on any fact, act, event, or omission, whether now known or unknown, occurring before the Effective Date of this Agreement. Petitioner understands that it is waiving, releasing, and giving up all Claims and rights that it knows about and all Claims and rights that it may not know about.

12. **Liens and Indemnification by Respondent**. It is further understood that as a condition of this settlement, all claims, and/or liens, past, current, and/or future arising out of this settlement or asserted against the proceeds of this settlement are to be satisfied by Respondent and/or his Attorneys, including but not limited to any Medicare or Medicaid claims and/or liens, Child Support claims and/or liens; Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including but not limited to claim based on subrogation or any other legal or equitable theory. Respondent therefore agrees, upon prompt presentation of any such claims and/or liens, to defend Petitioner and its insurer against any such claims and/or liens, and to indemnify and hold Petitioner and its insurer harmless against any judgment entered against Petitioner and its insurer based on such claims and/or liens, including the payment of any fines, charges, and attorneys' fees incurred as a result of any such lien.

13. **Costs and Attorneys' Fees.** Each party's costs and attorneys' fees, if any, will be borne by the respective party.

14. **Payment**. Payment to Respondent is subject to Petitioner's receipt of Respondent's signed and notarized Agreement, letter of resignation, as well as a child support search report.

Respondent represents and warrants that neither Petitioner nor its attorneys provided any advice regarding the taxability of the settlement amounts paid pursuant to this paragraph. Respondent acknowledges and agrees that he is solely responsible for payment of any and all federal, state, and local taxes which may be due from the settlement sum in the event that it is determined that any taxes are owed based on the taxation laws in effect on the date of execution of this Agreement or become due at any time in the future because of a change to the laws governing the taxation of such settlement proceeds. Respondent further acknowledges and agrees to indemnify and hold harmless Petitioner and its attorneys in the event that any federal, state, or local taxing authority asserts against any claim for unpaid taxes, failure to withhold taxes, or interest based upon the payment of the settlement sum to Respondent.

15. **Effective Date**. The effective date of this Agreement shall be the day following the date upon which the signed and notarized Agreement is received by Petitioner's attorneys and executed by Petitioner's Board of Education President. The Board will hold a special meeting on December 7, 2017, to review and vote on this Settlement Agreement.

16. **Applicable Law**. This Agreement shall be governed by and construed in accordance with the laws of New Jersey, except where federal law controls. Should any provision of this Agreement be declared or determined by any Court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of this Agreement or may be modified as necessary.

17. **Entire Agreement**. This Agreement sets forth the entire agreement between the parties and fully supersedes any and all prior agreements or understandings between the parties.

18. **Signatures**. This Agreement may be signed in counterparts. However, this Agreement will not be binding among the parties until it has been executed by and among the Parties, and subject to Petitioner's receipt of Respondent's signed and notarized Agreement, and a completed child support search report.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties have executed this Settlement Agreement and General Release as of the dates set forth below.

By: _____
Dated: 12/6/17
DREW PACKARD

By: _____
Dated: 12/8/17
NAME: James P Hart III
TITLE: Vice President

STATE OF NEW JERSEY,
COUNTY OF MIDDLESEX: SS.:

I CERTIFY that on the 6th day of December, 2017, Drew Packard personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as his act and deed.

_____
Notary Public
Carol R. Smeltzer, Esq
Attorney At Law
State of New Jersey

December 4, 2017

Dear Superintendent and Board of Education:

Please be advised that I hereby give notice of my irrevocable resignation from the Carteret Public Schools for purpose of retirement, effective December 8, 2017. Please be advised that my resignation is expressly conditioned upon the Board adopting the attached Settlement Agreement and Release and complying with all terms of same.

Thank you.

Drew Packard

374-17

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing of John McEntee, Jr.:

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON

"Petitioner,"

- and -

JOHN MCENTEE, JR.

"Respondent."

OPINION AND AWARD

Agency Docket No. 61-3/17

Before
James W. Mastriani
Arbitrator

Appearances:

For the Petitioner:
Mark J. Blunda, Esq.
Apruzzese, McDermott, Mastro & Murphy, P.C.

For the Respondent:
Sanford Oxfeld, Esq.
Oxfeld Cohen, P.C.

This arbitration proceeding arises under the terms of N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1 and concerns tenure charges filed by the State Operated School District of the City of Paterson [the "Petitioner" or "District"] with the Commissioner of Education on March 29, 2017 seeking an unpaid suspension for tenured teacher John McEntee, Jr. [the "Respondent" or "McEntee"]. Respondent McEntee also serves in a full-time capacity President of the Paterson Education Association. He was serving as President at the time of the incident that led to the tenure charges and continues to do so. The Petitioner alleges that the Respondent engaged in Unbecoming Conduct or other inappropriate behavior on December 19, 2016 in his interactions with Dr. Sharon Davis, Vice Principal of the Napier Academy[1] and by submitting a written report to the Superintendent of Schools, and widely circulating it to others, stating that Dr. Davis "had me forcibly ejected from the building by security" on December 19, 2016.

The statutory reference for evaluating tenure disciplinary action is set forth in N.J.S.A. 18A:6-10: "[n]o person shall be dismissed or reduced in compensation ... if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state ... except for inefficiency, incapacity, unbecoming conduct, or other just

[1] Dr. Davis is no longer employed by the District and currently serves as Principal of a new middle school in the Hoboken Public School District.

cause." Petitioner has the burden to prove, by a preponderance of the evidence, that the tenure charges must be sustained and, if so, that the penalty of an unpaid suspension be imposed in the amount to be determined by the arbitrator. On April 13, 2017, the Respondent filed an Answer to the tenure charges. While admitting to many underlying facts that are not in dispute, Respondent denied engaging in any conduct that would support the District's position that he engaged in any conduct unbecoming or any other inappropriate behavior and rejected any basis claimed by the District as authority it has to take any disciplinary action against him. Pursuant to N.J.S.A. 18A:6-16, as amended by P.L. 2012, Chapter 26 and P.L. 2015, Chapter 109, this controversy and dispute is subject to arbitration and was assigned to this arbitrator to hear and decide on April 21, 2017.

In addition to the record developed in this proceeding, the record includes documents associated with an unfair practice charge filed by the Paterson Education Association [the "Association"] filed with the New Jersey Public Employment Relations Commission ["PERC"] against the District on February 10, 2017 and amended on April 17, 2017 in connection with the same incident that gave rise to the tenure charges. The initial charge alleged that the District violated various sections of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et. seq. by conduct exhibited by Dr. Sharon Davis alleged to have been discriminatory and retaliatory to Respondent during and after the December 19, 2016 meeting. The Association amended the unfair practice

charge on April 17, 2017 alleging that the District filed tenure charges in retaliation for the Association's filing of the February 10, 2017 unfair labor practice charge. The Association also applied for interim relief, requesting that "PERC should enjoin the matter from proceeding pursuant to TEACHNJ..." The Association asserted that PERC had exclusive jurisdiction, or in the alternative, predominant interest over the issues in light of Respondent's position as President of the Paterson Education Association and its claim that the tenure charges filed by the District in late March 2017 were in retaliation for the Association's filing of the initial unfair practice charge on February 10, 2017. A PERC Designee conducted an interim relief proceeding. He issued an Interlocutory Order on July 28, 2017 denying the Association's request for interim relief. He found that the dispute involving both the tenure proceeding and the unfair labor practice charge was one of first impression for PERC and further, that there were material facts in dispute from which he could not determine that the Association could establish a substantial likelihood of success. Thereafter, the unfair labor practice charge, as amended, has been held in abeyance by PERC pursuant to party request pending the disposition of this tenure arbitration proceeding.

This arbitrator held an informal pre-hearing conference on May 16, 2017 at which time the parties reached several procedural agreements that allowed for formal hearings to be conducted in a timely and efficient manner. Arbitration hearings were originally scheduled on August 13, 14 and 15, 2017 but were

adjourned due to witness unavailability. Arbitration hearings were then held on September 14 and 19, 2017. During the course of the arbitration hearings, the parties argued orally, examined and cross-examined witnesses and submitted documentary evidence into the record. Testimony was received from six witnesses: Dr. Sharon Davis, former Vice Principal, Dr. Frank Napier, Jr. Academy of Technology, Irene DelRosso, District Supervisor, Federal Programs – No Child Left Behind (NCLB), Captain James Smith, Executive Director Security, Internal Investigations and Transportation, Diane Caparso, Instructional Assistant Special Education, Sasha Wolf, Esq., Field Representative, New Jersey Education Association Passaic County and John McEntee, Jr., Respondent and President, Paterson Education Association. A transcript of proceedings was taken. Post-hearing briefs were filed by the Petitioner and the Respondent on or about November 1, 2017. An extension of time to issue an award until December 26, 2017 was granted by the Director, Office of TEACHNJ Arbitration.

BACKGROUND

The Encounter in the Office of Dr. Davis

The facts giving rise to the tenure charges center mainly on events occurring during and shortly after an unscheduled meeting took place between Respondent and Vice-Principal Sharon Davis in the office of Dr. Davis at approximately 1:37 p.m. on December 19, 2016. NJEA Field Representative Wolfe accompanied Respondent. Prior to this time, Dr. Davis had been meeting

with Irene DelRosso, the District's Supervisor of Federal Programs - NCLB. According to Ms. DelRosso, her meeting with Dr. Davis was to discuss grant funding for two staff members, a review of their schedules and responsibilities and the students that they serve. The meeting in Dr. Davis' office lasted just shy of four minutes. DelRosso was seated at a desk to the left of the doorway that opens to Dr. Davis' office. Prior to the time that Respondent entered the office, the door to Dr. Davis' office was closed. A sign hung from the door covering most of a door window stating there was a "Meeting in Conference." A portion of the bottom of the window below the sign allowed for a limited view into the office. Dr. Davis testified that she normally hung this sign when she conducted a meeting.

At approximately 10:30 a.m., some three hours prior to the meeting, Respondent entered the school on the first floor along with PEA Vice President Charles Ferrer and NJEA Field Representative Sasha Wolfe, Esq. According to District testimony, their visit to the school was part of scheduled visits and was prearranged. The Association representatives followed protocol by signing in and going to the second floor office of the school's principal, Marc Medley. Principal Medley's office is a short distance from the office of Dr. Davis on the same side of the hallway. On the other side of Dr. Davis' office on the same side of the hallway is a teachers' lounge. The three met with Principal Medley for approximately three minutes. They then left his office accompanied by Principal Medley, walked past the office of Dr. Davis and entered the teachers' lounge

located adjacent to the office of Dr. Davis. Principal Medley then returned to his office. Respondent, Mr. Wolfe and Mr. Ferrer met with staff members in the lounge for approximately three hours until 1:37 p.m. Respondent testified that during this time, he was made aware of Dr. Davis' use of a confidentiality statement in her emails to staff. Respondent and Mr. Wolfe then left to go next door to Dr. Davis' office while Mr. Ferrer remained in the lounge.

Video surveillance cameras are in the school and reflect all of the above actions except what occurred inside of the office. The video also shows that when Respondent and Mr. Wolfe left the lounge, they went next door where Dr. Davis' office is located. After Mr. Wolfe knocked on the door, Ms. DelRosso opened the door and the two entered to see Dr. Davis. There is no video of what transpired inside the office of Dr. Davis. Some facts as to what happened during the next few minutes are not in dispute but some facts central to the conduct of Respondent and Dr. Davis during their interactions are in conflict and are directly relevant to the merits of the disciplinary action sought by the Petitioner/District.

After entering the office, the Respondent asked Dr. Davis if she was busy. Because the meeting between the two had not been previously scheduled, Dr. Davis was unaware of the reason Respondent went to her office. Dr. Davis responded that she was busy but that Respondent and Mr. Wolfe could enter the office. She asked if they wished to sit but they decided to remain standing. She asked and received business cards from the two. Drawings of the desk where

Dr. Davis was sitting, the desk where Ms. DelRosso was sitting and the locations of where Respondent and Mr. Wolfe were standing were submitted into evidence. There is disagreement in the testimony over precisely where Respondent and Mr. Wolfe were situated in relation to Dr. Davis. According to Dr. Davis, after standing up and greeting the two, she went back to sit behind her desk while Respondent stood in close proximity to her desk with Mr. Wolfe standing behind him facing her. Their backs were to the hallway door while Dr. Davis was facing the door. The drawings in evidence as well as testimony confirm that there was little space to the left of Dr. Davis as she sat behind the desk. To the right of where Dr. Davis was seated, there was a door to the main office and to the left was a door to the teachers' lounge. Both doors were closed. According to Respondent, he was standing by the right-hand portion of Dr. Davis' desk. There is sufficient room between this side of the desk to enter and exit from behind the desk towards the front doorway. According to Mr. Wolfe he stood to Respondent's left and both were up against the edge of the desk. All witnesses testified that the office was small. Mr. Wolfe described it as "cramped." Respondent said that the "quarters" were "tight."

The initial discussions came from Respondent and concerned the practice of Dr. Davis to include confidentiality language in emails she sent to staff.[2]

[2] Dr. Davis testified that at the time of the meeting she had already ceased using the confidentiality statement in her emails. However, Respondent said she made no mention of this during the December 19, 2016 meeting and said he was unaware it had ceased. Respondent testified that he and Director of Labor Relations Luis Rojas had dealt with a similar issue at School No. 8 and he was under the impression that email references to confidentiality had been resolved. Respondent said he believed that Dr. Davis was continuing to use the confidentiality statement based upon what he was told in the teachers' lounge.

According to Dr. Davis, Respondent asked "are you familiar with the confidentiality law?" She responded "why do you ask?" Respondent referred to an email that he had in his hand. Dr. Davis responded "why are you asking me if you already know the answer?" She said to Respondent that he entered her office under "false pretenses" because she was unaware of Respondent's intent to raise a grievable matter. Respondent said that there could be a grievance filed over whether her practice was a contract violation. In response, Dr. Davis said if Respondent was raising a grievance issue she needed to call Principal Medley to have him present for the discussion. She was unable to reach Principal Medley because he had left the main office to go downstairs. After this unsuccessful attempt to reach Principal Medley, an interchange occurred between the two that escalated beyond normal conversation.

According to Dr. Davis, Respondent's demeanor changed after she tried to reach Principal Medley. She described that Respondent moved around the desk to Respondent's right and to her left while saying loudly "you can get whoever you want." Because she perceived that Respondent's tone had changed, she said "if you're going to discuss a grievance with me, I wish you would have extended the same courtesy as your building delegates do which is Dr. Davis we may have a possible grievance, can we talk about it?" According to Dr. Davis, Respondent said "I am not one of your teachers" while gesturing with his hand and pointing his index finger while shaking his hand. Dr. Davis testified that Respondent came within 12 to 18 inches of her. Dr. Davis testified that

because his hand with shaking finger moved closer to her face and this led her to move her head back. She testified that Respondent continued to state loudly that he was not one of her teachers. She testified that she feared she was going to get hit by Respondent whose physical dimensions far exceeded that of Dr. Davis. Mr. Wolfe remained silent during the interchange. Dr. Davis testified that she changed her tone at that time because of Respondent's yelling and his actions and said to him "we're done. I'm going to ask you to leave my office and to leave the building." She testified that Respondent was standing in the only exit path available to her in a place that would have blocked her. According to Dr. Davis, Respondent then said "you can't kick me out of this building. You can't kick me out of this building. I have a right to be here. You can't kick me out of this building. Who do you think you are? You think I am one of your teachers?" She described Respondent as continuing to gesture with his hand while getting red in the face. According to Dr. Davis, Respondent said "I will say it the way I want to say it. I will talk to you the way I want to talk to you. You're going to get grieved." At that point, Dr. Davis testified that she said "I'm calling security. I'm calling security" because she felt that Respondent made no effort to leave. She said that Respondent then said "you can't throw me out of the building." She explained that Respondent and Mr. Wolfe began to exit her office after she said she was going to call security. While the two were exiting into the hallway, Dr. Davis testified that Respondent continued to yell "She's telling me I have to leave the building, she's telling me I have to leave the building." Later that day, at 5:49 p.m., Dr. Davis sent an email to the then District Superintendent Donnie Evans

and several others with a letter attachment recounting her version of the interaction with Respondent earlier that afternoon.

According to Respondent, while he was in the staff lounge a teacher had raised the issue of Dr. Davis using the confidentiality statement and this was the reason he went next door to see Dr. Davis. He confirmed her testimony as to the first part of their dialogue and testified he said to her that "if you're still utilizing it, it could be a violation of the contract and we want it to stop." Respondent testified that after saying this he observed a change in the body language of Dr. Davis. He said to her:

> Are you aware that unless you are a priest, a therapist or a doctor, you do not possess the confidentiality that you've put into these statements? We had members complaining saying administrators were saying if this is included in your email you can't send our emails to the union. And that's why we dealt with this."

According to Respondent, he elevated his own voice but only after Dr. Davis started to elevate her voice. After saying that he could file a grievance, he saw Dr. Davis stand up, walk to her phone and attempt to call Principal Medley. He said "I don't care who you call, you can call anybody you want, but we want to resolve this here, today." He acknowledged that he raised his voice to the same level or possibly even higher than that of Dr. Davis. He said "listen, you can't speak to me this way. I am not one of your teachers. You can't put me on a CAP the same way you're putting your teachers on CAPS, so let's resolve this

thing."[3] Respondent recalled that Dr. Davis then called for security. He denied that he refused to leave the office prior to the call to security. According to Respondent, he had stayed in the same position he was in when he first walked in front of the desk and denied moving to the right of the desk to impede Dr. Davis. He acknowledged he gestured with his finger but denied coming close to her at any time. He explained the use of the finger gesture as helping him make a point and that it was normal and routine for him to speak with his hands. He recalled that Dr. Davis said "I want you out of this building at once. I'm directing you to leave" before she called security. He testified that he then turned around and walked out of the office and opened the door with Mr. Wolfe behind him. Mr. Wolfe's testimony concerning this phase of the incident prior to exiting the office essentially corroborated that testified to by Respondent.

Ms. DelRosso also offered testimony as to what occurred inside the office of Dr. Davis. She recalled that Respondent raised the issue of the confidentiality statement and said he had an email with him. This prompted Dr. Davis to respond "why are you asking me if you already know the answer?" She also recalled Respondent saying it could become a grievance issue and that, in response, Dr. Davis picked up the phone to call Principal Medley. According to Ms. DelRosso, Respondent began to get upset and yelled "you can call whoever you want." She said that after Dr. Davis put the phone down, Respondent said "who do you think you are ... is this how you talk to one of your teachers?" and

[3] Respondent's reference to the CAP was his knowledge that Dr. Davis had placed "at least 20 teachers on a Corrective Action Plan" during a past year.

"I'll talk to you I want to talk to you, speak to you the way I want to speak to you." She testified that Respondent was about 12 inches from Dr. Davis when he made the finger pointing hand gesture. At hearing, she provided an animated impression of Respondent's actions with emphasis on having a sharp tone while finger pointing. She recalled that Dr. Davis said: "I'm done here. You need to leave my office and you need to leave the school." After this, Respondent said "you can't tell me what to do. I will leave when I want to leave and I will go when I want to go." She observed Dr. Davis picking up the phone to call security. She described Dr. Davis as having been calm but that towards the end of the interchange with Respondent her voice was quivering. She testified that she felt afraid for Dr. Davis "because she was cornered. She was cornered in a way that if he continued to get close to her, I don't know what he was thinking and I was afraid he might hit her and hurt her. There was no other way for her to get out. He was blocking the only way out." Ms. DelRosso wrote an "Incident Report" to Captain James Smith, Executive Director of Security later that day detailing her version of the events that occurred in Dr. Davis' office. At hearing, she also provided handwritten notes describing the events as they were occurring.

Each of the above witnesses was cross-examined without significant variation from their direct testimony as to the verbal interchanges. Dr. Davis believed that Respondent went into a tirade when he gave her the list of categories such as a priest as one who could properly use a confidentiality statement. She said she felt he entered her office under "false pretenses"

because he did not initially state that he was there for grievance purpose and because when he asked her if she was aware of the confidentiality statement he was already aware that she had used the statement in her emails and had one in his possession. She acknowledged that she did not tell him that she was no longer using the confidentiality statement after he said he could grieve the issue. She maintained that Respondent moved to the open side of the desk during his interactions with her and that any statement he made to the contrary was incorrect. She denied that Respondent began to walk out of her office before she made the call to security.

Respondent denied that he moved from his original position in front of Dr. Davis' desk to the side of her desk to impede her movement during the encounter. He acknowledged that the meeting was unscheduled, that Dr. Davis was initially not aware that he entered her office to discuss a possible grievance and that neither Dr. Davis nor Ms. DelRosso had shown any animosity towards him prior to the meeting. He also acknowledged saying that he yelled at Dr. Davis in a police report but that it was Dr. Davis that began the yelling. He confirmed Dr. Davis' testimony that she said if a grievance was going to be filed she needed to have Principal Medley present. He confirmed that he exited the office at the same point in time that Mr. Ferrer left the teachers' lounge and knocked on Dr. Davis' door. District testimony suggests that Mr. Ferrer went to knock on the door because of commotion in Dr. Davis' office but there is no supporting evidence for this suggestion.

Mr. Wolfe was questioned by District counsel as to what was the meaning of the allegation in the unfair practice charges and in emails from Respondent that he and Respondent had been "forcibly ejected" from the building. He stated that it meant "we did not have a choice to remain." He acknowledged that there was a "very heated exchange" between Respondent and Dr. Davis. He confirmed Respondent's testimony that he never refused to leave the office after being told to by Dr. Davis.

Ms. DelRosso acknowledged that upon witnessing the encounter between Respondent and Dr. Davis, she did not leave the office to ask for assistance nor did she say anything inside the office. She denied she did nothing and watched the events because she took notes of what she observed as the events unfolded.

Additional testimony as to the interchange in the office of Dr. Davis was provided by Ms. Diane Caparso. Ms. Caparso is a retired School Aide. She testified she was in the teachers' lounge during the brief time that Respondent was in Dr. Davis' office. According to Ms. Caparso, she heard voices that were louder than normal "but it wasn't anything like, oh my God." She testified that she heard a male voice and a female voice whose levels were "basically the same." According to Ms. Caparso:

> It wasn't like somebody was screaming louder than - - and I don't even mean screaming, speaking louder than the other. And that's when I turned around and I said to whoever was sitting there, I

> says, "I'm going to go" and I walked out the door. As I walked out, I will say this, I saw security coming so I was like, oh, and then I walked down the hall.
>
> So evidently somebody had called for security at that point.

The Events in the Hallway and Building Shortly After Respondent Left Dr. Davis' Office

The tenure charges include allegations referencing Respondent's conduct as he was exiting the office and shortly thereafter. According to the District, Respondent continued to shout "you can't make me leave" and "who do you think you are," or language similar in nature as he was exiting the office and entered into the hallway. Dr. Davis testified that she observed Respondent continuing to shout as he walked back and forth in front of her door in the hallway. This sequence of post-meeting events also concerns District allegations that Respondent falsely stated in an email shortly after the meeting that Dr. Davis "forcibly ejected" him and his colleagues from the school by security. Dr. Davis testified that after Respondent exited the office:

> I stayed by my desk. And then to see him in front of my office door going back and forth, back and forth, and I could hear him yelling in the hallway in the presence of students, in the presence of teachers. "She's telling me I have to leave the building, she's telling me I have to leave the building."

Upon questioning by Respondent's counsel, Dr. Davis acknowledged that Respondent was not confrontational or argumentative in the hallway but that he was more volatile and vocal while he was in her office. Dr. Davis testified that

she had concern that when Respondent was in the hallway she felt unable to leave her office.

The District also charges Respondent with making false statements he widely circulated by email and in the unfair labor practice charge that he and Mr. Wolfe were "forcibly ejected" from Dr. Davis' office and the building. On this point, the District relies heavily on the video to contradict this claim. Although Dr. Davis' call to security resulted in Security Officer Benjamin arriving and entering her office and briefly chatting with Respondent and Mr. Wolfe, the District submits that the video shows Respondent and his colleagues interacting with a classroom teacher and lingering for several minutes in the hallway both near the stairs and near Dr. Davis' door and then exiting the building without any coercion whatsoever by security or anyone else.

Respondent denies that he acted in a confrontational manner after he exited Dr. Davis' office and entered the hallway. Pointing to what appears on the video, Respondent asserts that there is nothing that shows him screaming or upset and he refers to the testimony of Dr. Davis acknowledging that the video did not show him being confrontational or argumentative in the hallway. The video also depicts that it was Mr. Wolfe walking back and forth in front of her door and not Respondent.

An additional issue was raised at hearing concerned an alleged action by Respondent after he exited the office. The video shows Respondent turning around to face the doorway to Dr. Davis' office. The District contends that it shows Respondent pursing his lips and blowing a kiss in the direction of Dr. Davis. Respondent denies this and asserts instead that he was getting in "the last word." The video on this point was shown at the hearing and is in the record as an exhibit. Ms. DelRosso testified that she observed the alleged kiss, although she did not include it in her report.

The Post-Incident Events

The record includes events occurring after the date of the incident that refer back to the December 19, 2016 meeting. Many documents were authored by all key participants describing the 1:37 to 1:41 p.m. actions that took place in the office of Dr. Davis on December 19, 2016. These documents have been thoroughly reviewed and considered but will not be detailed in their entirety. A summary of these documents is as follows:

- Handwritten notes from Ms. DelRosso taken during the meeting on December 19, 2016 in Dr. Davis' office recording her observations of what she witnessed, including a map depicting the locations of Respondent and Dr. Davis.

- An Incident Report written by Ms. DelRosso on December 19, 2016 detailing events occurring in Dr. Davis' office and sent to Executive Director Smith.

- Respondent's email to Dr. Davis on December 19, 2016 at 2:41 p.m. that was blind copied to staff. The email thanks Dr. Davis for meeting with him, accuses her of terminating the discussion and

having him forcibly ejected from the school by security and requests a resumption of their discussions concerning the confidentiality statement.

- An email with letter attachment from Dr. Davis to Superintendent Donnie Evans at 5:49 p.m. on December 19, 2016 summarizing the events occurring in her office earlier that afternoon. It incorporates Respondent's 2:41 p.m., December 19, 2016 email to her. Dr. Davis' letter includes a request that the District take certain actions against Respondent, including:

    - A written and public apology to Dr. Sharon V. Davis
    - A written and public apology to Paterson Public School District as a result to the email that was blind copied
    - Removed from his position as president of the PEA
    - Supervision when Mr. McEntee is in School 4 or in my proximity.

- A December 19, 2016 email sent by Respondent to Principal Medley at 6:27 p.m. attaching a grievance he filed with Director of Labor Relations Luis Rojas alleging a violation of contract by Dr. Davis and alleging that she refused to discuss the issue with him on December 19, 2016.

- A December 20, 2016 letter from Respondent to Superintendent Donnie Evans detailing the events of the December 19, 2016 meeting and alleging that Dr. Davis prematurely terminated discussions and had him forcibly ejected from the building by security. The letter was copied to District administrators and staff.

- A December 20, 2016 report from Captain Lucilla Johnson explaining the role of Security Officer Benjamin who reported to Dr. Davis' office and followed Respondent as he left the building.

- A December 20, 2016 Offense Report written by a City of Paterson police officer after a complaint Dr. Davis filed over Respondent's alleged actions during the December 19, 2016 meeting in her office. The Report included a one page narrative of the police officer summarizing his understanding of Ms. Davis' complaint, including that she wanted to "scare him straight."

- A December 20, 2016 email with letter attachment written at 3:10 p.m. by Respondent and sent to Superintendent Donnie Evans with blind copy to District staff. The letter summarizes Respondent's

account of the events occurring in Dr. Davis' office on December 19, 2016.

- A December 21, 2016 email from Dr. Davis to Superintendent Donnie Evans noticing him of Respondent's Facebook posting that described the remedies sought by Dr. Davis and her contact with the Paterson Police Department.

- Three December 22, 2016 emails to and from Dr. Davis and Executive Director of School Security James Smith regarding Dr. Davis' request to have a security escort while she entered and left District premises.

- A December 23, 2016 email from Dr. Davis to Superintendent Donnie Smith with copies to several individuals objecting to a second Facebook posting by Respondent and alleging that Respondent misstated that she told the Paterson Police Department that she wanted to "scare me straight."

- A January 6, 2017 Summary Report of the December 19, 2016 incident authored by Executive Director of Security James Smith. The report chronicles the December 19, 2016 events, including timelines after Director Smith interviewed and obtained written reports from Dr. Davis, Ms. DelRosso, PEA President John McEntee, Jr. (Respondent) and Mr. Wolfe. The written reports from these individuals Director Smith interviewed were separately submitted into the record.

- A January 12, 2016 Summary Analysis from Director Smith setting forth his conclusions as to what happened in Dr. Davis' office on December 19, 2016 and the reasons upon which he made credibility determinations.

The Investigation

James Smith, Executive Director of Security for the District,[4] was asked by Superintendent Donnie Evans to investigate the December 19, 2016 incident. He testified that before this request he was aware of the incident because he was copied on the December 19, 2016 email from Dr. Davis to Superintendent Evans

and he had also spoken to Respondent that day. He interviewed and received reports from Dr. Davis, Ms. DelRosso, PEA President/Respondent John McEntee, Jr. and NJEA Field Representative Sasha Wolfe, Esq. Based upon his investigation, Director Smith submitted a lengthy report on January 6, 2017 summarizing the December 19, 2016 incident. The Report contains a timeline of events based on the video, a summary of each person he interviewed, their written reports and his own observations. His report contains no recommendations on what course of action, if any, should be taken by the District. Instead, his Report served as one significant source of information for the District's review of the events. Director Smith also submitted a summary of the events on January 12, 2017. The District and Respondent both offer extensive arguments in support of their conflicting interpretations of Director Smith's Reports as they relate to the merits of the tenure charges.

On direct and cross-examination, Director Smith also offered insights as to what he believed occurred through descriptions of the video. Respondent made objections to Director Smith's opinions that served as interpretations of his reports and the events shown on the video. Director Smith testified that he spoke with the police officer whose report summarized what Dr. Davis described to him. According to Director Smith, the officer told him that the reference to "scare him straight" was not a quote he received from Dr. Davis but rather was "his own thing."

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[4] Director Smith had formerly served as Captain in the Paterson Police Department and is commonly referred to as Captain Smith. He has been employed by the District for fifteen years.

The Positions of the Parties

The positions of the parties are comprehensive and well articulated. They reference witness testimony, exhibits, as well as liberal citations to decisions on similar subject matters from the courts, PERC, the Commissioner of Education, the Civil Service Commission, as well as private sector labor law cases, all of which address standards to measure whether Union representatives were properly or improperly disciplined for their interactions with management and whether disciplinary actions taken against union representatives were justified or evidence of retaliation.[5] Of particular note is the Respondent's emphasis on In the Matter of Bridgewater Twp., 95 NJ 235 (1984). In that case, the New Jersey Supreme Court essentially adopted the National Labor Relations Board Wright Line Test (251 NLRB 1083, 1980) when evaluating disputes alleging anti-union animus. I will not summarize the extensive number of cases cited by the parties

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[5] These include: Pietrunti v. Board of Education of Brick Township, 128 N.J. Super. 149, 162-163 (App. Div. 1974); In the Matter of the Tenure Hearing of Carol Ziznewski and the Edison Board of Education, 2010 WL 1846768 (ALJ 5/5/10); adopted 2010 WL 5624384 (Comm'r 8/3/10); aff'd 2012 WL 1231874 (App. Div. 4/13/12); cert denied 211 N.J. 608 (2012); In re the Tenure Hearing of I. Toorzani and the Elmwood Park Board of Education, 2011 WL 7068333 (ALJ 2011); In re Tenure Hearing of Christopher Molokwu and the State-Operated School District of the City of Paterson, http://www.state.nj.us/education/legal/commissioner/2005/dec/447-05.pdf (Comm'r 2005); aff'd, http://www.state.nj.us/education/legal/sboe/2006/may/sb56-05.pdf (State Board of Ed. 2005); Morris School District Board of Education v. Brady, 92 N.J.A.R. 2d (EDU) 410 (1992); IFPTE, Local 195 and Stockton State College, PERC Dkt. CO-2008-321 citing Blackhorse Pike Reg'l Bd of Ed, 7 NJ PER 502 (¶ 12223) (1981); In the Matter of the Tenure Charges of Jill Buglovsky, Opinion and Award of Joseph Licata (December 21, 2012); Tenure Hearing of Wachendorf, OAL Dkt. No: EDU 6860-04 (May 3, 2005); West New York vs Bock, 38 NJ 500, 523; Pietrunti v. Board of Education of Brick Township, 128 N.J. Super. 149, 162-163 (App. Div. 1974); A. Hollander & Son vs Imperial Fur Blending Corp, 2 NJ 35, 235 (1949); Matter of Bridgewater Twp., 95 NJ 235 (1984) citing Wright Line, 251 NLRB 1083 (1980); Orange Board of Ed, 20 NJPER 25146 (1994); Borough of Glassboro 12 NJPER ¶ 17117 (1986); Township of Mine Hill, 12 NJPER 17156 (1986); Belleville Ed Assn, on Behalf of Michael Mignone vs. Belleville Bd of Ed, 42 NJPER ¶ 12 (2015); Township of Hillsborough, 26 NJPER 31000 (1999); Lakehurst Board of Ed, 30 NJPER 5 (2004); Harrison Board of Ed, 34 NJPER 98 (2008); Township of Winslow, 33 NJPER ¶16 (2007); New Jersey Transit Corp, 31 NJPER 122 (2005); New Jersey Dep't of Corrections, 19 NJPER ¶ 24087 (1993); Manchester Reg. High School Board of Ed., 25 NJPER ¶ 30166 (1999); In the Matter of Jose Santana (OAL Dkt No: CSV277-09); Blackhorse Pike Reg'l Bd of Ed, 7 NJ PER 502 (¶ 12223) (1981); IFPTE, Local 195 and Stockton State College, PERC Dkt. CO-2008-321; City of Garfield and Garfield PBA Local 46 (App. Div. Dkt # A-5842-12T3) (41 NJPER 63, 2014); City of Asbury Park, 5 NJPER 389 (¶ 10199 1979).

but will fully consider their applicability to this case in my analysis of the evidence of this proceeding.

The District contends that Respondent engaged in bullying and physically intimidating conduct when he interacted with Dr. Sharon Davis on December 19, 2017. It further contends that he falsely stated in a report he sent to the Superintendent of Schools and widely circulated to the school community that he had been forcibly ejected from the building by security upon instruction from Dr. Davis. While acknowledging Respondent's role as President of the Paterson Education Association, the District submits that applicable case law fully supports the ability of a school district to discipline an employee for misconduct even when the employee is acting on behalf of the Union when such conduct threatens workplace discipline, order and respect.

The District seeks to credit the testimony of Dr. Davis that after she tried to contact Principal Medley, Respondent moved to her side of the desk, came within twelve (12) to eighteen (18) inches from her and loudly yelled "you can get whoever you want" and "I'm not one of your teachers" while pointing his index finger and shaking his hand close to her face. This, the District contends, caused Dr. Davis to be scared and fearful because of Respondent's conduct and because he was blocking her way while verbally attacking her. After telling the Respondent that "we're done" because of his alleged intimidating conduct, Dr. Davis asked him to leave her office. The District urges credit be given to Dr.

Davis' testimony that Respondent then got red in the face while yelling "you can't kick me out of the building" and "I will say it the way I want to say it. I will talk to you the way I want to talk to you." Although Respondent then exited the office, it was not until Dr. Davis threatened to call security. The District contends that he continued to shout these or similar statements as he was leaving the office. According to the District, Dr. Davis' version of the events are wholly supported by her and the testimony and written contemporaneous notes taken by Ms. DelRosso who witnessed the events while working inside the office of Dr. Davis. Ms. DelRosso's testimony and her notes are said to mirror Dr. Davis' version of the events and confirmed by her testimony. The District points out that Ms. DelRosso was in the office solely for business reasons and her testimony graphically depicted Respondent's actions as they were occurring. Ms. DelRosso also expressed that she had fear for Dr. Davis' safety as a result of Respondent's conduct. The District also points out that Dr. Davis testified that she had fear for her safety as a result of the incident and called City police to make an incident report the next morning, as well as asking the District to provide a security escort for her to and from her car as she came and left the building.

The District also takes issue with the report Respondent wrote to the Superintendent of Schools on December 20, 2016 representing that Dr. Davis had him forcibly ejected from the building by security. The District refers to "video proof" showing that no one from security forcibly ejected Respondent walked down the hall, down the stairs and out of the building and there is no

evidence of physical or forceful removal. Instead, the video reflects Respondent voluntarily leaving the building after engaging in social interaction with colleagues and teachers as he left. The video shows the security guard in an unremarkable exchange with Respondent and his colleagues and simply following them as they left. The District further notes that, despite the evidence to the contrary, Respondent repeated the allegation that he was forcibly ejected in a certified unfair practice charge the Association filed with PERC.

The District contends that Respondent's denials of misconduct are not credible for several reasons. In addition to the forcible ejection allegation, the District points to Respondent's denial that he puckered his lips and blew a kiss at Dr. Davis while he faced her doorway after exiting the office. It submits that Respondent's testimony that he was only getting in the last word with Dr. Davis as clearly inconsistent with what is clearly shown on the video. The District also cites the testimony of Ms. DelRosso who testified that Respondent made this facial gesture. The District further notes Respondent's admission that he contacted the President of the Hoboken Education Association after Dr. Davis accepted a position as principal in the Hoboken District for the 2017-2018 school year because he wanted to let her new district know what they were in for. This latter incident is said to support its belief that Respondent has acted with malice towards Dr. Davis.

Respondent seeks dismissal of the tenure charges for several reasons. Initially, he contends that he was clearly engaged in protected activity as President of the Association when he approached Dr. Davis to question her about her use of a confidentiality statement in her remarks to staff. Respondent emphasizes a decision from PERC that an employer may criticize a union representative's conduct during a meeting but may not discipline the representative as an employee when that conduct is unrelated to job performance.[6] Here, as a full-time released President of the Paterson Education Association, Respondent had no teaching duties yet tenure charges were filed against him as a District employee.

Moreover, Respondent contends that Dr. Davis refused to discuss a grievable issue, terminated the meeting and instead called security to have him removed. This, it submits, showed hostility towards Respondent for his having exercised his statutory rights. The filing of tenure charges some three months after the incident and a month after the unfair labor practice charge is claimed to have been an act of retaliation for filing an unfair practice over the incident. Respondent alleges that the District has unlawfully threatened his employment, has interfered with his rights to advocate on behalf of his membership, and has had a chilling effect on the rights of all other union representatives to engage in protected activities. In support of these arguments, Respondent cites to numerous cases supporting its his belief that Respondent's conduct was justified and that the District's actions in response were unlawful. Respondent submits

[6] Blackhorse Pike Reg'l Bd of Ed, 7 NJ PER 502 (¶ 12223) (1981)

that the District has not met its burden to establish that it had any legitimate business justification to interfere with his rights as President of the PEA or to have filed tenure charges against him.

Citing Garfield and Garfield PBA Local 46 (App. Div. Dkt # A-5842-12T3) (41 NJPER 63, 2014), Respondent contends that the District has not met its burden to establish that his conduct rose to the level of that which "indefensibly threatens workplace discipline, order and respect. On this point, it is urged that his testimony and that of Mr. Wolfe be credited over the diametrically opposite testimony of Dr. Davis and Ms. DelRosso.

Respondent takes issue with Dr. Smith's Investigation Report as to his assessment of credibility. It points to his reference to Ms. DelRosso only meeting with Dr. Davis approximately twice per year as a basis to support his statement that "I can see no reason why her account wouldn't be credible." It points to Ms. DelRosso's testimony that she would meet with Dr. Davis a few times a month either in teachers' classrooms or in Dr. Davis' office. Respondent also points to the testimony of Ms. Caparso who testified that she was in the teacher's lounge between 1:37 p.m. and 1:41 p.m. on December 19, 2017 and overheard a male and a female voice speaking loudly but not more loudly than the other and was not alarmed over the loud voices she heard. Ms. Caparso was not alarmed over the conversation. This is said to contrast with the testimony of Ms. DelRosso and Dr. Davis that Respondent was yelling while Dr. Davis remained calm.

Respondent also questions the lack of any investigation into who else was in the teachers' lounge at the time and what they may have heard. Respondent further cites to the video showing nothing of an irregular nature occurring in the hallway after he exited Dr. Davis' office. On this point, Respondent argues:

> If the testimony of both Dr. Davis and Ms. DelRosso is to be credible, the video should show a very upset Mr. McEntee, who has just lost control of himself, who was screaming while they remained calm and who almost hit Dr. Davis, leaving her office in a huff/rage, red in the face. Yet the very second he comes into view in the hallway, the exact opposite occurs – Mr. McEntee is his usual jovial self. There is no one indication from the video that he was upset or that he was red in the face from screaming inside the office. There is no one indication of any hostility towards anybody in Dr. Davis' office. Also, the video shows Dr. Davis following him out. So much for Dr. Davis being fearful of being close to Mr. McEntee.

Respondent also notes that Ms. DelRosso filed a written report after the incident that, unlike her testimony, did not mention Respondent blowing a kiss to Dr. Davis after he exited her office. Respondent further contends that Dr. Davis' filing a police report the day after the incident and her request for security two days after the incident were totally at odds with the video depicting an unremarkable conclusion to the meeting. He points to the reference in the police report that Dr. Davis wanted to "scare him straight." In respect to the request for security, Respondent notes the testimony of Dr. Davis that it was the social media posting that prompted her fear yet Respondent was not responsible for the postings of others and there were no threats made to Dr. Davis in the postings.

DISCUSSION

Pursuant to N.J.S.A. 18A:6-10, "[n]o person shall be dismissed or reduced in compensation ... if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state ... except for inefficiency, incapacity, unbecoming conduct, or other just cause." The burden is on the District to establish that there was unbecoming conduct or other just cause and, if so, whether it had just cause to issue an unpaid suspension to Respondent McEntee.

I first address the record's reference to the unfair labor practice charge filed by the Paterson Education Association against the State Operated School District of the City of Paterson. This charge, as amended, has been held in abeyance by PERC pending a decision in this tenure proceeding. It is beyond my authority to decide the merits of the PEA's contention that PERC has exclusive jurisdiction over its claims that Dr. Davis interfered with Respondent's statutory rights and that the tenure charges were filed in retaliation for the Association's filing of an unfair practice charge. PERC has not deferred the unfair practice charge to this arbitration proceeding. Nevertheless, the core of the Respondent's answer and defense to the tenure charges raises the very standards set forth in Bridgewater. The issues raised in this proceeding require consideration of those standards in this tenure proceeding when evaluating whether the District has met its burden to meet the standards necessary to support a reduction in compensation as set forth in N.J.S.A. 18A:6-10.

The parties have offered many citations to cases they assert support their respective positions. They are all applicable to this analysis because they help describe what constitutes protected activity, they relate to the proper scope of conduct allowable for union representatives in their efforts to engage in protected activity, the boundaries for such conduct during those efforts, the rights and obligations of employers when responding to an employee who has engaged in protected activity, as well as what constitutes unbecoming conduct or other just cause. A review of these cases underscores the requirement to examine all specific relevant facts and circumstances surrounding events that give rise to deciding whether a union representative is engaging in protected activity, to whether an employer exhibits hostility to a union representative engaging in protected activity and whether the conduct of the union representative when doing so gives rise to corrective or punitive action that an employer would have taken in any event.

The record reflects that the December 19, 2016 meeting was unscheduled. Nevertheless, Respondent's first comments to Dr. Davis after he entered her office raised an issue protected by statute. It challenged her use of a confidentiality statement in emails to staff. Respondent testified that he went to Dr. Davis' office to discuss her use of the confidentiality statement based on what he had been told by a teacher in the teachers' lounge. While it is clear that Respondent had the right to raise this issue with Dr. Davis, the location chosen

for this purpose is not unlimited in scope. In this instance, no grievance had been filed concerning Dr. Davis, nor was a meeting scheduled with her or anyone else to discuss an issue that could become grievable. Nevertheless, despite the fact that Dr. Davis was conducting school business at the time, she initially allowed for discussions on the issue. Respondent was aware that a similar issue had previously been raised at School No. 8 and had been resolved through intervention by Luis Rojas, Director of Labor Relations. Respondent and Dr. Davis both testified that they were aware of this resolution at the time that Dr. Davis allowed Respondent entry to her office on December 19, 2016. Dr. Davis testified that she had ceased using the confidentiality statement in her emails prior to December 19, 2016 because of the understanding reached at School No. 8. However, she did not mention this to Respondent when he made his inquiry. Respondent asserts he did not know that Dr. Davis' use of confidentiality statements in her emails had ceased. There are no emails in evidence contradicting Dr. Davis' testimony that she ceased using the confidentiality statements.

After entering her office, Respondent asked Dr. Davis if she uses a confidentiality statement in her emails. She responded "why do you ask?" Prior to this, Dr. Davis voluntarily permitted Respondent and Mr. Wolfe to enter her office despite the fact that she was busy at the time and no meeting had been scheduled. She was aware of who they were after asking and receiving business cards from them. There also had been one unremarkable prior interaction

between Respondent and Dr. Davis that would have led Dr. Davis to be aware that Respondent was President of the PEA. This knowledge, coupled by the response "why do you ask," placed the meeting in the context of protected activity because at that time this interchange was voluntary, it involved a potentially grievable issue and it opened the door for further discussion. There is no allegation of impropriety in Respondent being in Dr. Davis' office despite the fact that the meeting was unscheduled since Respondent was voluntarily admitted into the office and was given an opportunity to state his reason for being there. Because Dr. Davis was in a business meeting with Ms. DelRosso she could have, but did not, deny Respondent entry and then provide him with the opportunity to meet at a different time. Instead, she appeared to be willing to continue the discussions if Principal Medley were present.

The record shows that Dr. Davis was initially without knowledge that Respondent would raise the issue of a potential grievance with her. Upon learning this, Dr. Davis said if a grievance was going to be discussed or filed she wanted to involve Principal Medley and have him present. There is no evidence that Principal Medley had been advised earlier by Respondent that an issue over the email existed. She then unsuccessfully tried to contact him by telephone. Respondent, without any evidence of provocation from Dr. Davis, questioned her decision to call Principal Medley by saying and repeating "I don't care who you call." At this point, the testimony of Respondent and Dr. Davis conflict as to who began to raise the voice and tone level. Dr. Davis clearly indicated that she was

not going to allow for an impromptu grievance meeting without the presence of Principal Medley and communicated this to Respondent. Under these circumstances, Dr. Davis acted within her rights to terminate the unscheduled meeting during the conduct of official school business while maintaining an obligation to be available to Respondent to continue discussion of the issue at a time to be scheduled. Similarly, Respondent maintained the right to file a grievance at any time over the issue of the confidentiality statement. There is no evidence during this initial phase of the brief meeting that Dr. Davis was hostile to Respondent or that her request to have Principal Medley present was improper or was evidence of hostility. On the contrary, Dr. Davis showed a willingness to continue the discussion and did not ask Respondent to leave merely because he said a grievance might be filed. Based on the evidence existing at the time, had Principal Medley been contacted and was able to participate, it is reasonable to conclude that the discussions would have continued and that the events that followed would not have occurred.

The dialogue between Respondent and Dr. Davis grew in intensity after Respondent said "I don't care who you call." Respondent acknowledged that he did make a finger gesture while making this statement. I credit the testimony of Dr. Davis and Ms. DelRosso that Respondent first raised the volume level after and repeating this statement. This occurred in close proximity to Dr. Davis when she asked Respondent why he did not extend her the same courtesy as building delegates by simply asking her if they could discuss a possible grievance.

Respondent at that time said "I'm not one of your teachers" and, according to Dr. Davis and Ms. DelRosso, moved aggressively to the side of Dr. Davis' desk. I find that Respondent did make this movement, and while doing so made gestures to Dr. Davis that she deemed to be aggressive and made her feel uncomfortable. However, I do not find sufficient evidence supporting the view expressed by Dr. Davis that Respondent deliberately moved in a fashion that prevented her from leaving the office.

Ms. DelRosso testified that Dr. Davis remained calm but that later her voice quivered. I accept Respondent's characterization that both he and Dr. Davis got loud and that the level of his voice may have exceeded that of Dr. Davis. Dr. Davis told Respondent that "we are done" and asked him to leave the office. This statement, under all of the verifiable circumstances, was not unlawful. Dr. Davis was not under an obligation to convert her business meeting into a grievance meeting. The events thereafter unfolded very swiftly and gave rise to differing interpretations. I credit the testimony of Dr. Davis that Respondent was saying "you can't throw me out of the building" and "I'll talk to you the way I want to talk to you" after she asked him to leave. Dr. Davis asserts that Respondent refused to leave her office until the point that she said she was going to call security. Respondent denies refusing to leave before Dr. Davis called security. There is insufficient evidence to support Dr. Davis' testimony that Respondent refused to exit her office and did so only in response to her saying she was going to call security. I do not find this to be an issue of credibility. The

interchange at that point occurred within a few brief seconds and it reasonably may have appeared to Dr. Davis that Respondent refused to leave. However, I find it more than likely that the sequence of events occurred so quickly that Respondent's alleged refusal to leave came very soon before the call to security and reasonably gave rise to different perceptions over the timing of these events. It is clear, however, that he initially did not honor the request to leave the office. Respondent did exit voluntarily but continued to challenge Dr. Davis as he was leaving the office. However, as acknowledged in Dr. Davis' testimony, Respondent was not argumentative or confrontational in the hallway. The charge that Respondent paced back and forth in the hallway is not supported by the video footage and indeed appears to show Mr. Wolfe instead. The differing opinions in this issue appear to arise due to the limited view through the bottom of the window that depicted a person walking back and forth without the ability to identify the individual who was doing the pacing.

An additional charge made by the District is that Respondent falsely accused the District of forcibly ejecting him from the school and widely disseminating the false allegation. Mr. Wolfe provided an explanation that the forcible ejection language was intended to reflect that "we did not have a choice to remain." While this statement accurately reflects that Dr. Davis did not give Respondent the option to continue to remain in the office, the video clearly reflects that there was no basis for Respondent to accuse the District of forcible ejection within the literal meaning of the term which strongly implied to the District

and the outside world that the District used some form of a physical act that forced Respondent's removal.

In my evaluation of the record and the above findings, I have considered the video, the testimony, the exhibits, the case citations and the arguments advanced by the parties. This record must be viewed as a whole. After doing so, it supports the District's conclusions that disciplinary action of a corrective nature was warranted for Respondent's conduct while in Dr. Davis' office. His statements were not reasonable connected to the grievance issue and contributed to the erosion of order in Dr. Davis' office. Dr. Davis had a right to end the meeting and this was clearly not initially accepted by Respondent. However, I also find that that the District's request for Respondent to serve an unpaid suspension to be beyond the level of the conduct that it has proven.

Respondent has broad protection as a Union President and a right to utilize the grievance procedure to air and settle disputes without employer interference. Yet, he did not initially accept and repeatedly challenged the direction from Dr. Davis to end the impromptu meeting after being unable to contact Principal Medley. At the time she was in a business meeting with Ms. DelRosso who did not plan to be in a location that would evolve into a grievance meeting with "very heated" discussion. Respondent was engaged in protected activity up until the point that Dr. Davis decided to end the impromptu meeting. The District's obligations to continue dialogue with Respondent remained but it was not obligated to convert the meeting into a grievance meeting under the

conditions present after Dr. Davis said "we're done" and asked Respondent to leave the office. Respondent's comments, while not insubordinate, reflected dissatisfaction with not being able to pursue the issue immediately and undermined the authority of a Vice Principal in the presence of a subordinate. Respondent's statements to Dr. Davis were mostly acknowledged by him but in a context far milder than described by Dr. Davis and Ms. DelRosso. I credit their testimony concerning Respondent's demeanor but do not find that his conduct rose to the level of threats designed to have Dr. Davis fear for her safety. Because Respondent's challenging statements continued beyond the point in time that were allowable under the circumstances, the District has established a just cause basis for a written warning but not an unpaid suspension. Such action is to be viewed as corrective and progressive in nature and to provide positive direction to Respondent that while he has a right to engage in the vigorous pursuit of complaints and/or grievances his lawful activities must be conducted without disruption or challenge to the ongoing order of school business.

There are activities that followed the incident that are said by both Respondent and the District to support their respective positions. These include wide dissemination of written statements to the District by both Respondent and Dr. Davis, the Respondent's use of social media, Dr. Davis' incident report to police, the narrative written by the police officer, Dr. Davis' request for security escort and Respondent's communication with the Hoboken School District. The record with respect to these events has been fully considered when fashioning the terms of the Award that I have rendered.

Accordingly, and based upon all of the above, I respectfully enter the following award.

AWARD

The District has established other just cause to issue a written warning to John McEntee, Jr. The District's request to issue an unpaid suspension pursuant to N.J.S.A. 18A:6-10 is dismissed. I will retain jurisdiction for the sole purpose of resolving any dispute that may arise in the implementation of this Award.

Dated: December 26, 2017
Sea Girt, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth }ss:

On this 26th day of December, 2017, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Gretchen L Boone

Gretchen L Boone
Notary Public
New Jersey
My Commission Expires 8-24-2022
No. 50066778